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EUROPEAN ANTI-DUMPING LAW
a legal and economic analysis

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**Proefschrift ingediend door
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met het oog op het verwerven
van de academische graad van
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To my mother

up to date on 15 February 1995

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Abbreviations

Basic EC legislation	Basic EC Regulation and basic ECSC Decision
Basic EC Regulation	Council Regulation (EEC) No 2423/88 of 11 July 1988 «on protection against dumped or subsidized imports from countries not members of the European Economic Community» (<i>O.J.</i> , 2 August 1988, No L 209/1)
Basic ECSC Decision	Commission Decision No 2424/88/ECSC of 29 July 1988 «on protection against dumped or subsidized imports from countries not members of the European Coal and Steel Community» (<i>O.J.</i> , 2 August 1988, No L 209/18 ; corrigendum, <i>O.J.</i> , 5 October 1988, No L 273/19)
C.J.E.C.	Court of Justice of the European Communities
E.C.R.	European Court Reports
GATT	General Agreement on Tariffs and Trade
GATT Anti-dumping Code	Agreement on Implementation of Article IV of GATT of 16 April 1994
ME	Market economy
MNE	Multinational enterprise
NME	Non-market economy
O.J.	Official Journal of the European Communities
P.C.I.J.	Permanent Court of International Justice

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INTRODUCTION

CHAPTER I

INTRODUCTION

1. HISTORICAL BACKGROUND

Since Jacob VINER, in 1923, published his famous and outstanding book «*Dumping : a Problem in International Trade*»¹, dumping has traditionally been defined as price discrimination between national markets. Anti-dumping law, though, dates from well before that year. In 1904, Canada was the first country to enact anti-dumping law. In terms of free trade, Canadian anti-dumping law was enacted with a positive intent, *i.e.*, to allow anti-dumping relief only when and where necessary : contrary to tariffs having a global and permanent scope, anti-dumping relief would only temporarily be applicable to imports coming from a restricted number of countries.

Soon other countries too enacted anti-dumping laws, *e.g.*, New Zealand (1905), Australia (1908), South Africa (1914) and the United States of America (1916). In the period from 1920 to 1921, no less than ten countries, such as New Zealand, Australia, the United States and the United Kingdom, adopted new anti-dumping laws. Those anti-dumping laws would ultimately serve as a basis for the anti-dumping provisions of the General Agreement on Tariffs and Trade (hereinafter : GATT) signed in 1947. Indeed, in the meantime, the notion of dumping had been extended beyond the notion of price discrimination to encompass sales at a loss (anti-dumping laws of the United Kingdom and of New Zealand) ; in addition, the idea had been introduced that dumping should only be actionable if it caused or threatened to cause injury to the domestic industry of the importing country (anti-dumping law of the United States)².

All those elements were, indeed, incorporated in GATT anti-dumping law. It may appear quite peculiar that GATT, being based on non-discrimination and on the most-favoured-nation clause and enacting a general stop on tariff increases and other trade restrictions in order to organise and enhance free trade, still allowed its Contracting Parties to adopt anti-dumping relief involving

¹ VINER, J., *Dumping : A Problem in International Trade*, in *Reprints of Economic Classics*, New York, Kelly, 1966 (reprint ; original date of publication : 1923), 381 p.

² BOUDANT, J., *L'anti-dumping communautaire*, Paris, Economica, 1991, 16 ; DALE, R., *Anti-dumping Law in a Liberal Trade Order*, New York, St. Martin's Press, 1980, 12-14 ; STEWART, T.P. (ed.), *The GATT Uruguay Round. A Negotiating History (1986-1992)*, Deventer, Kluwer Law and Taxation Publishers, 1993, vol. II, 1390-1410 ; WARES, W.A., *The Theory of Dumping and American Commercial Policy*, Lexington, Lexington Books, 1977, 14-15.

restrictions on trade coming from certain countries. By incorporating provisions on dumping, GATT probably made publicity to the possibilities of anti-dumping law, especially in view of its prohibition to enact or to increase other trade restrictions. Indeed, though it did not require its Contracting Parties to adopt national anti-dumping laws, GATT eventually resulted in an increasing number of countries enacting such laws. For example, the comparative study carried out by GATT as to the national anti-dumping laws of its Contracting Parties shows that in 1957 already twenty Contracting Parties had enacted anti-dumping laws and that eight countries actually resorted to them³.

In 1957, the Treaty of Rome was signed, creating the European Economic Community (since the Treaty of Maastricht : the European Community) (hereinafter : EC). At the end of the transitional period, on 1 January 1970, the Community became empowered as to foreign trade, including anti-dumping policy. However, even before the end of the transitional period, namely on 5 April 1968, the Community enacted its first anti-dumping legislation. Its entry into force, on 1 July 1968, coincided with that of the first GATT Anti-dumping Code. It was only on 15 April 1977 that the European Coal and Steel Community (ECSC) enacted its first anti-dumping legislation, though the Treaty establishing the ECSC had been signed on 18 April 1951.

Since 1968, both EC and ECSC (hereinafter : the Community), on several occasions, have modified their anti-dumping legislation (hereinafter : European anti-dumping law), usually in order to adjust it to the developments in GATT anti-dumping law, which they themselves contributed to shape. Indeed, in 1979 and, recently, in 1994, new GATT Anti-dumping Codes have been drafted. However, only EC anti-dumping legislation has been adapted to the 1994 GATT Anti-dumping Code, which has entered into force on 1 January 1995.

From the outset, the Community would prove to be an active user of anti-dumping law. It was only after the end of the transitional period in 1970, though, that European anti-dumping law was applied for the first time. Since then, the number of anti-dumping proceedings has considerably increased : from 2 anti-dumping cases in 1970 up to 36 in 1993, *i.e.*, an increase of 1,700 %. Over the period 1970-1993, the average number of cases amounts to 38 *per annum*. Since 1978, the year in which a spectacular increase in the number of anti-dumping proceedings occurred, the number of anti-dumping proceedings has stabilized at 54 cases on a year average (1978-1993) (see table 1).

³ GATT, *Anti-Dumping and Countervailing Duties*, Geneva, GATT, 1958, 165 p.

Table 1 - Number of European anti-dumping proceedings

year	initiation			review					total*
	EC	ECSC	total	EC			ECSC	total*	
				ordinary review*	assem- bly**	additional duty***			
1970	2		2						2
1971	2		2						2
1972	8		8						8
1973	1		1						1
1974	2		2						2
1975	3		3						3
1976	6		6						6
1977	12	3	15						15
1978	38	47	85						85
1979	50	6	56	(1)			1	1 (1)	57 (1)
1980	25		25	2 (1)				2 (1)	27 (1)
1981	47		47	17				17	64
1982	48	7	55	23				23	78
1983	34	2	36	6 (1)				6 (1)	42 (1)
1984	48		48	5				5	53
1985	32	4	36	22				22	58
1986	22	2	24	16				16	40
1987	34	5	39	5	3			8	47
1988	37	1	38	25	4		3	32	70
1989	24		24	18	2			20	44
1990	35	8	43	20		4	5	29	72
1991	18	2	20	13				13	33
1992	36	2	38	24				24	62
1993	21		21	15				15	36
total	585	89	674	211 (3)	9	4	9	233 (3)	907 (3)

* The numbers between brackets refer to reviews of national anti-dumping duties.

** «Assembly» refers to the reviews initiated against the production or assembly of the like products in the Community in cases where definitive anti-dumping duties apply to the exports of that product coming from the dumping country (Article 13 Council Regulation (EC) No 3283/94⁴).

*** «Additional duty» refers to reviews initiated because the dumping exporter is alleged to bear partly or wholly the burden of the definitive anti-dumping duty (Article 12 Council Regulation (EC) No 3283/94 and 13(11) Commission Decision No 2424/88/ECSC⁵).

Source : Official Journal of the European Communities.

In view of this yearly high number of anti-dumping cases, an investigation into the application of actual European anti-dumping law seems warranted. The new GATT Anti-dumping Code and the new legislative action adapting EC anti-dumping law to the new GATT provisions, are further a good occasion to examine whether the Community really needs any anti-dumping law at all and whether anti-dumping law is developing as it should from an economic point of view.

⁴ Council Regulation (EC) No 3283/94 of 22 December 1994 on protection against dumped imports from countries not members of the European Community, *O.J.*, 31 December 1994, No L 349/1.

⁵ Commission Decision No 2424/88/ECSC of 29 July 1988 on protection against dumped or subsidized imports from countries not members of the European Steel and Coal Community, *O.J.*, 2 August 1988, No L 209/18 (corrigendum, *O.J.*, 5 October 1988, No L 273/19).

2. LEGISLATIVE FRAMEWORK

2.1. EUROPEAN FRAMEWORK

2.1.1. European anti-dumping law

2.1.1.1. EC anti-dumping law

Before the end of the transitional period, the initial anti-dumping regulation, *i.e.*, Council Regulation (EEC) No 459/68 of 5 April 1968 on protection against dumping or the granting of bounties or subsidies by the countries which are not members of the European Economic Community⁶, was adopted in pursuance of Article 113 EC Treaty and was meant to enact the 1968 GATT Anti-dumping Code into EC law⁷.

On several occasions, EC anti-dumping legislation has been modified in order to adapt it to the 1980 and 1994 GATT Anti-dumping Codes⁸ or to improve or specify the existing anti-dumping provisions, frequently on the basis of the anti-dumping case law built up by the European anti-dumping authorities (*i.e.*, the Council and the Commission⁹), as well as on the basis of the anti-dumping case law of the Court of Justice¹⁰. Prevailing EC anti-dumping law is contained in Council Regulation (EC) No 3283/94 of 22 December 1994 on protection against dumped imports from countries not members of the European Community¹¹ (hereinafter: «basic EC Regulation»), which has already once been amended in order to determine its scope *ratione temporis*¹².

⁶ *O.J.*, 17 April 1968, No L 93/1.

⁷ See : *infra*, 12.

⁸ See : *infra*, 12.

⁹ For their respective powers in anti-dumping proceedings, see : *infra*, 10-11.

¹⁰ Council Regulation (EEC) No 2011/73 of 24 July 1973, *O.J.*, 27 July 1973, No L 206/3 ; Council Regulation (EEC) No 1411/77 of 27 June 1977, *O.J.*, 30 June 1977, No L 160/4 ; Council Regulation (EEC) No 1681/79 of 1 August 1979, *O.J.*, 2 August 1979, No L 196/1 ; Council Regulation No 3017/79 of 20 December 1979, *O.J.*, 31 December 1979, No L 339/1 (corrigendum, *O.J.*, 2 April 1980, No L 89/22) ; Council Regulation (EEC) No 1580/82 of 14 June 1982, *O.J.*, 22 June 1982, No L 178/9 ; Council Regulation (EEC) No 2176/84 of 23 July 1984, *O.J.*, 30 July 1984, No L 201/1 ; Council Regulation (EEC) No 1761/87 of 22 June 1987, *O.J.*, 26 June 1987, No L 167/9 ; Council Regulation (EEC) No 2423/88 of 11 July 1988, *O.J.*, 2 August 1988, No L 209/1 ; Council Regulation (EC) No 521/94 of 7 March 1994, *O.J.*, 10 March 1994, No L 66/7 ; Council Regulation (EC) No 522/94 of 7 March 1994, *O.J.*, 10 March 1994, No L 66/10 ; Council Regulation (EC) No 519/94 of 7 March 1994, *O.J.*, 10 March 1994, No L 67/89.

¹¹ *O.J.*, 31 December 1994, No L 349/1.

¹² Council Regulation (EC) No 355/95 of 20 February 1995 amending Regulation (EC) No 3283/94 on protection against dumped imports from countries not member of the European Community, *O.J.*, 23 February 1995, No L 41/2.

Since the enactment of the basic EC regulations, all anti-dumping decisions must conform to them. It is not possible to deviate from them by making anti-dumping decisions *sui generis*, based directly on Article 113 EC Treaty, without interfering with the legislative system of the EC and distorting the equality before the law of those to whom the law applies¹³.

2.1.1.2. ECSC anti-dumping law

The first ECSC anti-dumping case, initiated on 3 February 1977, was based directly on Article 74 ECSC Treaty. At that time, no specific ECSC anti-dumping legislation had been enacted. Two months later, *i.e.*, nine years after the introduction of the initial EC anti-dumping regulation, the first ECSC anti-dumping recommendation, *i.e.*, Commission Recommendation 77/329/ECSC of 15 April 1977 on protection against dumping or the granting of bounties or subsidies by the countries which are not members of the European Economic Community¹⁴, was adopted in pursuance of Articles 74 and 86 ECSC Treaty. As for EC anti-dumping law¹⁵, the enactment of the ECSC recommendation on anti-dumping law probably also excludes anti-dumping proceedings based directly on the ECSC Treaty, for it would also interfere with the ECSC legislative system and the principle of equal treatment.

The ECSC recommendation made the provisions of EC anti-dumping legislation applicable to anti-dumping cases under the ECSC Treaty, due allowance being made for the special features of the ECSC Treaty which essentially concern the division of powers between the Council and the Commission as anti-dumping authorities. ECSC anti-dumping legislation, like EC anti-dumping legislation, has frequently been modified¹⁶. Prevailing ECSC anti-dumping law is contained in Commission Decision No 2424/88/ECSC of 29 July 1988 on protection against dumped or subsidized imports from countries not members of the European Coal and Steel Community¹⁷ (hereinafter : «basic ECSC Decision»). Until 1994, the modifications of EC and ECSC anti-

¹³ C.J.E.C., case 113/77, 29 March 1979, *NTN Toyo Bearing Company Ltd a.o. v Council*, E.C.R., 1979, (1185), 1209 ; C.J.E.C., case 118/77, 29 March 1979, *Import Standard Office (ISO) v Council*, E.C.R., 1979, (1277), 1298 ; C.J.E.C., case 119/77, 29 March 1979, *Nippon Seiko KK a.o. v Council and Commission*, E.C.R., 1979, (1303), 1331 ; C.J.E.C., case 120/77, 29 March 1979, *Koyo Seiko Co. Ltd a.o. v Council and Commission*, E.C.R., 1979, (1337), 1357-1358 ; C.J.E.C., case 121/77, 29 March 1979, *Nachi Fujikoshi Corporation a.o. v Council*, E.C.R., 1979, (1363), 1383.

¹⁴ O.J., 5 May 1977, No L 114/6.

¹⁵ *Supra*, 7.

¹⁶ Commission Recommendation No 3004/77/ECSC of 28 December 1977, O.J., 31 December 1977, No L 352/13 ; Commission Recommendation No 158/79/ECSC of 29 January 1979, O.J., 30 January 1979, No L 21/14 ; Commission Recommendation No 3018/79/ECSC of 21 December 1979, O.J., 31 December 1979, No L 339/15 (corrigendum, O.J., 2 April 1980, No L 89/22) ; Commission Recommendation No 1995/82/ECSC of 22 July 1982, O.J., 23 July 1982, No L 215/28 ; Commission Recommendation No 3025/82/ECSC of 12 November 1982, O.J., 13 November 1982, No L 317/17 ; Commission Decision No 2177/84/ECSC of 27 July 1984, O.J., 30 July 1984, No L 201/17.

¹⁷ O.J., 2 August 1988, No L 209/18 (corrigendum, O.J., 5 October 1988, No L 273/19).

dumping legislation were parallel. Since then, however, ECSC anti-dumping legislation did not entirely follow the development of EC anti-dumping legislation. Like EC anti-dumping law, it has only been amended in order to take account of the fundamental political and economic changes in the East and Central European countries¹⁸. As a result, ECSC anti-dumping legislation does not incorporate the procedural innovations in EC anti-dumping legislation¹⁹, nor has it been adjusted to the new GATT Anti-dumping Code²⁰. In fact, ECSC anti-dumping law is still identical to former EC anti-dumping law and, consequently, the interpretations by the anti-dumping authorities, the Court of Justice or scholarly publications of former EC anti-dumping law still hold for prevailing ECSC anti-dumping law²¹. Nevertheless, insofar as there is still some degree of similarity, both EC and ECSC anti-dumping legislation will in this work be referred to as «basic EC legislation».

2.1.2. *Scope of application*

2.1.2.1. *Ratione materiae*

Since «(a)n anti-dumping duty may be applied to any dumped *product* whose release for free circulation in the Community causes injury» (Article 1(1) basic EC Regulation ; Article 2(1) basic ECSC Decision) (emphasis added), European anti-dumping law applies only to products and not to services²².

With regard to products, a distinction must be made between, on the one hand, coal and basic steel products, falling under the ECSC Treaty²³, to which the basic ECSC Decision applies,

¹⁸ Council Regulation (EC) No 519/94 of 7 March 1994 on common rules for imports from certain third countries and repealing Regulations (EEC) No 1765/82, 1766/82 and 3420/83, *O.J.*, 10 March 1994, No L 67/89.

¹⁹ See : Council Regulation (EC) No 521/94 of 7 March 1994 on the introduction of time limits for investigation procedures carried out against dumped or subsidized imports from countries not members of the European Community and amending Regulation (EEC) No 2423/88, *O.J.*, 10 March 1994, No L 66/7 ; Council Regulation (EC) No 522/94 of 7 March 1994 on the streamlining of decision-making procedures for certain Community instruments of commercial defence and amending Regulations (EEC) no 2641/84 and No 2423/88, *O.J.*, 10 March 1994, No L 66/10.

²⁰ See : Council Regulation (EC) No 3283/94 of 22 December 1994 on protection against dumped imports from countries not members of the European Community, *O.J.*, 31 December 1994, No L 349/1.

²¹ For the interpretation of ECSC anti-dumping law, therefore, reference will also be made to interpretations of former EC anti-dumping law insofar as prevailing ECSC anti-dumping law and former EC anti-dumping law are identical.

²² Answer of the Commission to written question No 1012/80, *O.J.*, 3 December 1980, No C 316/12.

With regard to services only dumping in the sector of maritime transport can be sanctioned under Council Regulation (EEC) No 4057/86 of 22 December 1986 on unfair pricing practices in maritime transport, *O.J.*, 31 December 1986, No L 378/14 (corrigendum, *O.J.*, 5 May 1988, No L 117/35).

²³ These products are listed in Annex I of the ECSC Treaty.

and, on the other hand, all the other products, including agricultural²⁴ as well as nuclear²⁵ products, to which the basic EC Regulation applies.

2.1.2.2. Ratione loci

European anti-dumping law applies to dumped imports coming from third countries which are not members of the Community (see : Article 1 basic ECSC Decision). It is, thus, not applicable to intra-community dumping. European anti-dumping law does not make a distinction among countries, whether or not they are parties to GATT or the GATT Anti-dumping Code. This distinction is, however, important. Indeed, only in respect of countries which are parties to GATT or the GATT Anti-dumping Code, European anti-dumping law must comply with GATT, respectively, GATT Anti-dumping Code.

2.1.2.3. Ratione temporis

The prevailing basic EC Regulation entered into force on 1 January 1995 (Article 24 basic EC Regulation). However, former EC anti-dumping law²⁶ continues to apply to proceedings in relation to which an investigation pending on 1 September 1994 has not been concluded by the date of entry into force of the prevailing basic EC Regulation, or in relation to which an expiry review investigation is initiated following the publication before 1 September 1994 of a notice of impending expiry (Article 23 basic EC Regulation²⁷). References to prior European anti-dumping legislation must be construed as references to the actual basic EC Regulation where appropriate (Article 24 basic EC Regulation²⁸).

²⁴ Answer of the Commission to written question No 50/68, *O.J.*, 9 July 1968, No C 68/8.

According to its Article 22(ii), the basic EC Regulation shall not preclude the application of the Community Regulations in the agricultural sector and of Regulations (EEC) No 1059/69 (*O.J.*, 12 June 1969, No L 141/1), (EEC) No 2730/75 (*O.J.*, 1 November 1975, No L 281/20) and (EEC) No L 2783/75 (*O.J.*, 1 November 1975, No L 282/104); the basic EC Regulation shall operate by way of complement to those Regulations and in derogation from any provisions thereof which preclude the application of anti-dumping duties (see also : Answer of the Commission to written question No 1047/78, *O.J.*, 27 August 1979, No C 214/6).

²⁵ See : Article 232(2) EC Treaty, according to which the EC Treaty and its subsidiary legislation apply to nuclear products in so far as the Euratom Treaty does not expressly derogate from them.

²⁶ I.e., Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community, *O.J.*, 2 August 1988, No L 209/1 (amended by Council Regulation (EC) No 521/94 of 7 March 1994 (*O.J.*, 10 March 1994, No L 66/7), Council Regulation (EC) No 522/94 of 7 March 1994 (*O.J.*, 10 March 1994, No L 66/10) and Council Regulation (EC) No 519/94 of 7 March 1994 (*O.J.*, 10 March 1994, No L 67/89)).

²⁷ As amended by Article 1(1) Council Regulation (EC) No 355/95 of 20 February 1995, *O.J.*, 23 February 1995, No L 41/2.

²⁸ As amended by Article 1(2) Council Regulation (EC) No 355/95 of 20 February 1995, *O.J.*, 23 February 1995, No L 41/2.

The prevailing basic ECSC Decision entered into force on 5 August 1988. It is applicable to all anti-dumping proceedings, including those already initiated (Article 19 basic ECSC Decision)²⁹. References to prior European anti-dumping legislation have to be construed as reference to the actual basic EC legislation (Article 18 basic ECSC Decision).

2.1.3. *Institutional framework*

Though this work does not investigate procedural anti-dumping law, a short description of the course of an anti-dumping proceeding will nevertheless be made here. This overview is confined to the main procedural aspects of an anti-dumping proceeding, which it is useful to be acquainted with in order to have a good understanding of the analysis, which is to follow, of substantive anti-dumping law. Specific procedural aspects, which are necessary to understand certain elements of substantive anti-dumping law, will be treated at the occasion of the analysis of the aspect of substantive anti-dumping law for which they are relevant.

In many aspects, EC and ECSC anti-dumping proceedings are identical. Therefore, after the overview of an EC anti-dumping proceeding (section 2.1.3.1.), the section on ECSC procedural anti-dumping law will only point out the differences characteristic to an ECSC anti-dumping proceeding (section 2.1.3.2.).

2.1.3.1. EC anti-dumping proceedings

When a complaint about injurious dumping on behalf of a Community industry is lodged, the Commission must decide whether or not to initiate an anti-dumping proceeding (Article 5 basic EC Regulation).

After a decision to initiate an anti-dumping proceeding, the Commission investigates whether injurious dumping is being practised and whether anti-dumping relief is in the interests of the Community (Article 6 basic EC Regulation). The Commission must consult the Advisory Committee on the various aspects of its investigation, such as the existence of injurious dumping and the kind of anti-dumping relief which should be granted. The Advisory Committee consists of representatives of each Member State and a representative of the Commission as chairman (Article 15 basic EC Regulation).

If it does not find injurious dumping against which the interests of the Community call for anti-dumping relief, the Commission takes a decision to terminate the proceeding without anti-dumping relief (Article 9(2) basic EC Regulation). If an objection has been raised within the Advisory Committee, the Commission must submit to the Council a report on the results of the consultation, together with a proposal that the proceeding be terminated. If the Council does not decide otherwise, the proceeding is terminated (Article 9(2) basic EC Regulation).

²⁹ See: C.J.E.C., case 312/84, 24 February 1987, *Continental Produkten Gesellschaft Ehrhardt-Renken (GmbH & Co.) v Commission*, E.C.R., 1987, 841.

If the Commission finds injurious dumping against which the interests of the Community call for anti-dumping relief, the Commission takes a decision to terminate the anti-dumping investigation on the basis of the acceptance of an undertaking (Article 8 basic EC Regulation), or it enacts a regulation imposing a provisional anti-dumping duty by means of which, sometimes, the Commission also accepts undertakings (Article 7 basic EC Regulation). With regard to exporters subject to a provisional anti-dumping duty, the investigation is terminated when the Commission takes afterwards a decision to accept an undertaking, or when the Council enacts a regulation imposing a definitive anti-dumping duty (Article 9(4) basic EC Regulation). Such a Council regulation usually also orders the definitive collection of the provisional anti-dumping duty (Article 10(2) and (3) basic EC Regulation). Provisional and definitive anti-dumping duties are collected by the Member States (Article 14(1) basic EC Regulation).

Provisional anti-dumping duties have a maximum period of validity of nine months : they may be imposed for six months and extended for a further three months, or they may be imposed for nine months. However, they may only be extended or imposed for a nine-month period, when the dumping exporters representing a significant percentage of the trade involved so request or do not object (Article 7(7) basic EC Regulation). Undertakings and definitive anti-dumping duties lapse after five years from the date they entered into force or were last modified or confirmed (Article 11(2) basic EC Regulation).

The Council may, under certain conditions, extend the scope of definitive anti-dumping duties to the products which are identical to the dumped product and which are assembled in the Community (Article 13 basic EC Regulation). It may also amend definitive anti-dumping duties in order to compensate for the amount of the definitive anti-dumping duty borne by the dumping exporter (Article 12 basic EC Regulation).

The decisions accepting undertakings and the regulations imposing definitive anti-dumping duties may be subject to review. The determinations initiating and terminating the review investigation are similar to those initiating and terminating the initial anti-dumping investigation (Article 11(2) till (7), (9) and (10) basic EC Regulation).

When an anti-dumping duty is imposed, the importers may request the refund of the amount of duty exceeding the dumping margin. When such a request is made, the Commission must take a decision whether or not to refund the duty collected (Article 11(8) till (10) basic EC Regulation).

2.1.3.2. ECSC anti-dumping proceedings

The main difference with EC anti-dumping law is that the Council has no part in an ECSC anti-dumping proceeding. The Commission is the sole ECSC anti-dumping authority and decides always by means of an ECSC decision, rather than by way of a regulation. As a consequence, an anti-dumping proceeding will be terminated by the Commission if it finds no injurious dumping against which the Community interests call for anti-dumping relief, irrespective of any objections within the Advisory Committee (Article 9(1) basic ECSC Decision). Provisional anti-dumping duties are imposed by Commission decision. Definitive anti-dumping duties are imposed by the Commission decision and not by Council Regulation.

Another difference consists in there being no possibility of extending definitive anti-dumping duties to assembly operations.

2.2. *INTERNATIONAL FRAMEWORK*

2.2.1. *GATT anti-dumping law*

The first and still valid international provisions on dumping are contained in Article VI GATT adopted in 1947. Article VI does not forbid dumping. It only allows the importing countries to undertake anti-dumping actions against dumping which causes injury to their domestic producers.

However, Article VI is vague (especially in connection with the injury requirement) and incomplete (especially the lack of procedural provisions). Moreover, several countries, like the United States of America, were, under the Protocol of Provisional Application (the so-called «Grandfather Clause»), bound by Article VI only insofar as Article VI was not inconsistent with their existing legislation.

In order to remedy those deficiencies, the «Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade»³⁰ (commonly known as the GATT Anti-dumping Code) was concluded and entered into force on 1 July 1968. The Code provided more detailed rules concerning the definition of the substantive concepts used in Article VI, especially in respect of the injury requirement. It contained also provisions with regard to the anti-dumping procedure to be followed. Thereby, a «Committee on Anti-dumping Practices» was established in order to provide a forum of consultation to the parties to the Code. Furthermore, the Code did not fall under the «Grandfather Clause». Instead the Code was obligatory for all the States which had accepted it.

Because of an internal discussion in the Congress of the United States of America, particularly concerning the provisions as to the injury requirement, the 1968 Code was never fully incorporated in United States anti-dumping law. The other Parties to the 1968 Code, however, had adapted their anti-dumping laws. This dichotomy resulted in a new «Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade»³¹ (hereinafter called the «1980 GATT Anti-dumping Code») which entered into force on 1 January 1980. The injury requirement was further specified and modified. Moreover, special attention was paid to the problems of developing countries. Finally, a consultation, conciliation and dispute settlement procedure was set up.

³⁰ Published in : *B.I.S.D.*, Fifteenth Supplement, Geneva, GATT, 1968, 24-35.

³¹ Published in : *B.I.S.D.*, Twenty-sixth Supplement, Geneva, GATT, 1980, 171-188 ; *O.J.*, 17 March 1980, No L 71/90.

Anti-dumping law has been put on the agenda of the Uruguay Round in order to improve the 1980 GATT Anti-dumping Code. As the 1980 Code was generally considered to be sound, fundamental modifications were not expected. The basic concepts of GATT anti-dumping law would only be further specified in order to tighten their interpretation³². During the negotiations on GATT anti-dumping law, it became clear that the many quite vague provisions of substantive GATT anti-dumping law resulted in fundamentally different interpretations upheld by, on the one hand, countries actively applying anti-dumping law and, on the other hand, exporting countries frequently subject to anti-dumping proceedings. Moreover, the exporting countries claimed more detailed provisions on procedural anti-dumping law, whereas the countries applying anti-dumping law demanded that the new GATT anti-dumping law would encompass anti-circumvention rules³³. As a result, an entirely new «Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994» (hereinafter called the «GATT Anti-dumping Code») was drafted. It has been signed on 16 April 1994 and has entered into force on 1 January 1995. However, as no agreement could be reached on the subject of anti-circumvention measures³⁴, the new Code has not produced any real innovation, but rather provides further specifications of several aspects of substantive anti-dumping law and elaborates many aspects of procedural anti-dumping law.

2.2.2. Relevancy for European anti-dumping law

GATT has been concluded in 1947, while the ECSC Treaty and the EC Treaty date from respectively 1951 and 1957. Thus, the Community could impossibly be an original Contracting Party to GATT. All its Member States, however, are Contracting Parties to GATT. Although the Community has not acceded to GATT, it is bound by it. Indeed, as the Court of Justice, after having underscored that the Member States could not nor did desire to withdraw from their obligations under GATT, concluded in the *International Fruit case*, the GATT provisions bind the Community because the Member States conferred the powers concerning tariff and trade policy on the Community, and, thus indicated their wish to bind the Community by the obligations entered into under GATT³⁵.

³² MESSERLIN, P., «The EC Antidumping Regulations : A First Economic Appraisal, 1980-85», *Weltwirtschaftliches Archiv*, 1989, (563), 563.

³³ See : STEWART, T.P. (ed.), *The GATT Uruguay Round. A Negotiating History (1986-1992)*, Deventer, Kluwer Law and Taxation Publishers, 1993, vol. II, 1462-1536.

³⁴ WAER, P. and VERMULST, E., «EC Anti-Dumping Law and Practice after the Uruguay Round. A New Lease of Life ?», *Journal of World Trade*, 1994/2, (5), 20.

³⁵ C.J.E.C., joined cases 21 to 24/72, 12 December 1972, *International Fruit Company NV, Kooy Rotterdam NV, Velleman en Tas NV and Jan Van den Brink's Im- en Exporthandel NV v Produktschap voor Groenten en Fruit*, E.C.R., 1972, (1219), 1226-1227.

The Community is equally bound by the various GATT Anti-dumping Codes since those Codes were adopted for the purpose of implementing Article VI GATT³⁶. Another important argument is that the Community, along with its Member States, has accepted the 1968 and 1994 GATT Anti-dumping Codes, whereas the 1980 GATT Anti-dumping Code has only been approved by the Community. Indeed, since the expiry of the transitional period on 1 January 1970, the Community, by virtue of Article 113 EC Treaty and Article 74 ECSC Treaty, has become exclusively competent for matters of trade policy. It may, therefore, be argued that the Member States are no longer empowered to accept the 1994 GATT Anti-dumping Code. It seems, however, that their approval results from the fact that the 1994 GATT Anti-dumping Code, along with all other GATT Agreements and Understandings some of which the Member States are indeed empowered for, is incorporated in the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations which must be adopted as a whole.

3. SCOPE OF THIS WORK

GATT and European anti-dumping law allow anti-dumping relief against dumping which causes injury to the domestic industry of the importing country. European anti-dumping law furthermore requires that the anti-dumping relief be in the interests of the Community. Besides these substantive rules, GATT and European anti-dumping law also encompass provisions regulating the course of anti-dumping proceedings.

This work will not investigate procedural anti-dumping law³⁷, but rather substantive anti-dumping law. It will analyse GATT and European substantive anti-dumping law from a legal and economic point of view. This law-and-economics approach is clearly distinct from the traditional legal approach. Under the traditional legal approach, there is much skepticism as to policy arguments, but those are the very arguments which are typical of the law-and-economics approach. Indeed, a law-and-economics scholar investigates whether an existing legal rule is economically-efficient and which legal rule would be the most efficient one. It examines whether

³⁶ C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, E.C.R., 1991, I, (2069), 2178.

³⁷ A short overview, though, is provided in section 2.1.3. of this Chapter (*supra*, 10-11). For more detailed information, see e.g. : BESELER, J.F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 171-259 ; BOUDANT, J., *L'anti-dumping communautaire*, Paris, Economica, 1991, 161-194 ; HERMITTE, M.A., «Les procédures anti-dumping en droit communautaire», *Droit et Pratique du Commerce international*, 1991, 42-58 ; VAN BAEL, I., and BELLIS, J.-F., *Anti-Dumping and other Trade Protection Laws of the EEC*, Bicester, CCH Editions, 1990, 178-221 ; VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 194-336.

the consequences of legal rules correspond to the policy goals which are or should be aimed at by the government. Economics provide a theory for evaluating those consequences of the law. The traditional legal approach, though, holds no theory by which to evaluate the consequences of the legal rules ; it mainly investigates the meaning and the scope of legal rules, as well as the internal coherence of a legal system.

In this work, both the legal and economic analyses will be made on a general level and on a specific one. The general legal approach investigates the general characteristics of prevailing GATT and European anti-dumping law, whereas the general economic approach discusses whether there should be any anti-dumping law and, if so, how its general characteristics should be. The specific approach, on the other hand, starts from the general characteristics of prevailing GATT and European anti-dumping law and does not bring them up for discussion. The specific legal approach examines how the specific provisions are actually interpreted and applied and whether this implementation is legally correct. Therefore, it concentrates essentially on the case law elaborated by the European anti-dumping authorities since 1970, though, of course, attention will also be paid to scholarly publications. As several aspects of GATT and European anti-dumping law have been modified on several occasions, only the case law which is an application of provisions identical to the prevailing ones will be taken into account, even if it dates from before the entry into force of the prevailing GATT Anti-dumping Code and basic EC legislation. The specific economic approach investigates whether, in view of the conclusions of the general approach, the specific anti-dumping provisions and their implementation are economically justified and, if not, how they can be optimized.

This twofold (general versus specific) approach clearly investigates anti-dumping law from a different angle. The general approach reaches solutions for the long run as it challenges the fundamentals of prevailing anti-dumping law. The specific approach recommends short-run improvements as they comply with the general characteristics of prevailing anti-dumping law. Hence, this work does not only aspire to be a purely academic approach of anti-dumping law reaching conclusions which are disposed of as being ignorant of current international politics. It tries also to be relevant for the daily implementation of anti-dumping law by recommending changes in interpretations which do not require any legislative action or by recommending legislative amendments which do not upset the fundamentals of prevailing anti-dumping law. Nevertheless, this work is based on the conviction that a fundamental academic approach is necessary, even if it will not have any noticeable effects on international politics in the near future. A fundamental academic approach does influence international politics not only in the long run, but also - be it less spectacular - in the short run. Indeed, governments, when frequently confronted with studies on the effects of trade law on international trade and welfare, will probably think twice before enacting any trade law and will probably try, insofar as politically possible, to incorporate the conclusions of fundamental research. For example, if

policy

fundamental research points out the welfare decreasing effects of trade restrictive laws, it will probably prevent governments to enact laws having too excessive trade restrictive effects and governments will presumably only enact trade restrictive laws insofar as they are politically necessary.

The twofold legal and economic approach will be applied to the two parts this work comprises. Part I examines the practise of dumping. Chapter II involves the general legal and economic approach. It examines whether dumping, as defined by GATT and European anti-dumping law, actually distorts competition. It will show that the general definition of dumping provided by GATT and European anti-dumping law is simultaneously too broad and too restrictive. The legal notion of dumping involves instances which do not distort competition, but does not encompass other cases which do distort competition.

Chapter III investigates the specific details of the notion of dumping as presently defined by GATT and European anti-dumping law and implemented by the European anti-dumping authorities. It studies whether, from a legal point of view, European anti-dumping law has correctly implemented GATT anti-dumping law and whether the European anti-dumping authorities interpret European anti-dumping law correctly. The results of this specific legal analysis are each time confronted with economic theory. For example, according to its general legal definition, the notion of dumping should encompass all instances of price discrimination. The specific economic approach investigates whether European anti-dumping law actually assesses all cases of price discrimination and how the law should be amended in order to detect all those instances, though, from a general economic point of view, anti-dumping law should not sanction each case of price discrimination.

Part II examines the characteristics of anti-dumping relief. Chapter IV investigates, from a general perspective, whether anti-dumping relief, as defined by GATT and European anti-dumping law, actually increases the welfare of the Community. It shows that there may be circumstances - though hard to assess - in which anti-dumping relief may enhance the Community welfare, but that GATT and European anti-dumping allow anti-dumping relief irrespective of whether the conditions necessary for anti-dumping relief to increase the Community welfare are fulfilled.

Chapters V, VI and VII start from prevailing GATT and European anti-dumping law on anti-dumping relief which they subject to the specific legal and economic analysis. In pursuance of GATT anti-dumping law, European anti-dumping law pays special attention to one component of the Community welfare, i.e., the interests of the Community producers. Indeed, GATT and European anti-dumping law only allow anti-dumping relief if the dumping inflicts injury upon the Community producers. In Chapter V, the specific legal analysis examines how the European anti-dumping authorities assess this injury and whether their method is legal. The specific economic

analysis revolves essentially around the question whether the method applied by the European anti-dumping authorities actually enables them to detect all instances of injurious dumping and prevents them from confounding injurious dumping with instances in which the dumping does not inflict injury upon the Community producers.

Chapter VI examines the legal requirement that anti-dumping relief may only be imposed if it is in the interests of the Community. This requirement is specific to European anti-dumping law, though not contrary to GATT anti-dumping law. Chapter VI investigates, from a legal point of view, how the European anti-dumping authorities implement the notion of Community interests. The economic analysis starts from the idea that the notion of Community interests coincides with the notion of Community welfare. Accordingly, this analysis revolves around the question whether, by means of the interpretation given by the European anti-dumping authorities, this notion captures all the components of the Community, which may be affected by anti-dumping relief and whether the European anti-dumping authorities evaluate those components correctly. It will also investigate whether the objectives aimed at under the heading «Community interests» may not be attained by means of alternative policy instruments which, compared with anti-dumping relief, result in higher Community welfare.

Chapter VII examines in detail the characteristics of the various types of anti-dumping relief. It investigates whether European anti-dumping law does not create certain types of anti-dumping relief which are at variance with GATT anti-dumping law. The characteristics of the anti-dumping measures as imposed by the European anti-dumping authorities will also be compared with GATT and European anti-dumping law. Chapter VII will further investigate whether the different characteristics are economically relevant and whether their economic effects are actually taken into account by the European anti-dumping authorities.

Finally, Chapter VIII concludes this work. It provides an overview of the most important findings of the twofold legal and economic analysis made in this work. On the basis of those findings, it will, by way of conclusion, make some recommendations, both on a general and a specific level. Thus, it will suggest an alternative for traditional anti-dumping law, as well as improvements of existing, traditional anti-dumping law.

PART I

DUMPING

CHAPTER II

DUMPING : AN UNFAIR PRACTICE IN A FREE-TRADE WORLD ORDER ?

GATT = agreed on the dumping

1. INTRODUCTION

Dumping is generally held to be an unfair trade practice. Precisely because of that conviction, GATT, though it promotes free trade, allows trade restrictive remedies against dumping.

Since free trade generally maximizes welfare, it is important to know whether dumping is really unfair. Section 2 of this chapter tries to find out why dumping is considered unfair and whether this notion of unfairness stands economic theory. It shows that this notion is not economically underbuilt, unless it is equated to predatory pricing. But then dumping will not always be unfair since not all dumping is predatory.

In view of this conclusion, section 3 examines why GATT has accepted the general unfairness of dumping and whether the GATT rules on dumping do not contain the germs to erode the GATT free trading system. It is, indeed, the central thesis of this work that existing anti-dumping law threatens the free trade system from the inside, precisely because it is represented as being an essential part of it.

2. DUMPING : AN UNFAIR TRADE PRACTICE ?

2.1. INTRODUCTION

Legally, dumping is defined as exporting products at prices below either the prices charged in the exporting country or the production costs. For the consumers in the importing country, this is simply marvelous since they can get the products cheaply. The importing country's producers,

however, will label such imports as unfair³⁸. Intuitively, it seems, indeed, not fair that they are confronted with low prices, whereas their colleagues in the exporting country are not. Also prices which do not permit the recovery of the production costs, are generally accepted to be unfair.

On further consideration, however, it becomes apparent that one does not really care about low prices as such. Indeed, GATT does not prohibit dumping *in se*. It allows anti-dumping relief only if the dumping causes injury to the importing country's industry. The core of the problem is the competition the importing country's industry has to cope with as a result of low prices³⁹. Unfairness does not refer here to unbalanced trade, *i.e.*, the disequilibrium in the bilateral trade flows between two countries (one country exports more to another country than it imports from it). Of course, imports at extremely low prices may contribute to such a disequilibrium, but the main problem consist in the effects dumping may have on the competition in the importing country's market. With regard to dumping, unfair trade, thus, seems to rely on the idea that the importing country's industry has a kind of commercial property right in existing customers or price levels⁴⁰. However, even ordinary competition between producers in different countries may infringe that right⁴¹. Since free trade presumes free competition, a commercial property right in existing customers or price levels negates free trade. The advantages of free trade are, however, generally accepted. Like competition in national markets, it results in the efficient allocation of resources in conformity with comparative advantages and, thus, increases welfare. Therefore, the claim that dumping is unfair, should not be accepted unless the dumping is predatory.

The main threat to competition is, indeed, predatory pricing. A producer engaged in predatory pricing aims at destroying or preventing competition by means of abnormally low prices in order to reap high monopoly profits once competition is destroyed and prevented. Within national markets antitrust laws fight such predatory conduct. The non-existence of international antitrust law, however, does not imply that international trade is free of predatory pricing. It only implies that producers who want to engage in predatory conduct, are given free play in international trade, unless GATT and, in pursuance thereof, European anti-dumping law offer a good alternative to international antitrust law. Indeed, since predatory pricing usually presumes low prices, dumping may perhaps be another word for predatory pricing in international trade. For an exporter might

³⁸ BHAGWATI, J., *Protectionism*, Cambridge (Mass.), MIT Press, 1988, 34-35.

³⁹ LOWENFELD, A.F., «Fair or Unfair Trade : Does it Matter ?», *Cornell International Law Journal*, 1980, (205), 206.

⁴⁰ BARCELÓ, J.J., «Antidumping Laws as Barriers to Trade - The United States and the International Antidumping Code», *Cornell Law Review*, 1971-1972, (491), 503.

⁴¹ BARCELÓ, J.J., «Antidumping Laws as Barriers to Trade - The United States and the International Antidumping Code», *Cornell Law Review*, 1971-1972, (491), 503.

try to monopolise his export market by practising dumping, *i.e.*, by charging export prices below his domestic market prices or below his production costs, whereas anti-dumping law might sanction his monopolising his export market. Therefore, this section will investigate if and when dumping is predatory.

Since three types of dumping are being distinguished under GATT and European anti-dumping law, namely price discrimination, sales at a loss and NME dumping, this section is split up in three subsections. After a short explanation of their legal definition, these subsections investigate from an economic point of view whether and when each type of dumping is predatory⁴². Finally, they confront the legal definition with the economic findings.

2.2. DUMPING AS PRICE DISCRIMINATION

2.2.1. Legal definition

Under GATT and European anti-dumping law, dumping occurs when the export price of a product is below the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country. It also occurs when the export price is less than a comparable price for the like product for export to any third country in the ordinary course of trade (Article VI(1) GATT ; Articles 2.1. and 2.2. GATT Anti-dumping Code ; Articles 1(2) and 2(1) and (3) basic EC Regulation ; Article 2(2) and (3) basic ECSC Decision). Clearly, price discrimination between national markets is a type of dumping, but not all price discrimination comes within the legal definition of dumping. Indeed, if the exporter charges a higher price abroad than at home, he does not dump. The legal definition of dumping, thus, does not comprise «reverse dumping», *i.e.*, the price on the market of the exporting country is less than the export price. It comprises only «dumping proper», *i.e.*, the price on the market of the exporting country is higher than the export price. As a consequence, cases of reverse dumping are fully disregarded and, therefore, cannot offset cases of «dumping proper».

⁴² This work will concentrate on the question whether (and which) anti-dumping law is economically justified. It is not interested in the effects anti-dumping law may have on the economic behaviour of domestic and foreign producers. Therefore, it will only inquire why exporters practise dumping when there is no anti-dumping law. Hence, this work does not investigate dumping which is being practised by exporters faced with the positive probability of a future voluntary export restraint and subject to possible anti-dumping enforcement (see : ANDERSON, J.E., «Domino Dumping, I : Competitive Exporters», *American Economic Review*, 1992, (65), 65-83 ; ANDERSON, J.E., «Domino dumping II : Anti-dumping», *Journal of International Economics*, 1993/35, (133), 133-150). It does not investigate either the effects, for instance, of the mere existence of anti-dumping law on the production decisions (LEIDY, M.P., and HOEKMAN, B.M., «Production effects of price- and cost-based anti-dumping laws under flexible exchange rates», *Canadian Journal of Economics*, 1990, (873), 873-895) or on the investment decisions of the dumping exporter (see : STAIGER, R.W., and WOLAK, F.A., «The effects of domestic antidumping law in the presence of foreign monopoly», *Journal of International Economics*, 1992/32, (265), 265-287).

As GATT and European anti-dumping law require that due allowance is made for differences in conditions and terms of sale and for other differences affecting price comparability (such as differences in transport costs, quantity, physical characteristics) (Article VI(1) GATT ; Article 2.4. GATT Anti-dumping Code ; Article 2(10) basic EC Regulation ; Article 2(9) and (10) basic ECSC Decision), the legal definition of dumping also covers «non-price dumping». Indeed, price discrimination may occur not only when different prices are charged in different markets, but also when identical prices are charged which do not fully reflect differences in conditions and terms of sale or similar differences affecting prices.

2.2.2. *Economic theory*

In economics, dumping in the sense of price discrimination comprises both «dumping proper» and «reverse dumping». Thus, the economic definition is larger than the legal one.

In order to know if and when dumping is predatory, the distinction between «dumping proper» and «reverse dumping» is not to the point. Regardless of the market in which the exporter charges the lowest price, economics shows that price discrimination is frequently not predatory, but the result of competitive pricing. Competitive pricing, resulting from short-run profit maximization, is considered to be the ordinary economic behaviour of producers. Such competition maximizes welfare because it drives the less efficient producers out of the market or prevents them from entering it so that only the most efficient producers remain⁴³.

Unlike competitive pricing, predatory pricing is a strategic pricing policy which departs from short-run profit maximization. Instead, it is a strategy which aims at destroying or preventing competition in order to eventually gain monopoly profits. It may be directed against existing or potential competitors. Its object is to drive existing competitors out of the market, to prevent entry by potential competitors⁴⁴, or to compel them to cooperate by reducing output or by merging on favourable terms with the predator. To attain this object, prices are usually set below their short-run profit maximizing levels⁴⁵. At the end the predator will obtain a monopoly position or market leadership. From then on, he will be able to increase prices and thus obtain

⁴³ DEMSETZ, H., «Barriers To Entry», *American Economic Review*, 1982, (47), 52-53.

⁴⁴ In economics predatory pricing against market entrants is called limit pricing. Since the conclusions which will be made afterwards are identical for all types of predatory pricing, the notion «predatory pricing» will refer here also to limit pricing.

⁴⁵ AREEDA, P., and TURNER, D.F., «Predatory Pricing and Related Practices under Section 2 of the Sherman Act», *Harvard Law Review*, 1974-1975, (697), 698 and 703 ; BAUMOL, W.J., «Quasi-Permanence of Price Reductions : A Policy for Prevention of Predatory Pricing», *Yale Law Journal*, 1979-1980, (1), 1 ; BORK, R.H., *The Antitrust Paradox : A Policy at War with Itself*, New York, Basic Books, 1978, 144 ; JOSKOW, P.L., and KLEVORICK, A.K., «A Framework for Analyzing Predatory Pricing Policy», *Yale Law Journal*, 1979-1980, (213), 213 ; MILGROM, P., and ROBERTS, J., «Limit Pricing and Entry under Incomplete Information : An Equilibrium Analysis», *Econometrica*, 1982, (443), 443 ; YAMEY, B.S., «Predatory Price Cutting : Notes and Comments», *Journal of Law and Economics*, 1972, (129), 134.

monopoly profits. Since the predator's original low prices lie below short-run profit maximizing level, they do not reflect his degree of efficiency. He may be less efficient than his competitors. In order to succeed, the predator must only be powerful enough to outlast his competitors when prices are low and re-entry must be practically impossible in order to enable him to charge high monopoly prices⁴⁶. Predation, therefore, does not maximize welfare. It does not result in efficient allocation of resources, since a less efficient predator may drive more efficient competitors out of the market or prevent their entry⁴⁷.

Predatory pricing is, however, easily confused with competitive pricing. Low prices in general and price discrimination in particular are no proof of predatory pricing. Neither is the fact that competitors are driven out of the market or that potential competitors are prevented from entering it. Whereas subsection 2.3. investigates when low prices, in the sense of prices below production costs, are predatory, this subsection undertakes to define all types of competitive price discrimination which are relevant in anti-dumping law, in order to distinguish them from predatory price discrimination.

2.2.2.1. Competitive price discrimination

There are three instances of competitive price discrimination which are relevant for dumping : third-degree price discrimination, spatial price discrimination and second-degree price discrimination. Third-degree price discrimination and spatial price discrimination differ from second-degree price discrimination, as they imply that the producer, by some practical mark (*e.g.*, nationality, distance), is able to break down consumers into two or more groups. Those groups of consumers each constitute a market and, as a distinction may be made among those group of consumers, those markets are said to be separated. Therefore, third-degree price discrimination and spatial price discrimination imply discrimination between markets. Third-degree price discrimination requires furthermore that each market has a different demand or a different market structure. For spatial price discrimination, it is sufficient that markets are separated by distance ; demand and market structure need not to be different. As second-degree price discrimination occurs within one and the same market, it does not require market separation. It only requires that some consumers are willing to pay a higher price than others, and that the producer is able to differentiate to some extent between these different classes of consumers. Moreover, as there is no market separation, the producer must supply all consumers which are willing to pay the price he charges. Under third-degree price discrimination and spatial price discrimination, the producer

⁴⁶ BREYER, S., *Regulation and Its Reform*, Cambridge (Mass.), Harvard University, 1982, 32.

⁴⁷ DEMSETZ, H., «Barriers To Entry», *American Economic Review*, 1982, (47), 52-53.

may refuse to supply a market, irrespective of whether the price which the consumers on that market are willing to pay, exceeds the price he gets on the other markets.

2.2.2.1.1. Third-degree price discrimination

Dumping in the sense of price discrimination is usually considered as third-degree price discrimination⁴⁸. The traditional economic approach explains this type of price discrimination only by differences in demand, especially by differences in demand elasticity (*i.e.*, the more elastic demand is, the greater the effect of a price change will be on the quantity demanded)⁴⁹. According to it, third-degree price discrimination necessarily involves separated markets, each having a different demand elasticity, so that at least in one market the producer has market power. Indeed, without market separation consumers will equalize prices on all markets through arbitrage, since they will buy the product on the market with the lowest price and re-sell it in the others. Also, if the producer has no market power in any of the markets, prices in each market remain the same regardless of the quantity he sells. Consequently, he will sell his entire output only in the market with the highest price. If, on the other hand, markets are separated, but the demand elasticities on all markets are equal, the responsiveness of consumers to price changes is the same on all markets so that the producer must charge the same price in all markets, even if he has market power in those markets.

Traditional economic theory does not pay any attention to market structure, unless the differences in market structure result from the required difference in demand elasticities. Indeed, a perfectly elastic demand corresponds to perfect competition, whereas demand in an imperfectly competitive market is not perfectly elastic. Traditionally, that imperfect competition is represented as a monopoly market structure and the results obtained with regard to such a market structure are assumed to apply equally to an oligopolistic market structure.

However, more recent research shows that differences in market structure may also cause third-degree price discrimination. It demonstrates that price discrimination between oligopolistic markets having identical demand elasticities may occur when the degree of competition on each of

⁴⁸ BOLTUCK, R.D., «An Economic Analysis of Dumping», *Journal of World Trade Law*, 1987, (45), 45-47 ; FISHER, B.S., «The Antidumping Law of the United States : A Legal and Economic Analysis», *Law and Policy in International Business*, 1973, (86), 87-89 ; KNOLL, M.S., «United States Antidumping Law : The Case for Reconsideration», *Texas International Law Journal*, 1987, (265), 280-281 ; LEONTIEF, W., «The Theory of Limited and Unlimited Discrimination», *Quarterly Journal of Economics*, 1939-1940, (490), 490-501 ; YNTEMA, T.O., «The Influence of Dumping on Monopoly Price», *Journal of Political Economy*, 1928, (686), 686-698. See also : PIGOU, A.C., *The Economics of Welfare*, London, MacMillan, 1952 (reprint - 4th ed.), 275-289 ; ROBINSON, J., *The Economics of Imperfect Competition*, London, MacMillan, 1954 (reprint ; original date of publication : 1933) 1933, 179-202.

⁴⁹ See also : DAS, S.P., «Market uncertainties and cyclical dumping», *European Economic Review*, 1992, (71), 75.

those markets is different. The more producers compete on a market, the lower the price will be on that market⁵⁰.

Whether third-degree price discrimination is caused either by differences in demand elasticity or differences in market structure, the price discriminating producer can hardly be said to be acting predatory. His short-run profit maximization results in third-degree price discrimination only because markets are separated and have different demand elasticities or market structures, and because, on at least one of those market he has, as a monopolist or an oligopolist, market power.

Of course, the producer could be blamed for being a monopolist or an oligopolist in a protected market. Monopoly and oligopoly are, indeed, generally inferior to perfect competition because under monopoly or oligopoly output is lower and prices are higher than the marginal cost of producing the product. Also free trade is superior to restricted trade, since it procures maximal welfare. The ultimate responsibility, however, lies with his government which «subsidizes» the producer by allowing him to have a monopoly or oligopoly position at home and by protecting him against foreign competition⁵¹. Indeed, if his government enacted and applied antitrust law and removed all trade barriers, the producer would not be a monopolist or an oligopolist, nor would his home market be separated from the other markets. Consequently, his short-run profit maximization would not result in third-degree price discrimination.

2.2.2.1.2. Spatial price discrimination

Like third-degree price discrimination, spatial price discrimination results from market separation, but markets are now separated by distance. In this respect, it is particularly relevant for dumping since dumping occurs between national markets which are by definition separated in space. Contrary to third-degree price discrimination, spatial price discrimination does not require different demand elasticities or market structures.

Figure 1 assumes two markets separated by distance with identical demand elasticities and an identical market structure, namely a monopoly. Each market has only one buyer. These buyers are evenly distributed along a line. Buyer 1 is proximate to the monopolist ; buyer 2 is located at a distance. Both buyers have each the same gross demand curve, D^g . This curve reflects the demand function at the buyers's site and has to be distinguished from the net demand curve, D^n . Net demand is the demand as seen by the monopolist at his site. Transport costs make the difference between net and gross demand. If gross demand curves are identical, $D^g = D^g_1 = D^g_2$, and if transport

⁵⁰ EICHENGREEN, B., and VAN DER VEN, H., «U.S. Antidumping Policies : The Case of Steel», in *The Structure and Evolution of Recent U.S. Trade Policy*, BALDWIN, R.E., and KRUEGER, A.O. (eds.), Chicago, The University of Chicago Press, 1984, (67), 84-88.

⁵¹ BOURGEOIS, J.H.J., «EC Anti-dumping Enforcement - Selected Second Generations Issues», in *Antitrust and Trade Policy in the United States and the European Community*, HAWK, B.E. (ed.), New York, Bender, 1986, (563), 566-567 ; HOEKMAN, B.M., and LEIDY, M.P., «Dumping, Antidumping and Emergency Protection», *Journal of World Trade*, 1989/5, (27), 33-34 ; PETERSMANN, E.-U., «Need for Reforming Antidumping Rules and Practices. The Messy World of Fourth-Best Policies», *Aussenwirtschaft*, 1990, (179), 184.

costs are constant per unit distance, the different net demand curves can be represented by parallel demand functions, D_1^n and D_2^n , with respective marginal revenue curves, MR_1^n and MR_2^n . Aggregate net demand, AD, with corresponding marginal revenue, AMR, are represented in figure 1(b). The monopolist will maximize his profit by equating his marginal costs, MC, to marginal revenue and, thus, by producing a quantity Oq^* . He will sell a quantity Oq_1 to the distant buyer at a delivered price OP_1 , and a quantity Oq_2 to the proximate buyer at a delivered price OP_2 . When comparing these delivered prices, the producer seems to practise reverse dumping. However, if transport costs are accounted for, the ex-factory prices are OP_3 for the distant buyer and OP_2 for the proximate buyer. The producer, thus, practises dumping proper on the ex-factory level and this dumping is caused only by the fact that buyers are spatially distributed⁵².

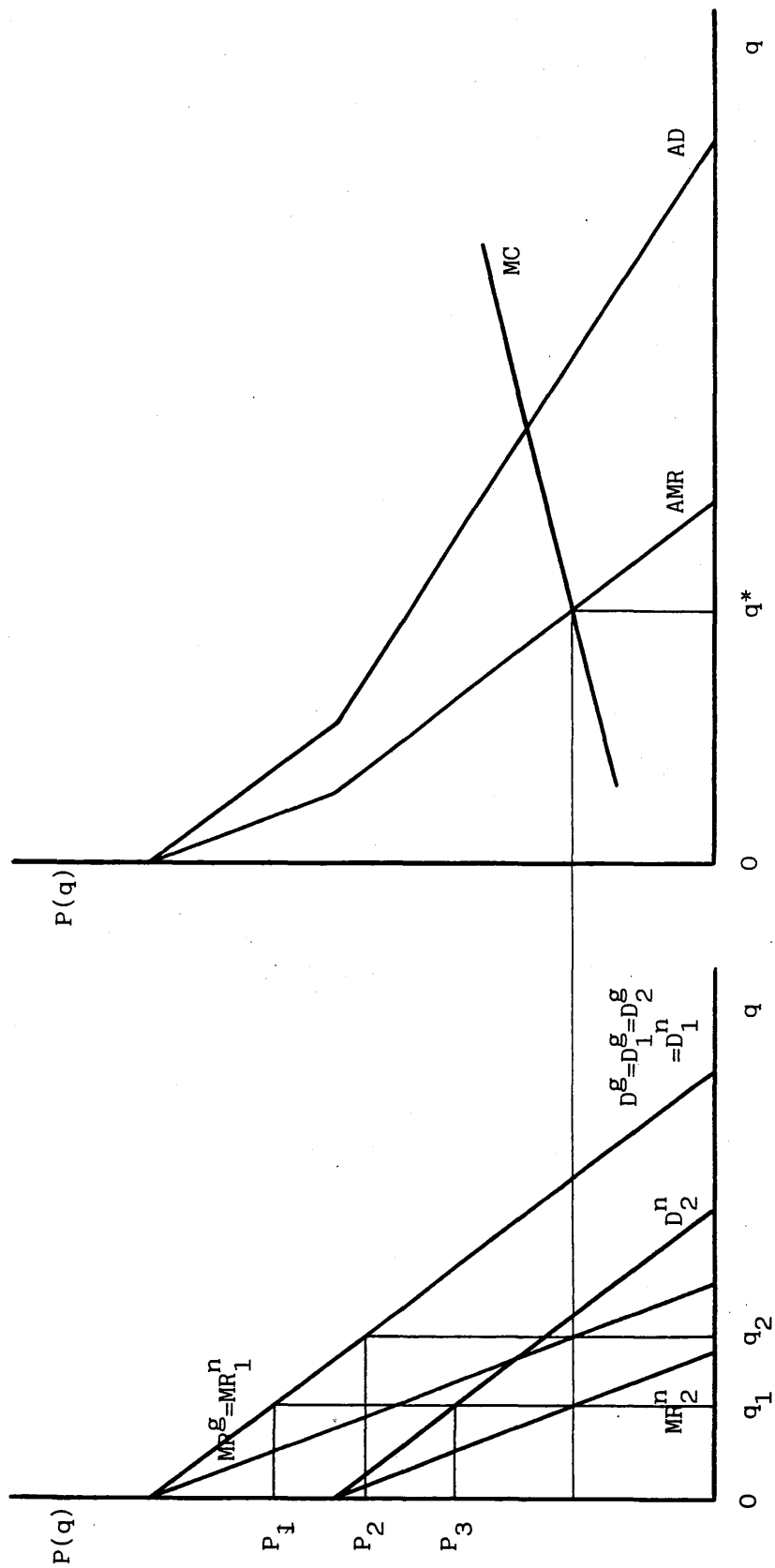
Spatial distribution of buyers affects delivered prices, which include transport costs, as well as ex-factory prices. If demand elasticities and market structure are identical, it will result in price discrimination in terms of either delivered prices or ex-factory prices. In terms of ex-factory prices, it may result in freight absorption (*i.e.*, the technical term for dumping proper in spatial economics), phantom freight (*i.e.*, reverse dumping) or no price discrimination, depending on demand conditions⁵³. Market structure too plays a role, for spatial price discrimination does not require monopoly. In terms of delivered prices, the relative degree of competition on all the markets is decisive for there being price discrimination or not: the degree of price discrimination increases if the more distant market is more competitive than the more proximate one⁵⁴. In terms of ex-factory prices, on the other hand, freight absorption does not necessarily require the producer's home market to have a less competitive market structure than the importing country. For, instance, if the home and export market are equally competitive, there will be no price discrimination in terms of delivered prices; however, if transport costs are accounted for, each producer will charge an ex-factory price in his export market which is lower than his home

⁵² A special case of spatial price discrimination may be found in: BRANDER, J., and KRUGMAN, P., «A 'Reciprocal Dumping' Model of International Trade», *Journal of International Economics*, 1983/15, (313), 313-316. They show that two firms, having a monopoly position in their home market and having a Cournot perception (*i.e.*, each of them assumes the other firm's output as fixed in each market), will dump in each others market if markets are separated and transport costs have to be incurred for exporting to the foreign market.

⁵³ The producer in figure 1 absorbs freight because net demand is linear and, therefore, less convex than a negative exponential. Indeed, for freight absorption to occur, net demand must be less convex than a negative exponential. If, however, net demand is less convex than a negative exponential, price discrimination will be practised against proximate buyers. If net demand is a negative exponential, no spatial price discrimination will occur (BENSON, B.L., «On the Ability of Spatial Competitors to Price Discriminate», *Journal of Industrial Economics*, 1984-1985, (251), 251-255; GREENHUT, M.L., NORMAN, G., and HUNG, C.-S., *The economics of imperfect competition. A spatial approach*, Cambridge, Cambridge University Press, 1987, 25-27 and 101-110; GREENHUT, M.L., and OHTA, H., *Theory of Spatial Pricing and Market Areas*, Durham N.C., Duke University Press, 1975, 51-88; HOOVER, E.M., «Spatial Price Discrimination», *Review of Economic Studies*, 1936-1937, (182), 182-191; NORMAN, G., «A Geometric Note on Some Propositions in Spatial Pricing Policy», *Economics Letters*, 1983/12, (341), 341-347; PHILIPS, L., *La formation des prix*, Louvain-la-Neuve, Cabay, 1983, 43-55; SINGER, H.W., «A Note on Spatial Price Discrimination», *Review of Economic Studies*, 1937-1938, (75), 75-77).

⁵⁴ DORWARD, N., «Recent Developments in the Analysis of Spatial Competition and their Implications for Industrial Economics», *Journal of Industrial Economics*, 1982-1983, (133), 135-141; GREENHUT, J.G., and GREENHUT, M.L., «Spatial Price Discrimination, Competition and Locational Effects», *Economica*, 1975, (401), 401-419; GREENHUT, M.L., NORMAN, G., and HUNG, C.-S., *The economics of imperfect competition. A spatial approach*, Cambridge, Cambridge University Press, 1987, 135-143; GREENHUT, M.L., and OHTA, H., *Theory of Spatial Pricing and Market Areas*, Durham N.C., Duke University Press, 1975, 124-150; PHILIPS, L., *La formation des prix*, Louvain-la-Neuve, Cabay, 1983, 57-73.

Figure 1



market price at the ex-factory level⁵⁵. Moreover, freight absorption may occur even if the producer's home market is more competitive than the export market⁵⁶.

Consequently, the objection against third-degree price discrimination⁵⁷, namely the assertion that the producer is a monopolist or an oligopolist, cannot always be raised against spatial price discrimination. And, for the cases, in which it might be possible, the answer is identical : the absence of (well-enforced) antitrust law in the producer's home country is the ultimate cause ; the producer practises only short-run profit maximization and cannot be blamed for acting predatorily.

2.2.2.1.3. Second-degree price discrimination

In case of spatial price discrimination, transport costs are accounted for differently. Likewise, second-degree price discrimination implies that other elements affecting price comparability, such as differences in physical characteristics, differences in quantity, or differences in conditions and terms of sale, are accounted for differently. For example, second-degree price discrimination occurs when products of different quality are sold at the same price. It also occurs when different services are not accounted proportionally for in the price⁵⁸.

It differs from spatial as well as from third-degree price discrimination in that markets are not separated. On the contrary, the producer is faced with only one demand function covering both his home and export market. Demand, however, is composed of heterogeneous customers. Some of them value the product highly and want to pay a higher price than the others.

If the producer has perfect information about each customer's preferences, he can practise perfect price discrimination (also called first-degree price discrimination) by charging different prices for each unit sold or by offering personalized bundles (price and quality, price and quantity, price and time of delivery) to each customer. Usually the producer will not be able to perfectly price discriminate since he does not have full information. Therefore, he will resort to a less complete form of first-degree price discrimination, namely second-degree price discrimination. Hence, he

⁵⁵ This case is called «reciprocal dumping». See : BRANDER, J., and KRUGMAN, P., «A 'Reciprocal Dumping' Model of International Trade», *Journal of International Economics*, 1983/15, (313), 314-318.

⁵⁶ For a specific example, see : WEINSTEIN, D.E., «Competition and unilateral dumpings», *Journal of International Economics*, 1992/32, (379), 379-388. In the model developed by D.E. WEINSTEIN, freight absorption by the producers in the most competitive market may occur, for instance, if those producers are able to lower their home market price to a level at which it is unprofitable for the producers in the less competitive market to export to the first market. But even then, the price in the less competitive market is still high enough to allow the producers in the most competitive market to export to the less competitive one. Moreover, they will even resort to dumping and, thus, practise freight absorption.

⁵⁷ *Supra*, 27.

⁵⁸ See : TIROLE, J., *The Theory of Industrial Organization*, Cambridge (Mass.), The MIT Press, 1988, 142-152.

will discriminate by offering the customers a menu of bundles to choose from. Thereby, he must determine the bundles so as to make sure that he can differentiate between customers who are willing to pay a higher price and those who are not. Otherwise all customers would pay the lowest price and the producer would not be able to practise second-degree price discrimination and, consequently, to maximize his profits⁵⁹.

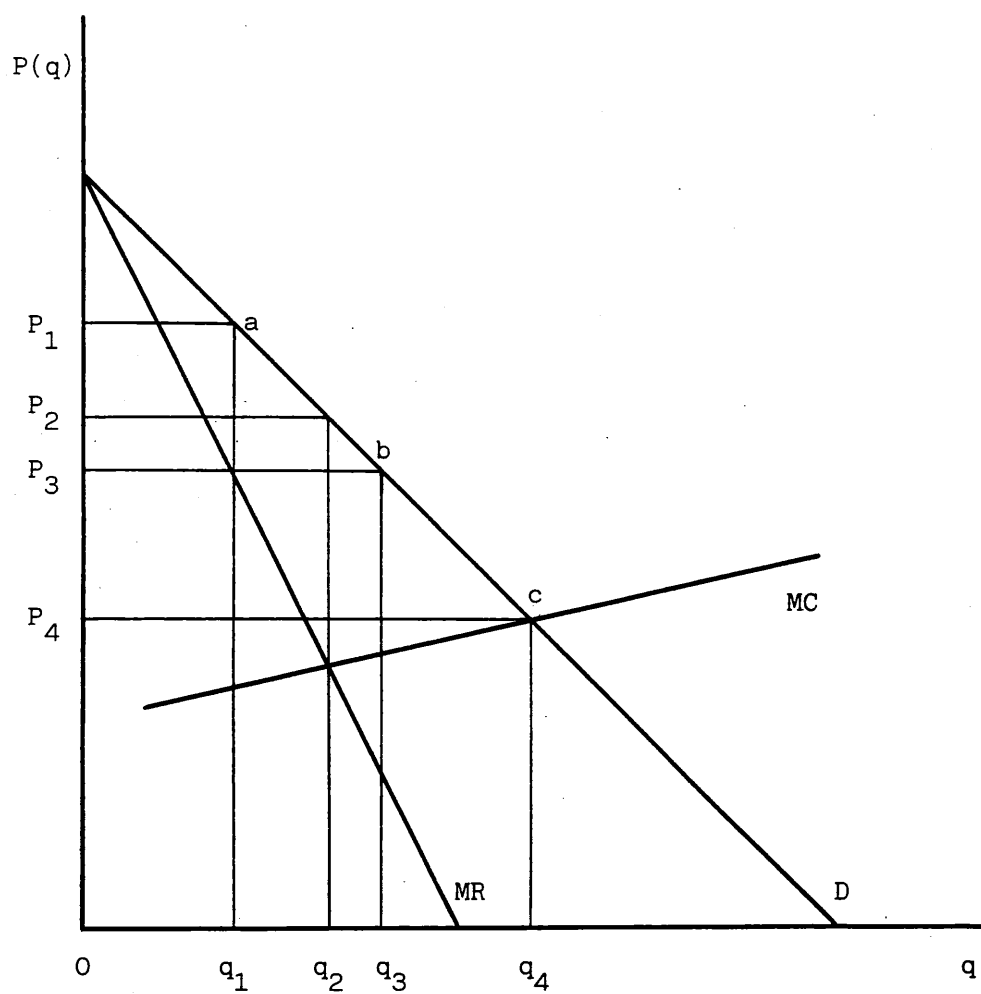
Figure 2 illustrates both first-degree and second-degree price discrimination. It assumes that each customer buys not more than one unit of the homogeneous product. If the profit maximizing monopolist does not price discriminate, he will equate his marginal cost (MC) to his marginal revenue (MR). As a consequence, he will sell a quantity Oq_2 at a price OP_2 . If the monopolist perfectly knows the demand of each customer, he will practise first-degree price discrimination and charge for each unit sold a different price. Indeed, the customer at Oq_1 will pay a price OP_1 , whereas the customer at Oq_3 will only pay a price OP_3 . Under first-degree price discrimination the monopolist will sell a total quantity Oq_4 to Oq_4 consumers, since it is profitable for him to offer product units as long as the price of the marginal unit offered does not fall below marginal cost.

Usually, however, the monopolist does not have perfect information. If he has only some rather rough indications as to the preferences of the different customers, he will discriminate by group of consumers. In figure 2, he will charge a price OP_1 at the group consumers Oq_1 , a price OP_2 at the group q_1q_2 and a price OP_4 at the group q_2q_4 . By practising second-degree price discrimination the monopolist captures partly consumer surplus. Under first-degree price discrimination the monopolist appropriates total consumer surplus.

Differences in the customers' preferences do not necessarily coincide with national borders. Customers with different preferences may be present in one and the same national market. Customers with the same preference may be dispersed over several national markets. As a consequence, the second-degree price-discriminating exporter may well practise at the same time dumping proper, reverse dumping as well as no dumping. It depends on which sales to which customers are compared: if sales to customers with the same preference are compared, no dumping will be found; if sales to customers with different preferences are compared, dumping proper or reverse dumping will be found, depending on whether the customers with the highest preference are located in respectively the producer's home country or export country. Usually, a mix of cases with no dumping, dumping proper and reverse dumping will be found. In this respect, second-degree price discrimination differs from third-degree and spatial price discrimination which are characterized by either dumping proper, reverse dumping or no dumping.

⁵⁹ For the concepts of first-degree and second-degree price discrimination, see: PIGOU, A.C., *The Economics of Welfare*, London, MacMillan, 1952 (reprint - 4th ed.), 275-289.

Figure 2



Nevertheless, like third-degree and spatial price discrimination, second-degree price discrimination results from the producer's competitive pricing. Therefore, the producer cannot be said to act predatorily. The ultimate cause of second-degree price discrimination also resides in the absence of perfect competition. Contrary to third-degree and spatial price discrimination, imperfect competition is present in both the producer's home and export market. Therefore, not the producer, but the governments of both countries are to be blamed for not having enacted or applied antitrust law.

2.2.2.2. Predatory price discrimination

Predatory price discrimination will be practised if export prices are determined at a level lower than short-run profit maximizing prices in order to drive competitors out of the market or to prevent them from entering it. As soon as competitors are driven out of the market, export prices are raised, but only to a level which prevents re-entry.

This subsection examines whether producers will actually engage in predatory price discrimination and whether predatory price discrimination can be distinguished from competitive price discrimination.

2.2.2.2.1. Occurrence of predatory price discrimination

In respect of predatory price discrimination, one automatically thinks of the cross-subsidy argument according to which a producer is able to charge low prices in his export market, since he can finance his lower income with the profits he earns in his home market, where he charges higher prices⁶⁰. This is, however, a weak argument. It only refers to the needed financial staying power of the predating producer, namely the fact that his profits in other markets enable him to charge extremely low prices for an extended period of time in his home market. It overlooks the fact that the price discriminating predator's high home market prices may attract competitors to enter his home market. Either their entry will grant the predator's competitors an identical financial staying power, so that they can face the predator's low export prices ; or, it will cause, through increased competition, the prices on the predator's home market to decline so that the predator's financial staying power vanishes.

Of course, the cross-subsidy argument seems to hold, if there are entry barriers preventing the competitors from entering the predator's home market. However, even if market entry does not

⁶⁰ BARCELÓ, J.J., «Antidumping Laws as Barriers to Trade - The United States and the International Antidumping Code», *Cornell Law Review*, 1971-1972, (491), 503-506 ; BERCK, P., and PERLOFF, J.M., «Dynamic Dumping», *International Journal of Industrial Organization*, 1990, (225), 225 ; SCHUNK, E.H., «Soviet Bloc Dumping, the Revenue Act of 1916, and Economic Policy», *UCLA Law Review*, 1979-1980, (1365), 1374.

endanger the predator's financial staying power, predatory price discrimination will only seldom occur. Successful predatory price discrimination also requires that the predator is able to convince his competitors of his predatory pricing strategy. Intuitively one would think that a more efficient producer will have no trouble to drive out less efficient producers. Economic theory, however, shows that even a low cost producer with a (not endangered) monopoly position in his home market and facing a competitive fringe of higher cost producers in his export market, may resort successfully to predatory price discrimination, only if he can commit to a certain price path for an extended period of time. Without commitment, the low cost producer will charge short-run profit maximizing prices and tolerate fringe producers. Indeed, if the low-cost producer cannot credibly commit to a certain price path, the fringe producers will expect the low-cost producer to charge short-run profit-maximizing prices and will stay in the market. But, if they will not leave the market, the low-cost producer will effectively charge short-run profit-maximizing prices, as he will not be able to compensate his lower prices by higher monopoly prices once the fringe producers have left the market. As a commitment for an extended period of time is difficult to sustain, predatory price discrimination will only exceptionnally be successful. Moreover, economic theory shows that, if commitment is possible, the low cost firm needs not to price discriminate in order to drive fringe competitors out of his export market⁶¹.

2.2.2.2.2. Discernability of predatory price discrimination

Predatory price discrimination is difficult to distinguish from competitive pricing. Intuitively one would think of predatory price discrimination when exports prices lie below production costs⁶². However, predatory price discrimination may occur without sales at a loss⁶³. Conversely, competitive price discrimination may occur with sales at a loss, especially when producers are

⁶¹ BERCK, P., and PERLOFF, J.M., «Dynamic Dumping», *International Journal of Industrial Organization*, 1990, (225), 228-242.

⁶² Even economists define predation as selling below costs, see : BERCK, P., and PERLOFF, J.M., «Dynamic Dumping», *International Journal of Industrial Organization*, 1990, (225), 234.

⁶³ BERCK, P., and PERLOFF, J.M., «Dynamic Dumping», *International Journal of Industrial Organization*, 1990, (225), 234.

uncertain about future demand conditions⁶⁴. One might also think that only less efficient producers must engage in predatory price discrimination in order to drive their competitors out of the market. However, economic theory shows that even a low cost producer must engage in predatory price discrimination, if he wants to drive his competitors out of his export market⁶⁵.

2.2.3. Legal theory and economic theory compared

GATT and European anti-dumping law do not distinguish competitive and predatory price discrimination. As allowance must be made for differences affecting price comparability, they apply to all kinds of price discrimination. European anti-dumping authorities do not even consider the cross-subsidy argument as a relevant criterion for the application of anti-dumping law⁶⁶, though they are convinced that charging high domestic prices facilitates dumping⁶⁷ and predatory pricing on the Community market⁶⁸. From an economic point of view, however,

⁶⁴ If confronted with uncertainty and perfect competition on his export market, a risk-neutral producer, who is a monopolist on his home market, may engage in non-predatory third-degree price discrimination charging export prices below marginal cost (DAVIES, S.W., and McGUINNESS, A.J., «Dumping at less than Marginal Cost», *Journal of International Economics*, 1982/12, (169), 171-176).

Also uncertainty on their home market may induce the same risk-neutral, as well as a risk-averse producer, who practices non-predatory third-degree price discrimination, to charge export prices below marginal costs. The probability of export prices below marginal costs is higher under risk-neutrality than under risk-aversion (HILLMAN, A.L., and KATZ, E., «Domestic uncertainty and foreign dumping», *Canadian Journal of Economics*, 1986, (403), 403-416). Economic theory, thus, seems to confirm the contention that producers are willing to sell at any positive price on the world market in order to dispose of their output surplus. Possibly, they do not want to sell their output surplus on their home market because selling all available output on the domestic market could drive domestic marginal revenue below the world price or could even make domestic marginal revenue negative. Thus, exports are used as a means to smooth out (unanticipated) changes in domestic demand. This practice of so-called cyclical dumping has been empirically investigated. The results of these investigations are, however, not univocal: whereas W.E. TAKACS finds evidence of cyclical dumping, D.G. TARR rejects in all cases the cyclical dumping hypothesis (TAKACS, W.E., «Cyclical Dumping of Steel Products. Comment», *Journal of International Economics*, 1982/12, (381), 381-383; TARR, D.G., «Cyclical Dumping. The case of steel products», *Journal of International Economics*, 1979/9, (57), 57-63). The absence of univocal empirical results could be interpreted that economic theory gives a realistic explication of price discrimination. Indeed, it shows that under domestic market uncertainty dumping is possible, but does not necessarily occur.

If the risk-averse producer is not only a monopolist on his home market, but has also market power on his export market, and if he practices a quantity setting strategy, uncertainty on his export market may induce him to charge lower prices on his home market than on his export market (KATZ, E., PAROUSH, J., and KAHANA, N., «Price Uncertainty and the Price Discriminating Firm in International Trade», *International Economic Review*, 1982, (389), 389-393). If the same producer adopts a price-setting instead of a quantity-setting policy, he may practice non-predatory price discrimination with exports prices below marginal costs (BLAIR, R.D., and CHENG, L., «On Dumping», *Southern Economic Journal*, 1983-1984, (857), 857-865).

⁶⁵ BERCK, P., and PERLOFF, J.M., «Dynamic Dumping», *International Journal of Industrial Organization*, 1990, (225), 228-234 and 239-240.

⁶⁶ Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1.

⁶⁷ Commission Decision 93/521/EEC of 3 September 1993 accepting undertakings given in connection with the anti-dumping review in respect of imports of binder and baler twine originating in Brazil, terminating the anti-subsidy review proceeding with regard to these imports and terminating the anti-dumping and anti-subsidy review in respect of imports of binder and baler twine originating in Mexico, *O.J.*, 8 October 1993, No L 251/28.

⁶⁸ Commission Regulation (EEC) No 3029/93 of 29 October 1993 imposing provisional antidumping duties on imports of television camera systems originating in Japan, *O.J.*, 30 October 1993, No L 271/1.

only predatory price discrimination should be prohibited or sanctioned. As, in practice, competitive and predatory price discrimination may be easily confused and predatory price discrimination is seldom successful (*i.e.*, the predator seldom obtains the monopoly position he seeks), it seems appropriate that the price discriminating firm should enjoy the benefit of the doubt: price discrimination should not be sanctioned as such. Indeed, the welfare cost of disregarding the few instances of successful predatory price discrimination (*i.e.*, the cost of not having prevented the monopolization of the market), will be below the overall welfare cost of distorting competition by sanctioning all instances of price discrimination. Price discrimination may, at most, be a first indication of predation, but it can never be sufficient proof of it. Moreover, as predation does not always require price discrimination, anti-dumping law should not be restricted to predatory price discrimination. It should also apply to non-price discriminating predation⁶⁹.

The sole objection against competitive price discrimination is that it may only be practised if the government of the producer's home country subsidizes the producer by the absence of (well-applied) antitrust law and by the protection of his home market against foreign competitors. This objection, though, is not always valid as competitive (spatial) price discrimination may occur even when the producer's home market is more competitive than his export market. But, even where the objection holds, both imperfect competition and protectionism do not come within the scope of anti-dumping law. Indeed, if the home and export market are imperfectly competitive to the same degree and have identical demand elasticities, no price discrimination will occur and anti-dumping law will be without object. Similarly, if the export market is less perfectly competitive and has a lower demand elasticity than the producer's home market, reverse dumping will occur and anti-dumping law will not apply either. Even more so, the producer who practices second-degree price discrimination, will be sanctioned for the instances of dumping proper, whereas anti-dumping law disregards the instances without dumping and those of reverse dumping which may occur at the same time and may outweigh the instances of dumping proper. Such a selective application is all the more conspicuous because the same market imperfection causes dumping proper as well as reverse dumping and the absence of dumping.

Moreover, anti-dumping law does not even remedy both causes of competitive price discrimination, namely the lower degree of competition and the protection against foreign competition on the price-discriminating producer's home market. Indeed, it does not render markets more competitive⁷⁰, nor does it remove protectionism. On the contrary, anti-dumping law results in protecting the import markets and, thus, may reduce the degree of competition on

⁶⁹ The question whether anti-dumping law applies to non-price discriminating predation is examined hereinafter (*infra*, 42-52).

⁷⁰ BARCELÓ, J.J., «Antidumping Laws as Barriers to Trade - The United States and the International Antidumping Code», *Cornell Law Review*, 1971-1972, (491), 506-507.

those markets. It, therefore, closely resembles retaliation : it allows to restrict trade in reaction to the fact that the exporting country protects his home market against foreign trade. Only if anti-dumping action can be used to break through the exporting country's protectionist policy, it might be accepted. As this is a rather theoretical hypothesis⁷¹, anti-dumping law will, like all retaliatory actions⁷², may be assumed to lower the welfare of both importing and exporting country⁷³.

2.3. DUMPING AS SELLING AT A LOSS

2.3.1. Legal definition

Under GATT and European anti-dumping law, dumping occurs when the export price of a product lies below the product's «constructed value». Since the constructed value is defined as covering the production costs plus a reasonable margin for overheads and profit (Article VI(1) GATT ; Article 2.2. GATT Anti-dumping Code ; Articles 1(2) and 2(3) basic EC Regulation ; Article 2(2) and (3) basic ECSC Decision), dumping occurs if the product exported is sold at a loss, regardless of whether price discrimination is being practised. GATT and European anti-dumping law undoubtedly require that constructed value comprises all costs, both fixed and variable, since they treat of «the cost of production» without making any distinction between fixed and variable costs.

GATT and European anti-dumping do not allow cases of sales at a loss to be compensated by cases of profitable sales. They define dumping as exports made at prices below the constructed value (Article VI(1) GATT ; Articles 2.1. and 2.2. GATT Anti-dumping Code ; Articles 1(2) and 2(3) basic EC Regulation ; Article 2(2) and (3) basic ECSC Decision)) and, therefore, disregard all cases in which the export price is above the constructed value.

2.3.2. Economic theory

The classical economic definition limits dumping to price discrimination⁷⁴ and refuses to equate dumping to sales at a loss. More recent economic theory broadens the economic definition of

⁷¹ BHAGWATI, J., *Protectionism*, Cambridge (Mass.), MIT Press, 1988, 25-26 ; PETERSMANN, E.-U., «Need for Reforming Antidumping Rules and Practices. The Messy World of Fourth-Best Policies», *Aussenwirtschaft*, 1990, (179), 185.

⁷² BHAGWATI, J., *Protectionism*, Cambridge (Mass.), MIT Press, 1988, 108-109.

⁷³ *Infra*, 343-373.

⁷⁴ VINER, J., *Dumping : A Problem in International Trade*, New York, Kelly, 1966, (reprint ; original date of publication : 1923), 3.

dumping to sales below cost for two reasons. First, it corresponds to the perception of the layman that dumping and sales at a loss are one and the same. Second, economic theory has become sophisticated enough to deal with problems such as market imperfections, fluctuations in demand and uncertainty, all causes of sales below cost⁷⁵.

Economic theory, however, does not agree with the layman that sales at a loss are always predatory. Market imperfections, fluctuations in demand and uncertainty may, indeed, cause a producer not engaged in predatory pricing to sell at a loss. Such sales at a loss are the result of short-run profit maximization (or loss minimization) and do not aim at destroying or preventing competition. This subsection tries to distinguish competitive sales at a loss from predatory sales at a loss. Therefore, it investigates how short-run profit maximization can result in sales at a loss and how to discern predatory sales at a loss.

2.3.2.1. Competitive sales at a loss

In order to show how short-run profit maximization may result in sales at a loss, the standard case should be distinguished from the case of sales at a loss under uncertainty, adjustment costs or economies of scale. In the standard case, there is no uncertainty nor are there adjustment costs or economies of scale: the producer knows exactly (future) market demand, can adjust all variable production factors without any costs and has no incentive to increase his production output in order to gain economies of scale. Economic theory distinguishes fixed from variable production costs. Contrary to variable cost, fixed costs cannot be adjusted.

2.3.2.1.1. The standard case

Economic theory generally accepts that sales at prices which do not permit the recovery of fixed costs, may be normal business practice⁷⁶. Production may be economically justified, even when prices are below total costs. Indeed, a producer who does not produce, incurs a loss equal to fixed costs. However, by producing he can reduce his loss if the price of the product covers all variable costs, as well as part of his fixed costs. In that case, his loss will amount only to the

⁷⁵ ETHIER, W.J., «Dumping», *Journal of Political Economy*, 1982, (487), 488-490.

⁷⁶ BRANDT, H., and ZEITLER, W.A., «Unfair Import Trade Practice Jurisdiction: The Applicability of Section 337 and the Countervailing Duty and Antidumping Laws», *Law and Policy in International Business*, 1980, (95), 111; VERMULST, E.A., «Dumping in the United States and the European Community: A Comparative Analysis», *Legal Issues of European Integration*, 1984/2, (103), 109; VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 431-432 and 486.

other, non-recovered part of his fixed costs and will, consequently, be lower than the loss he would incur without production⁷⁷ -

Of course, in the long run, all costs must be covered, for all costs are variable in the long run. But even then all costs need not to be covered in each period. Profits during certain periods may compensate losses incurred during other periods so that eventually all costs are covered in the long run.

2.3.2.1.2. Sales at a loss under uncertainty and adjustment costs

2.3.2.1.2.1. Uncertainty

The standard case could give the impression that prices which do not cover variable costs are not the result of short-run profit maximization. As the standard case assumes certainty, this impression is deceptive. In real life, a producer has to make his investment and price decisions for the future at a moment when the future is not yet known. That uncertainty about the future affects the producer's decisions.

In terms of investment decision, uncertainty reduces the probability of sales at a loss. An investment decision requires the producer to choose between production factors which may be adjusted in the short run and those which are fixed once the investment decision is made. Economic theory shows that a risk-averse⁷⁸ profit-maximizing producer will choose an investment with a smaller amount of fixed production factors under uncertainty than under certainty. By doing so, the producer reduces his losses when demand does not live up to the expectations. As he will not choose the optimal ratio between fixed and non-fixed production

⁷⁷ Only once has it been accepted in European anti-dumping law that only variable costs had to be covered. In the anti-dumping case in question it was found that total fixed costs should be allocated over the products of standard quality so that only variable costs had to be allocated to the products below standard quality (Commission Regulation (EEC) No 163/83 of 21 January 1983 imposing a provisional anti-dumping duty on 4,4'-Isopropylidenediphenol originating in the United States of America, *O.J.*, 26 January 1983, No L 23/9; Council Regulation (EEC) No 2024/83 of 18 July 1983 establishing a definitive anti-dumping duty on 4,4'-isopropylidenediphenol originating in the United States of America, *O.J.*, 22 July 1983, No L 199/4).

In fact, it was not a deviation from European anti-dumping law. Indeed, over the whole like product category, both fixed and variable costs were covered. The fact that to the products below standard quality only variable costs were allocated was merely an application of the rule that all cost calculations have to be based on available accounting data (see: Article 2(5) basic EC Regulation; Article 2(11) basic ECSC Decision). The repartition of fixed and variable costs over the different product qualities was, indeed, based on the accounting principle retained by the complainant.

⁷⁸ There are three types of risk attitude: risk neutrality, risk aversion and risk preference. Risk aversion seems the risk attitude of the most frequent occurrence. Moreover, uncertainty implies usually no effect on decisions of a risk neutral producer and the effects of risk preference are usually the opposite of those of risk aversion.

factors (*i.e.*, the ratio under certainty), he reduces also his profits when demand is higher than expected⁷⁹.

In terms of price decisions, however, uncertainty increases the probability of sales at a loss. Indeed, economic theory has shown that increasing uncertainty increases the probability of sales at a loss, when a profit maximizing producers is risk-neutral (so uncertainty does not affect his investment decision) and adopts a quantity-setting strategy (*i.e.*, he determines, on the basis of his expectations, his output before actual demand is known and makes later on the necessary adjustments in terms of the price charged⁸⁰)⁸¹.

However, under uncertainty, producers generally adopt a price-setting strategy, *i.e.*, they set, on the basis of their expectations, price before the actual demand is known and make later on the necessary adjustments by means of the quantity they produce⁸². Economic theory shows that, when a profit maximizing producer adopts such a price setting strategy, price decreases and output increases the more the producer is risk-averse⁸³. Economic theory is unable to show which effect of uncertainty will prevail. The outcome depends on the characteristics of each individual case. Nevertheless, economic theory demonstrates that sales at a loss do not contradict short-run profit maximization under uncertainty.

2.3.2.1.2.2. Adjustment costs

The standard case assumes that variable production factors are so flexible that producers can at every moment in time make the necessary adjustments. This assumption is, however, not very realistic since, in real life, producers are frequently confronted with adjustment costs. Such costs increase the probability of sales at a loss in two respects.

⁷⁹ See : BATRA, R.N., and ULLAH, A., «Competitive Firm and the Theory of Input Demand under Price Uncertainty», *Journal of Political Economy*, 1974, 537-548 ; DAS, S.P., «Further Results on Input Choices under Uncertain demand», *American Economic Review*, 1980, 528-532 ; HOLTHAUSEN, D.M., «Input Choices and Uncertain Demand», *American Economic Review*, 1976, 94-103 ; STEWART, M.B., «Factor-Price Uncertainty with Variable Proportions», *American Economic Review*, 1978, 468-473.

⁸⁰ When faced with demand uncertainty, the producer may choose between a price-setting and/or quantity-setting strategy. Under perfect competition, the producer is a price taker, *i.e.*, he cannot determine nor influence the price, and, thus, may only adopt a quantity-setting strategy (BLAIR, R.D., and CHENG, L., «On Dumping», *Southern Economic Journal*, 1983-1984, (857), 859).

⁸¹ DAS, S.P., «Market uncertainties and cyclical dumping», *European Economic Review*, 1992, (71), 77-79.

⁸² As, under perfect competition, the producer cannot determine nor influence the price, a price setting strategy is possible only when there is no perfect competition. Usually, there is no perfect competition and, apparently, producers choose often a price setting strategy (BLAIR, R.D., and CHENG, L., «On Dumping», *Southern Economic Journal*, 1983-1984, (857), 859).

⁸³ BARON, D.P., «Demand Uncertainty in Imperfect Competition», *International Economic Review*, 1971, (196), 202-203. See also : LELAND, H.E., «Theory of the Firm Facing Uncertain Demand», *American Economic Review*, 1972, 278-291.

First, adjustment costs affect the producer's investment decision. Indeed, in the face of adjustment costs, a profit-maximizing producer will choose an investment with a higher capacity since such an investment allows the evasion of adjustment costs⁸⁴. Higher capacity, however, implies higher fixed costs and, thus, a higher probability of sales at a loss.

Second, once the investment decision is made, adjustment costs make adjustment also to be rather sluggish and incomplete. Producers do not immediately dispose of all superfluous variable production factors if their replacement is difficult and costly. For example, labour is generally considered to be a variable production factor; nevertheless, if the actual demand is low, a profit maximizing producer will not immediately lay off specialized labourers in whose training he has invested⁸⁵. As a consequence, adjustment costs increase the probability of sales at a loss since the producer will bear the costs of variable production factors which he cannot employ for the time being.

2.3.2.1.2.3. Uncertainty and adjustment costs

The combination of both uncertainty and adjustment costs further raises the probability of sales at a loss. The decreasing effect of uncertainty on the prices of a profit-maximizing risk-averse producer subsists. But the effect of uncertainty on the producer's investment decision to restrain the use of fixed production factors is counterbalanced by the fact that adjustment costs induce him to use as much as possible fixed production factors and to apply variable production factors as little as possible.

Economic theory furthermore shows that, with uncertainty and adjustment costs, actual demand must not fall below the lowest expected demand for profit maximizing producers to sell at prices below production costs. Sales at a loss may occur when the actual demand equals the lowest expected demand⁸⁶. Moreover, if demand is low, short-run profit maximization may even result in prices which do not cover all variable costs⁸⁷. Thus, even prices below variable costs are no proof of predatory pricing.

⁸⁴ BERNHARDT, D., «Dumping, Adjustment Costs and Uncertainty», *Journal of Economic Dynamics and Control*, 1984/8, (349), 358.

⁸⁵ ETHIER, W., « Dumping», *Journal of Political Economy*, 1982, (487), 497.

⁸⁶ BERNHARDT, D., «Dumping, Adjustment Costs and Uncertainty», *Journal of Economic Dynamics and Control*, 1984/8, (349), 358 ; ETHIER, W., « Dumping», *Journal of Political Economy*, 1982, (487), 497.

⁸⁷ BERNHARDT, D., «Dumping, Adjustment Costs and Uncertainty», *Journal of Economic Dynamics and Control*, 1984/8, (349), 352-362 ; ETHIER, W.J., «Dumping», *Journal of Political Economy*, 1982, (487), 497..

2.3.2.1.3. Sales at a loss and economies of scale

There are economies of scale when the productivity of a producer depends on the size of his output (internal economies of scale) or on the size of the industry it is part of (external economies of scale). There may be internal economies of scale when substantial initial investments are required (e.g., research and development outlays) to develop new products. There will also be internal economies of scale when production processes are characterized by learning effects, i.e., by producing the producer will gain experience which will reduce his future production costs⁸⁸. An industry will be characterized by external economies of scale when, for instance, producers, because their being located near to one another, have a better access to markets of intermediate goods and specialized labour and, thus, may exert market power on those markets to a certain extent⁸⁹.

It has been demonstrated that short-run profit maximizing producers, when faced with learning effects, may set current prices below current costs in order to gain experience. Overall production costs will be covered by both present and future sales⁹⁰. Clearly, such pricing policy cannot be said to be predatory as it results from short-run profit maximization.

2.3.2.2. Predatory sales at a loss

Sales at a loss are predatory when a producer incurs losses in order to drive his competitors out of the market or to prevent them from entering it. As soon as he has driven his competitors out of the market, he will raise his prices in order to recoup his losses. However, since re-entry is possible, he can raise his prices only to a level which prevents re-entry.

This subsection examines whether predatory sales at a loss frequently occur and how they can be distinguished from competitive sales at a loss.

2.3.2.2.1. Occurrence of predatory sales at a loss

Traditional economic theory advances that producers rather exceptionally engage in predatory pricing (including predatory sales at a loss) as it is quite inefficient. Indeed, traditional economic theory assumes that there are no market imperfections and that information is perfect. If there are

⁸⁸ BALDWIN, R.E., «Are Economists' Traditional Trade Policy Views Still Valid?», *Journal of Economic Literature*, 1992, (804), 820 ; VAN BERGEUK, P.A.G., and KABEL, D.L., «Strategic Trade Theories and Trade Policy», *Journal of World Trade*, 1993/6, (175), 176-177.

⁸⁹ KRUGMAN, P. and OBSTFELD, M., *International Economics*, Glenview (Ill.), Scott, Foresman and Company, 1988, 127.

⁹⁰ DICK, A.R., «Learning by doing and dumping in the semiconductor industry», *Journal of Law and Economics*, 1991, (133), 133-159 ; GRUENSPECHT, H.K., «Dumping and Dynamic Competition», *Journal of International Economics*, 1988/25, (225), 230-233.

no market imperfections, capital markets must be perfect and producers, who are at least as efficient as the predator, will have sufficient financial staying power to survive a predatory attack⁹¹. If there is perfect information, producers know whether they are at least as efficient as the predator. If they are at least as efficient, they will ignore any predatory action. As they will not leave the market, the predator will not be able to raise his prices and recoup his losses afterwards⁹². Since the predator has also perfect information, he knows that he will be worse off with predatory pricing than without it and, therefore, he will not engage into it.

According to traditional economic theory, predation is also inefficient even if it is considered as an investment in the reputation for toughness, i.e., the predator will always fight back each producer who enters the market. Indeed, if there is perfect information, a producer will not be deterred by the predator's actions against another producer. To demonstrate this, assume a predator and ten potential entrants. The predator will fight the first entrant in order to deter the second ; he will fight the second in order to deter the third and so on. However, he will not fight the tenth entrant in order to built up his reputation for toughness since there is no eleventh entrant. As the tenth entrant will actually enter the market, the predator has no need to fight the ninth entrant and this one will also enter the market. But then, the predator does not benefit from fighting the eighth entrant. This reasoning holds true up to the first entrant. As the entrants have perfect information, the predator's actions will not deter them and, therefore, the predator, who also is perfectly informed, will not engage in predatory pricing⁹³.

More recent economic theory, especially game theory, however, shows that the assumptions about the absence of market imperfections and perfect information make predatory pricing inefficient. Since, in real life, information and markets are not perfect, it may be rational for a predator to engage in predatory pricing.

⁹¹ It is generally considered that financial staying power determines which producer will be the first to leave the market. Thus, if the predator has the largest financial staying power, he will succeed in driving out his competitors, even if he is less efficient than his competitors (AREEDA, P., and TURNER, D.F., «Predatory Pricing and Related Practices under Section 2 of the Sherman Act», *Harvard Law Review*, 1974-1975, (697), 698 ; GREER, «A Critique of Areeda and Turner's Standard for Predatory Practices», *Antitrust Bulletin*, 1979, (233), 240).

However, this proposition holds only if capital markets are imperfect (STIGLER, G.J., *Theory of Price*, London, Collier-MacMillan, 1952, 227-228 ; TELSER, L.G., «Cutthroat Competition and the Long Purse», *Journal of Law and Economics*, 1966, (259), 268 and 270 ; YAMEY, B.S., «Predatory Price Cutting : Notes and Comments», *Journal of Law and Economics*, 1972, (129), 131. Indeed, if capital markets are perfect, the more efficient producer will have an easier access to the capital market, as it is more profitable to invest in a more efficient producer than to provide capital funds to less efficient ones (DEMSETZ, H., «Barriers To Entry», *American Economic Review*, 1982, (47), 55).

⁹² BAIN, J.S., «A Note on Pricing in Monopoly and Oligopoly», *American Economic Review*, 1949, (448), 452 ; DORWARD, N., *The Pricing Decision : Economic Theory and Business Practice*, London, Harper & Row, s.d., 91 ; McGEE, J.S., «Predatory Pricing Revisited», *Journal of Law and Economics*, 1980, (289), 311 ; MODIGLIANI, F., «New Developments on the Oligopoly Front», *Journal of Political Economy*, 1958, (215), 217 ; SPULBER, D.F., «Capacity, Output, and Sequential Entry», *American Economic Review*, 1981, (503), 503.

⁹³ SELTEN, R., «The chain-store paradox», *Theory and Decision*, 1978, (127), 127-159. See also : KREPS, D.M., and WILSON, R., «Reputation and Imperfect Information», *Journal of Economic Theory*, 1982/27, (253), 254-255.

There are, for example, imperfections on the capital market when the entrant, who is at least as efficient as the predator, faces financial constraints. As his financial constraints prevent him from outlasting a predatory attack, the predator will be able to engage successfully in predatory pricing⁹⁴. Adjustment costs are another example of market imperfections. Traditional economic theory generally assumes that entrants expect the predator to maintain his pre-entry output level when entry occurs⁹⁵. However, since traditional economic theory assumes perfect information and the absence of market imperfections, the entrants know that the predator will incur losses by maintaining his output level, while, by decreasing his output level, he could make profits. If, however, there are adjustment costs, it will be costly for the predator to change his production plans after they have been made. Then, the entrants will know that the predator is committed to a certain output path, with corresponding prices, and his predatory action will be credible⁹⁶.

There is no perfect information if, for example, entrants are uncertain about demand conditions : prices may be low because market conditions are bad (low demand) or because the predator practices predatory pricing⁹⁷. Entrants may also be uncertain about the predator's pay-offs : the predator may charge low prices, because his production costs are low or because he is engaged in predatory pricing⁹⁸. They may equally be uncertain as to the predator's motivations and behaviour : perhaps the predator is not behaving rational or is able to precommit himself to an

⁹⁴ BENOIT, J.-P., «Financially constrained entry in a game with incomplete information», *Rand Journal of Economics*, 1984, (490), 490-499.

⁹⁵ This is the so-called «Sylos postulate», see : BAIN, J.S., «A Note on Pricing in Monopoly and Oligopoly», *American Economic Review*, 1949, (448), 452 ; DORWARD, N., *The Pricing Decision : Economic Theory and Business Practice*, London, Harper & Row, 1987, 91 ; GASKINS, D., «Dynamic Limit Pricing : Optimal Pricing Under Threat of Entry», *Journal of Economic Theory*, 1971/7, (306), 306-322 ; KAMIEN, M.I., and SCHWARTZ, N.L., «Limit Pricing and Uncertain Entry», *Econometrica*, 1971, (441), 442 ; KAMIEN, M.I., and SCHWARTZ, N.L., «Cournot Oligopoly With Uncertain Entry», *Review of Economic Studies*, 1975, (125), 125 ; McGEE, J.S., «Predatory Pricing Revisited», *Journal of Law and Economics*, 1980, (289), 311 ; MODIGLIANI, F., «New Developments on the Oligopoly Front», *Journal of Political Economy*, 1958, (215), 217 ; PYATT, G., «Profit Maximisation and the Threat of New Entry», *Economic Journal*, 1971, (242), 247.

⁹⁶ FLAHERTHY, M.T., «Dynamic Limit Pricing, Barriers to Entry, and Rational Firms», *Journal of Economic Theory*, 1980, (160), 160-182.

Also several traditional economic models show the rationality of predation when current price levels reflect an irreversible decision because producers have high adjustment costs and, therefore, hold excess capacity (SALOP, S.C., «Strategic Entry Deterrence», *Papers and Proceedings of the Ninety-First Annual Meeting of the American Economic Association*, August 29-31, 1978, in *American Economic Review*, 1979, (335), 335-338 ; SPENCE, A.M., «Entry, capacity, investment and oligopolistic pricing», *Bell Journal of Economics*, 1977, (534), 534-544 ; SPULBER, D.F., «Capacity, Output, and Sequential Entry», *American Economic Review*, 1981, (503), 503-514).

⁹⁷ ROBERTS, J., «A Signaling Model of Predatory Pricing», *Oxford Economic Papers*, 1986, (75), 75.

⁹⁸ KREPS, D.M., and WILSON, R., «Reputation and Imperfect Information», *Journal of Economic Theory*, 1982/27, (253), 254 and 256 ; MILGROM, P., and ROBERTS, J., «Limit Pricing and Entry under Incomplete Information : An Equilibrium Analysis», *Econometrica*, 1982, (443), 444

aggressive course of action⁹⁹. Entrants cannot see through the predator's reputation since, if demand conditions are bad or if the predator's production costs are low, the predator will charge low prices even in respect of the last entrant. They can only base their expectations about future predation on past conduct, making it worthwhile for the predator to build up a reputation of toughness¹⁰⁰. Thereby, the predator can induce exit or prevent entry. However, entrants will not always be fooled. As they know that the predator will try to present market conditions as bad or his production costs as low, they may enter or stay in the market, as if there was perfect information¹⁰¹. Then, if the predator is also uncertain about the entrants' pay-offs, the entrants too may have the incentive to build up a reputation of toughness and a price war may start between them and the predator¹⁰².

Though the assumptions of game theory about market imperfections and incomplete information seem quite realistic, most empirical studies do not find any indication of actual predatory pricing¹⁰³. However, the lack of hard empirical evidence may precisely prove that game theory is right in that it asserts that predation is only rational insofar as it is difficult to distinguish it from ordinary competition. Insofar as predation is obvious, it is less credible and should not

⁹⁹ MILGROM, P., and ROBERTS, J., «Predation, Reputation, and Entry Deterrence», *Journal of Economic Theory*, 1982/27, (280), 285-286 and 302-303.

¹⁰⁰ MILGROM, P., and ROBERTS, J., «Predation, Reputation, and Entry Deterrence», *Journal of Economic Theory*, 1982/27, (280), 283-284.

¹⁰¹ MILGROM, P., and ROBERTS, J., «Limit Pricing and Entry under Incomplete Information: An Equilibrium Analysis», *Econometrica*, 1982, (443), 443-444 and 457; ROBERTS, J., «A Signaling Model of Predatory Pricing», *Oxford Economic Papers*, 1986, (75), 75.

¹⁰² KREPS, D.M., and WILSON, R., «Reputation and Imperfect Information», *Journal of Economic Theory*, 1982/27, (253), 254 and 266-275.

¹⁰³ All case studies conclude predatory pricing is non-existent, see: BORK, R.H., *The Antitrust Paradox: A Policy at War with Itself*, New York, Basic Books, 1978, 149-155; BURNS, M.R., «Outside Intervention in Monopolistic Price Warfare: The Case of the 'Plug War' and the Union Tobacco Company», *Business History Review*, 1982, (33), 33-53; ELZINGA, K.G., «Predatory Pricing: The Case of the Gunpowder Trust», *Journal of Law and Economics*, 1970, (223), 223-240; KAMERSCHEN, D.R., «Predatory Pricing, Vertical Integration and Market Foreclosure: The Case of Ready Mix Concrete in Memphis», *Industrial Organization Review*, 1974, (143), 143-168; KOLLER, R.H., «The Myth of Predatory Pricing: An Empirical Study», *Antitrust Law and Economics Review*, 1971, (105), 105-123; MARIGER, R., «Predatory Price Cutting: The Standard Oil of New Jersey Case Revisited», *Explorations of Economic History*, 1978, (341), 341-367; McGEE, J.S., «Predatory Price Cutting: The Standard Oil (N.J.) Case», *Journal of Law and Economics*, 1958, (137), 137-169; McGEE, J.S., «Predatory Pricing Revisited», *Journal of Law and Economics*, 1980, (289), 289-330; TELSER, L.G., «Cutthroat Competition and the Long Purse», *Journal of Law and Economics*, 1966, (259), 259-277; ZERBE, R., «The American Sugar Refinery Company, 1887-1914: The Story of a Monopoly», *Journal of Law and Economics*, 1969, (339), 339-375.

Also a laboratory experiment found predation to be exceptional, see: ISAAC, R.M., and SMITH, V.L., «In Search of Predatory Pricing», *Journal of Political Economy*, 1985, (320), 320-345.

Only one study, which used a multiple regression model, showed predation not to be so exceptional as generally thought, see: BURNS, M.R., «Predatory Pricing and the Acquisition Cost of Competitors», *Journal of Political Economy*, 1986, (266), 266-296.

occur¹⁰⁴. On the other hand, game theory, though showing the rationality of predation, does not prove that producers frequently engage in it.

2.3.2.2.2. Discernability of predatory sales at a loss

Economic theory proposes several rules in order to distinguish predatory pricing from competitive pricing, a short overview of which will be given⁽¹⁰⁵⁾.

2.3.2.2.2.1. Cost-based rules

Frequently, economic theory proposes a cost-based rule. However, there is no unanimity as to the exact content of such a rule as different cost-based rules are proposed, namely rules according to which pricing is predatory when prices are below either short-run marginal costs¹⁰⁶, average variable costs¹⁰⁷ or average total costs¹⁰⁸.

However, a cost-based rule is not appropriate, as it does not distinguish predatory from competitive pricing. Such a rule may consider competitive pricing as predatory and vice-versa, since prices below production costs may result from short-run profit maximization, especially in the face of the uncertainty and adjustment costs¹⁰⁹, while, on the other hand, predation may be practised without prices below production costs¹¹⁰.

¹⁰⁴ EASLEY, D., MASSON, R.T., and REYNOLDS, R.J., «Preying for Time», *Journal of Industrial Economics*, 1984-1985, (445), 445-446 and 455-456 ; O.E.C.D., *Predatory Pricing*, Paris, O.E.C.D., 1989, 21.

¹⁰⁵ For a more complete overview, see : O.E.C.D., *Predatory Pricing*, Paris, O.E.C.D., 1989, 23-32.

¹⁰⁶ BERCK, P., and PERLOFF, J.M., «Dynamic Dumping», *International Journal of Industrial Organization*, 1990, (225), 228-234. P. BERCK and J.M. PERLOFF do not explain why predation is defined as selling below short run marginal costs. Probably they rely on P. AREEDA and D.F. TURNER according to whom short run marginal costs are the first-best criterion for distinguishing predatory pricing. P. AREEDA and D.F. TURNER were, however, of the opinion that the criterion of short run marginal costs was practically unworkable. Therefore, they proposed average variable costs as second-best criterion (AREEDA, P., and TURNER, D.F., «Predatory Pricing and Related Practices under Section 2 of the Sherman Act», *Harvard Law Review*, 1974-1975, (697), 697-718.).

¹⁰⁷ AREEDA, P., and TURNER, D.F., «Predatory Pricing and Related Practices under Section 2 of the Sherman Act», *Harvard Law Review*, 1974-1975, (697), 697-718.

¹⁰⁸ POSNER, R., *Antitrust Law : An Economic Perspective*, Chicago (Ill.), University of Chicago Press, 1976, 190-192 ; WILLIAMSON, O.E., «Predatory Pricing : A Strategic and Welfare Analysis», *Yale Law Journal*, 1977-1978, (283), 333-337.

¹⁰⁹ *Supra*, 38-42.

¹¹⁰ EASLEY, D., MASSON, R.T., and REYNOLDS, R.J., «Preying for Time», *Journal of Industrial Economics*, 1984-1985, (445), 457 ; ROBERTS, J., «A Signaling Model of Predatory Pricing», *Oxford Economic Papers*, 1986, (75), 78, note 2, and 91-92.

2.3.2.2.2. Output expansion rule

As predatory pricing does not necessarily imply sales at a loss, an output expansion rule has been proposed. It is argued that a producer will adopt his conduct to cost-based rules and, therefore, will invest in overcapacity so that he can increase his output in response to entry without violating the applicable cost-based rule¹¹¹. To avoid these effects a rule has been proposed which prohibits output increases in response to entry for a certain period¹¹². As the cost-based rules, this output expansion rule also fails to detect all instances of predatory pricing since predation may occur without any output expansion¹¹³.

2.3.2.2.3. Dynamic pricing rule

As predation usually involves low prices followed by high monopoly prices once market power is obtained, economic theory has also proposed a dynamic pricing rule which prohibits producers to raise their prices during a certain period after the disappearance of a competitor, unless it can be shown that price rises are due to changes in demand or production costs¹¹⁴.

Besides the practical problem of distinguishing price rises caused by changes in demand and production costs from predatory price rises, such a prohibition would also affect promotional pricing. Promotional pricing also consists of charging temporarily low prices in order to gain a durable foothold on a market, but, once such a foothold is obtained, higher prices will be charged. However, contrary to predatory pricing, promotional pricing is considered to be a normal competitive pricing strategy¹¹⁵ and should, therefore, not be sanctioned.

¹¹¹ This is the case of limit pricing which consists of charging the highest price possible, but at the same time expanding output, thereby leaving insufficient residual demand for entry on a sufficient scale. See : BAIN, J.S., «A Note on Pricing in Monopoly and Oligopoly», *American Economic Review*, 1949, (448), 448-464 ; MODIGLIANI, F., «New Developments on the Oligopoly Front», *Journal of Political Economy*, 1958, (215), 215-232. See also : DORWARD, N., *The Pricing Decision : Economic Theory and Business Practice*, London, Harper & Row, 1987, 90-96 ; WILLIAMSON, O.E., «Predatory Pricing : A Strategic and Welfare Analysis», *Yale Law Journal*, 1977-1978, (284), 295-299.

¹¹² WILLIAMSON, O.E., «Predatory Pricing : A Strategic and Welfare Analysis», *Yale Law Journal*, 1977-1978, (284), 331-336.

¹¹³ ROBERTS, J., «A Signaling Model of Predatory Pricing», *Oxford Economic Papers*, 1986, (74), 91-92.

¹¹⁴ BAUMOL, W.J., «Quasi-Permanence of Price Reductions : A Policy for Prevention of Predatory pricing», *Yale Law Journal*, 1979-1980, (1), 4-8.

¹¹⁵ Promotional pricing is based on a penetration strategy. This is a normal competitive strategy of starting with a low price which will be increased in the long run as soon as market circumstances are favourable (DORWARD, N., *The Pricing Decision : Economic Theory and Business Practice*, London, Harper & Row, 1987, 126).

2.3.2.2.2.4. *Intent*

Since intent is the only crucial difference between predatory and promotional pricing¹¹⁶, one might think of an approach based on intent. It is, indeed, the intent to eliminate or to prevent competition that makes pricing predatory¹¹⁷. However, it is generally accepted that it is difficult, if not impossible to prove predatory intent¹¹⁸. Especially if the predator has a high legal sophistication, he will not leave any trace of such an intent when predatory intent is used as a legal criterion¹¹⁹. Moreover, intent as such is economically irrelevant. The effects of a pricing strategy are equally relevant and a pricing strategy, intended to be predatory, does not always have predatory effects. From an economic point of view, only a producer who aims at destroying or preventing competition and who manages to or has already succeeded in monopolizing the market, should be sanctioned¹²⁰.

2.3.2.2.2.5. *Rule-of-reason test*

None of the rules proposed above allows to distinguish predatory pricing from competitive pricing. They only discern some instances of predatory pricing, while they sometimes mistake competitive pricing for predatory pricing. As they do not satisfy entirely, a rule-of-reason test has been proposed¹²¹. Such a test implies an inquiry into all the factors surrounding the predator's conduct, such as prices, production costs, output, intent, as well as the producers' relative efficiency and market structure such as the existence of market imperfections (*e.g.*, adjustment costs) or the lack of perfect information or other entry barriers. None of these factors is decisive.

Of course, such a test is less workable than the bright-line rules about costs, output, prices and intent. In order to make the rule-of-reason test more workable, a two-tier approach has been proposed : bright-line rules should be only applied in markets with a structure in which predatory pricing would be rational. Thus, in the first stage, it should be examined whether, in view of the structural characteristics of the market, it seems reasonable to expect predatory pricing to occur

¹¹⁶ Though a penetration strategy is usually accepted as a normal competitive pricing strategy, it may also be used with the intent of discouraging new entrants (DEAN, J., «Pricing Policies for New Products», *Harvard Business Review*, 1950, (45), 51). Only because of intent, a penetration strategy becomes predatory.

¹¹⁷ YAMEY, B.S., «Predatory Price Cutting : Notes and Comments», *Journal of Law and Economics*, 1972, (129), 135 and 137.

¹¹⁸ POSNER, R., *Antitrust Law : An Economic Perspective*, Chicago (Ill.), University of Chicago Press, 1976, 185 ; YAMEY, B.S., «Predatory Price Cutting : Notes and Comments», *Journal of Law and Economics*, 1972, (129), 135 and 137.

¹¹⁹ POSNER, R., *Antitrust Law : An Economic Perspective*, Chicago (Ill.), University of Chicago Press, 1976, 189-190.

¹²⁰ DEMSETZ, H., «Barriers To Entry», *American Economic Review*, 1982, (47), 54-56.

¹²¹ SHERER, F.M., «Predatory Pricing and the Sherman Act : A Comment», *Harvard Law Review*, 1975-1976, (869), 890.

and actually to succeed. Only in market situations which are conducive to predatory pricing, it should, in a second stage, be examined, by means of bright-line rules, whether the producer was actually engaged in predatory pricing. This two-tier approach is said to be less time-consuming and less complicated as the first tier would require only an analysis of structural evidence available from public sources (e.g., number of competitors, (the development of) their respective market shares, number of new entrants, the cost of initial investments, whether the product is homogeneous or differentiated). It would, moreover, rule out many allegations of predatory pricing, as not many market situations are conducive to predatory pricing¹²². This two-tier approach seems indeed to render the rule-of-reason test more workable. However, it should be applied in a flexible way : it should not preclude predatory pricing from being found in markets the structure of which probably makes predation irrational.

Despite the complexity of its application, the merit of the rule-of-reason test, though, is that it allows to distinguish predation from ordinary competition with all available evidence at hand : it does not impose to take into account only one element and to disregard all other relevant information¹²³. Moreover, it takes account of recent game theory which precisely shows predation to be rational when certain structural characteristics, such as market imperfections and lack of perfect information, are present.

but also not perfect (p51)

2.3.3. *Legal theory and economic theory compared*

As they define dumping as selling at prices below total production costs, GATT and European anti-dumping law apply one of the cost-based rules proposed by economic theory in order to distinguish predatory pricing from competitive pricing. The first problem with GATT and European anti-dumping law, though, is that they apply a long-run standard (prices may not be lower than fixed and variable production costs), but do not allow that, in the long run, sales at a loss are compensated by profitable sales since they disregard reverse dumping. Economic theory, on the other hand, shows that sales at a loss may result from short-run profit maximization, especially if, in the long run, overall sales are made at a profit. But even if GATT and European anti-dumping law took account of reverse dumping, there would still be a problem as they take account of only a short period of minimum six months¹²⁴, seldom exceeding one year (the so-called «investigation period») for assessing dumping. Hence, if the exporter is not able to cover

¹²² JOSKOW, P.L., and KLEVORICK, A.K., «A Framework for Analyzing Predatory Pricing Policy», *Yale Law Journal*, 1979-1980, (213), 213-270 ; ORDOVER, J.A., and WILLIG, R.D., «An Economic Definition of Predation : Pricing and Product Innovation», *Yale Law Journal*, 1981-1982, (8), 8-21.

¹²³ O.E.C.D., *Predatory Pricing*, Paris, O.E.C.D., 1989, 29-30.

¹²⁴ The investigation period must normally cover a period of not less than six months (Article 6(1) basic EC Regulation ; Article 7(1)(c) basic ECSC Decision).

all his production costs during this rather short investigation period, he will be found to practise dumping, though he may be making considerable profits over a longer period of time and, therefore, may not be dumping (in the sense of selling at a loss). In order to solve this problem, reverse dumping should be considered. Moreover, a longer investigation period should be taken into account, namely a period in which all costs should be covered. If it would be impossible to take into account longer investigation periods, another solution could seem to be the application of the cost-based rule according to which only variable costs must be covered. However, this cost-based rule has the same flaw as the cost-based rule applied under GATT and European anti-dumping law.

Indeed, the second problem with GATT and European anti-dumping law is that the cost-based rule they apply, as all the others, does not discern all instances of predatory pricing since predation may occur without sales at a loss. They may also mistake competitive pricing for predatory pricing as sales at a loss may result from competitive pricing, especially when there are uncertainty and adjustment costs. As only predatory pricing should be sanctioned, GATT and European anti-dumping law should not employ a cost-based rule.

In traditional economic theory, it is frequently argued that no rule should be applied since predatory pricing occurs but exceptionally. Game theory, however, shows that, in the face of market imperfections or imperfect information, predation may be rational. Though game theory is not yet able to make definitive policy recommendations¹²⁵, it seems appropriate to provide a rule on predatory pricing since the assumptions made in game theory about market imperfections and lack of information, are quite realistic.

That rule should not be restricted to predatory sales at a loss, but should apply to all instances of predatory pricing. Economic theory proposes many bright-line rules to discern predatory pricing from competitive pricing. However, each of them fails as they do not detect all instances of predatory pricing and may mistake ordinary competition for predation. As each of these rules has also its merits, the rule-of reason test seems more appropriate, since it allows to apply all those bright-line rules simultaneously and to take all other relevant information into account. If, on the basis of one or more of these rules, there is evidence of predatory pricing, this may serve as an indication. However, the existence of sales at a loss, as well as output expansion in response to entry or a price rise after market exit, should not be automatically decisive. Neither do the absence of sales at a loss, output expansion or price-rises prove that there is no predation. No absolute prevalence should be given to those bright-line rules. Otherwise, they may serve as a kind of instruction manual for predators on how to avoid liability when preying : predators will

¹²⁵ ROBERTS, J., «A Signaling Model of Predatory Pricing», *Oxford Economic Papers*, 1986, (74), 91-92.

adapt their behaviour so as to reduce, if not to eliminate, their vulnerability to legal sanction¹²⁶. Instead, all other evidence available should be taken into account, such as the existence of market imperfections, the lack of perfect information or the producers' relative efficiency. All elements should be weighed against each other. In doing so, the rule-of-reason test should be applied with the utmost care and caution, since enforcement authorities, as producers, do not have perfect information and predators will try to conceal their predatory actions and present them as competitive pricing, especially when predatory pricing is illegal. Moreover, as game theory shows, predation is only rational if it closely resembles ordinary competition. Like the empirical studies, a cautious application of the rule-of-reason test may only seldom find predation. Possibly, such an approach may disregard some instances of predation. Nevertheless, a cautious application of the rule-of-reason test is warranted. Indeed, as the rule-of-reason test requires the assessment of complex economic situations, it may result in finding producers to practise predatory dumping when in fact they did not engage in it. Such producers do not want to be found to practise predatory pricing and will take care to adopt such a pricing policy which could not be confused with a predatory one¹²⁷. By doing so, they will depart from competitive pricing, *i.e.*, they will charge export prices well above production costs even if it would be economically justified to sell at a loss¹²⁸. If the producers do not charge competitive prices, the rule-of-reason test will eventually distort competition. Clearly, competition should be prevented from being distorted by a non-cautious application of the rule-of-reason test, especially since distortion of competition by not detecting all instances of actual predatory pricing seems limited. Indeed, if it is true that there are not many markets having a structure in which predatory pricing would be rational¹²⁹, predation may be more exceptional than generally thought ; or, at least, the cost of not detecting it will be smaller since the

¹²⁶ EASLEY, D., MASSON, R.T., and REYNOLDS, R.J., «Preying for Time», *Journal of Industrial Economics*, 1984-1985, (445), 445-447 ; JOSKOW, P.L., and KLEVORICK, A.K., «A Framework for Analyzing Predatory Pricing Policy», *Yale Law Journal*, 1979-1980, (213), 240 ; WILLIAMSON, O.E., «Predatory Pricing : A Strategic and Welfare Analysis», *Yale Law Journal*, 1977-1978, (284), 285.

¹²⁷ See : COOTER, R., and ULEN, T., *Law and Economics*, Glenview, Scott, Foresman and Company, 1988, 401-402 ; JOSKOW, P.L., and KLEVORICK, A.K., «A Framework for Analyzing Predatory Pricing Policy», *Yale Law Journal*, 1979-1980, (213), 237-239.

Producers will also adapt their decisions on production and on investment in order to avoid anti-dumping action (LEIDY, M.P., and HOEKMAN, B.M., «Production effects of price- and cost-based anti-dumping laws under flexible exchange rates», *Canadian Journal of Economics*, 1990, (873), 873-895 ; STAIGER, R.W., and WOLAK, F.A., «The effects of domestic antidumping law in the presence of foreign monopoly», *Journal of International Economics*, 1992/32, (265), 265-287).

¹²⁸ Producers will have an identical reaction in case of price discrimination : in order to prevent their from being subjected to an anti-dumping proceeding, they will charge export prices well above their domestic market prices, even if it would be economically justified to charge lower prices in their export markets.

¹²⁹ JOSKOW, P.L., and KLEVORICK, A.K., «A Framework for Analyzing Predatory Pricing Policy», *Yale Law Journal*, 1979-1980, (213), 258.

probability of predatory pricing resulting in the monopolization will be low in markets without a structure conducive to predatory pricing¹³⁰.

2.4. NME DUMPING

2.4.1. Legal definition

Initially, GATT anti-dumping law did not contain any special provision concerning dumping from non-market economy (hereinafter NME) countries. There was no need to. GATT, like any other international agreement, is only applicable to its signatories, and, at the time GATT was concluded, none of the original Contracting Parties to GATT could be considered as a NME country, not even Czechoslovakia. However, in 1948 Czechoslovakia became a NME country while remaining a Contracting Party to GATT¹³¹. GATT law, being drafted for market economy (hereinafter ME) countries, then had to be adapted to take account of the special features of NME countries. Since 1948 several NME countries have attained membership of GATT at the time they had a NME system (*e.g.*, Poland, Romania, Hungary), whereas Cuba, originally a ME country party to GATT, has become a NME country while remaining party to GATT. Thus, since 1948, the importance of NME countries within GATT has increased and, in 1955, GATT anti-dumping law was adapted to dumping from NME countries (acceptance of Note No 2 *ad* Article VI(1) GATT).

Since 1989, however, radical political and consequent economic systemic reforms towards democracy and ME systems have started in many NME countries of East and Central Europe. Hence, the importance of the NME provisions of GATT anti-dumping law seems bound to decline. Nevertheless, in the near future, they will remain applicable to countries of East and Central Europe in which the political and economic reforms are a long-term process. In some of the countries which have emerged as a result from the dissolution of the U.S.S.R., such as Belarus, Kazakhstan and even Ukraine, a minimum of economic reforms has been pursued¹³². Moreover, Asian NME countries, such as the People's Republic of China, North Korea and Vietnam, have also undertaken economic reforms, introducing ME elements in their economic

¹³⁰ JOSKOW, P.L., and KLEVORICK, A.K., «A Framework for Analyzing Predatory Pricing Policy», *Yale Law Journal*, 1979-1980, (213), 223-239..

¹³¹ FLORY, T., *Le G.A.T.T. Droit international et commerce mondial*, Paris, Librairie générale de droit et de jurisprudence, 1968, 196; GRZYBOWSKI, K., «Socialist Countries in GATT», *American Journal of Comparative Law*, 1980, (539), 547. China, on the other hand, left GATT after it had changed into a NME country.

¹³² ASLUND, A., «Lessons of the First Four Years of Systemic Change in Eastern Europe», *Journal of Comparative Economics*, 1994/19, (22), 29-30.

system, which, however, remains essentially a NME one¹³³. Also Cuba has still a NME system and it is yet unclear which economic system Cuba will develop into. As some of those countries are Contracting Parties to GATT (e.g., Cuba) or intend to rejoin GATT (e.g., the People's Republic of China¹³⁴), it is still useful to investigate whether imports from NME countries may be dumped and, if so, whether such dumping may be called unfair. Subsequently, it will also be investigated which rules have to be applied for determining unfair NME dumping.

Under GATT anti-dumping law, a strict comparison with domestic prices in NME cannot always be appropriate (Note No 2 *ad* Article VI(1) GATT ; Article 2.7. GATT Anti-dumping Code). In pursuance of that Note, European anti-dumping law considers dumping from NME countries to occur if their export price is less than

- (a) the price at which the like product of a ME third country is actually sold :
 - (i) for consumption on the domestic market of that country, or
 - (ii) to other countries, including the Community, or
- (b) the constructed value of the like product in a ME third country, or,
- (c) if neither price nor constructed value as established under (a) or (b) provides an adequate basis, (any other reasonable basis including)¹³⁵ the price actually paid or payable in the Community for the like product (Article 2(7) basic EC Regulation ; Article 2(5) basic ECSC Decision).

Hence, NME countries are assumed to practise dumping if they export their products at prices below the prices or even the production costs of their competitors established in ME countries. NME dumping, thus, has an entirely different content than dumping practised by producers established in ME countries.

GATT anti-dumping law defines a NME country as a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State (Note No 2 *ad* Article VI(1) GATT). European anti-dumping law does not provide a definition of a NME country, but uses a list of countries which are considered to be NME countries (Article 2(7) basic EC Regulation ; Article 2(5) basic ECSC Decision¹³⁶). GATT anti-dumping law

¹³³ CHEN, K., JEFFERSON, G.H., and SINGH, I., «Lessons from China's Economic Reform», *Journal of Comparative Economics*, 1992/16, (201), 201-225 ; ELLMAN, M., «Transformation, Depression, and Economics : Some Lessons», *Journal of Comparative Economics*, 1994/19, (1), 18-19 ; FISCHER, S., « Socialist Economy Reform : Lessons of the First Three Years», *American Economic Review*, 1993, (390), 392-393.

¹³⁴ The People's Republic of China, though not a Contracting Party to GATT, has signed the Final Act Embodying the Uruguay Round of Multilateral Trade Negotiations and the Agreement Establishing the Multilateral Trade Organization on 16 April 1994 (see, e.g. : WANG, G., «China's Return to GATT. Legal and Economic Implications», *Journal of World Trade*, 1994/3, (51), 51).

¹³⁵ Under ECSC anti-dumping law, the third standard must always be the price actually paid or payable in the Community for the like product. Any other reasonable basis is legally impossible.

¹³⁶ As amended by Regulation (EC) No 519/94 of 7 March 1994 on common rules for imports from certain third countries and repealing Regulations (EEC) Nos 1765/82, 1766/82 and 3420/83, *O.J.*, 10 March 1994, No L 67/89.

does not provide any further interpretation of its definition of NME countries¹³⁷. It is unavailing to try and find more clarifying information in European anti-dumping law¹³⁸. Only the Court of Justice once made an half-way attempt : it held that the GATT definition was not met, as there was no system of price fixing and there were three companies in the market, which proved that there was no monopoly¹³⁹. The Court, however, failed to investigate whether those companies were State-owned, for, if they were, there would have been a monopoly. Thus, the GATT definition of NME countries is not quite obvious. For instance, it is not clear whether governmental price controls should always be regarded as a form of price fixing by the State, or from which degree of price control on there is price fixing. In ME countries too, price controls are a policy instrument of the government¹⁴⁰. So the question arises where the line should be drawn. Therefore, a closer look into the characteristics of NME countries is warranted, in order to ascertain whether and how NME countries should be treated differently.

¹³⁷ See : *B.I.S.D.*, Twenty-fifth supplement, Geneva, GATT, 1979, 25, consideration 25. It is reported that a member of the GATT Committee on Anti-dumping Practices held that Note No 2 *ad* Article VI(1) GATT contains a «very clear definition» of what was meant by the term State-trading countries.

¹³⁸ In several European anti-dumping cases, it was held that the allegedly dumping country «has a substantially complete monopoly of its trade and that the prices are fixed by the State» without any further explanation (Commission Recommendation No 811/78/ECSC of 21 April 1978 imposing a definitive anti-dumping duty on certain sheets and plates, of iron or steel, originating in Bulgaria, the German Democratic Republic and Romania, *O.J.*, 22 April 1978, No L 108/26 ; Commission Recommendation No 932/78/ECSC of 2 May 1978 imposing a definitive anti-dumping duty on iron or steel coils for re-rolling originating in Bulgaria, *O.J.*, 4 May 1978, No L 120/22 ; Commission Recommendation No 1006/78/ECSC of 18 May 1978 imposing a definitive anti-dumping duty on certain galvanized sheets and plates originating in the German Democratic Republic, *O.J.*, 19 May 1978, No L 131/8 ; Commission Recommendation No 1704/78/ECSC of 19 July 1978 imposing a definitive anti-dumping duty on certain sheets and plates, of iron or steel, originating in Czechoslovakia, Japan, Poland and Spain, *O.J.*, 20 July 1978, No L 195/17 ; Commission Regulation (EEC) No 322/79 of 16 February 1979 imposing a provisional anti-dumping duty on a certain herbicide originating in Romania, *O.J.*, 21 February 1979, No L 44/8 ; Council Regulation (EEC) No 955/79 of 15 May 1979 imposing a definitive anti-dumping duty on a certain herbicide originating in Romania, *O.J.*, 17 May 1979, No L 121/5).

All these cases are an application of Recommendation No 77/1329/ECSC and of Regulation (EEC) No 459/68 which, prior to its modification by Regulation (EEC) No 1681/79, contained a provision identical to the Interpretative Note No. 2 to Article VI(1) GATT.

From Regulation (EEC) No 1681/79 onwards, European anti-dumping law does no longer provide those two GATT criteria explicitly. Instead it uses the concept «non-market economy countries», thereby referring to a list of such countries (Article 2(7) basic EC Regulation ; Article 2(5) basic ECSC Decision). Nevertheless, in one anti-dumping case, which was an application of this new anti-dumping Regulation, reference has been made to the two GATT criteria (Commission Decision 82/285/EEC of 6 May 1982 terminating the review of the anti-dumping proceedings concerning imports of a herbicide from Romania, *O.J.*, 11 May 1982, No L 128/17). This reference was in fact superfluous for the country in question figured on the list to which European anti-dumping law refers and no further specifications of the GATT criteria were given.

¹³⁹ C.J.E.C., joined cases C-305/86 and C-160/87, 11 July 1990, *Neotype Techmashexport GmbH v Commission and Council*, E.C.R., 1990, I, (2945), 3000-3001. See also : C.J.E.C., case C-323/88, 11 July 1990, *SA Sermes v Directeur des services des douanes de Strasbourg*, E.C.R., 1990, I, (3027), 3052.

Advocate General VAN GERVEN even seems to allow to take into consideration other elements than the two conditions of the GATT definition. For he held that the shortage of foreign currency seems to be a common characteristic of NME countries, but that this factor is not sufficient for a country to be regarded as having a NME system (C.J.E.C., joined cases C-305/86 and C-160/87, 11 July 1990, *Neotype Techmashexport GmbH v Commission and Council*, E.C.R., 1990, I, (2945), 2976-2977 (Opinion of Advocate General VAN GERVEN). It may be doubted whether he is giving an exact interpretation of GATT anti-dumping law. There is no relationship between one of the two elements of the GATT definition and the shortage of foreign currency.

¹⁴⁰ C.J.E.C., joined cases C-305/86 and C-160/87, 11 July 1990, *Neotype Techmashexport GmbH v Commission and Council*, E.C.R., 1990, I, (2945), 2960 (Report for the Hearing : conclusions of the Council).

2.4.2. Economic theory

This section will provide a general description of the economic system of NME countries and compare it with the ME system. It will describe the role of prices in a NME system (section 2.4.2.1.) and the NME trade organisation (section 2.4.2.2.). It will further investigate whether NME countries may actually practise dumping in the sense of price discrimination and sales at a loss, and whether they may engage in predatory dumping (section 2.4.2.3.). This section will not go into the specific details of each NME country, but it should be borne in mind that there are substantial differences in the economic system of countries having (had) a NME system¹⁴¹.

2.4.2.1. The pricing mechanism in NME countries

The pricing mechanism in a NME country is essentially different from that in a ME country. As the concepts «market economy» versus «non-market economy» suggest, the distinguishing criterion between both economic systems is the role the market plays in each of them. In a ME system, the market, through its pricing system, coordinates all consumption and production decisions and eventually reaches an equilibrium between demand and supply. Prices are the translation of the private value or scarcity of goods and factors, and are, therefore, used by producers and consumers as information in order to maximize respectively their profits and utility¹⁴².

In a NME country the plan replaces the market as coordination and information mechanism. The market is denied any function because the micro-economic objectives of profit and utility maximization, which is characteristic of producers and consumers in a ME, are rejected and replaced by macro-economic objectives based upon ideological, social and economic values¹⁴³. Those objectives and values vary from one situation to another. Ideological reasons are also determining for the planning technique used in a NME country¹⁴⁴. In particular, the use of prices which measure scarcity, is usually rejected because such prices are considered not to

¹⁴¹ GRZYBOWSKI, K., «Socialist Countries in GATT», *American Journal of Comparative Law*, 1980, (539), 542-547.

¹⁴² GREGORY, P.R., and STUART, R.C., *Comparative Economic Systems*, Boston, Houghton Mifflin, 1980, 17 ; LAYARD, P.R.G., and WALTERS, A.A., *Microeconomic Theory*, New York, McGraw-Hill, 1978, 28. See also : Council Regulation (EEC) No 3946/88 of 16 December 1988 imposing a definitive anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 December 1988, No L 348/49, where the Council noted that «in market economies prices are not set solely on the basis of production costs but also take into account demand».

¹⁴³ SCHNITZER, M.C., and NORDYKE, J.W., *Comparative Economic Systems*, Cincinnati, South-Western Publishing Co., 1977, 344 ; VERMULST, E.A., «Dumping in the United States and the European Community : A Comparative Analysis», *Legal Issues of European Integration*, 1984/2, (103), 109 ; WILCZYNSKI, J., «Dumping and Central Planning», *Journal of Political Economy*, 1966, (250), 257.

¹⁴⁴ GREGORY, P.R., and STUART, R.C., *Comparative Economic Systems*, Boston, Houghton Mifflin, 1980, 127.

contribute to social value¹⁴⁵. Therefore, NME countries usually apply non-price planning¹⁴⁶ based on material balances. In such a case, the plan specifies which goods and in what quantities they are to be produced. The planning authorities must make sure that a balance exists between output, on the one hand, and input and production factors, on the other hand. Such a balance must be reached not only for each item, but also on the aggregate level. When both sides are not in balance, quantity adjustments must be carried out¹⁴⁷.

Notwithstanding a certain reticence as to prices, non-price planning implies the use of prices. Indeed, there must be an equilibrium between production supply and consumption demand. As this equilibrium is not automatically established by the plan, retail prices are used in order to balance supply and demand¹⁴⁸. Those retail prices are not comparable to those in a ME system. Retail prices are set by the planning authorities at a level at which consumers will buy the exact quantity produced. Hence, those prices do not necessarily reflect private value, consumer preferences or scarcity¹⁴⁹.

Prices are also necessary in order to select the most optimal plan between different alternatives. Therefore, the planning authorities must know the value of the various production factors and inputs, measuring their scarcity¹⁵⁰. This valuation is provided by producers' prices, which are

¹⁴⁵ NOVE, A., *The Economics of Feasible Socialism*, London, Allen & Unwin, 1984, 97; WILCZYNSKI, J., *Socialist Economic Development and Reforms. From Extensive to Intensive Growth under Central Planning in the USSR, Eastern Europe and Yugoslavia*, London, Mac Millan, 1972, 76.

¹⁴⁶ Besides non-price planning, price planning is also possible. In the case of price planning, prices are used as source of information and as coordination mechanism. All the prices in the economy are set by the planning authorities in order to obtain the maximization of the objectives of the plan. As in a market economy, the economic agents will use the prices of the plan as information to make their decisions. Each of these decisions conduces to the maximization of the objectives of the plan, if the latter are correctly reflected by the prices. This will be the case if the prices are intended to reflect the relative values or scarcities. These values or scarcities will be different from those in a market economy for the maximization of different objectives is aimed at. If the objectives were identical in both economic systems, the prices would be completely comparable. Price planning is difficult to apply for it is characterised by insurmountable problems of data, aggregation and knowledge of the complex interrelationships in a modern economy (GREGORY, P.R., and STUART, R.C., R.C., *Comparative Economic Systems*, Boston, Houghton Mifflin, 1980, 138-140; LAYARD, P.R.G., and WALTERS, A.A., *Microeconomic Theory*, New York, McGraw-Hill, 1978, 28-29).

¹⁴⁷ GREGORY, P.R., and STUART, *Comparative Economic Systems*, Boston, Houghton Mifflin, 1980, 130-131; ISACHSEN, A.J., HAMILTON, C.B., and GYLFASON, T., «Understanding the Market Economy. Aspects of Planning», *Journal of World Trade*, 1992/5, (25), 25-26.

¹⁴⁸ SCHUNK, E.H., «Soviet Bloc Dumping, the Revenue Act of 1916, and Economic Policy», *UCLA Law Review*, 1979-1980, (1365), 1378; WARES, W.A., *The Theory of Dumping and American Commercial Policy*, Lexington, Lexington Books, 1977, 104.

¹⁴⁹ CHAVANCE, B., *Le système économique soviétique*, Paris, Le Sycomore, 1983, 52-54; ISACHSEN, A.J., HAMILTON, C.B., and GYLFASON, T., «Understanding the Market Economy. Aspects of Planning», *Journal of World Trade*, 1992/5, (25), 28-29; SCHNITZER, M.C., and NORDYKE, J.W., *Comparative Economic Systems*, Cincinnati, South-Western Publishing Co., 1977, 359-360; WARES, W.A., *The Theory of Dumping and American Commercial Policy*, Lexington, Lexington Books, 1977, 104; WILCZYNSKI, J., *Socialist Economic Development and Reforms. From Extensive to Intensive Growth under Central Planning in the USSR, Eastern Europe and Yugoslavia*, London, Mac Millan, 1972, 81.

¹⁵⁰ WILCZYNSKI, J., *Socialist Economic Development and Reforms. From Extensive to Intensive Growth under Central Planning in the USSR, Eastern Europe and Yugoslavia*, London, Mac Millan, 1972, 73-74.

based on the average production costs of the entire branch of the industry, plus a profit margin¹⁵¹. Although efforts are usually made to reduce the gap between retail prices and producers' prices, they are still determined independently from each other and retail prices do not necessarily reflect production costs¹⁵².

As retail prices, producers' prices are not comparable to ME prices either. First, producers' prices are not the prices charged to the consumers on the domestic market of the NME country. Second, producers' prices are a kind of full-cost pricing, whereas in a ME system marginal pricing is prevalent¹⁵³. They are a specific type of full-cost pricing because the actual production costs of each individual producer are not taken into account, but producers' prices are based on the average costs of the entire branch of industry. Third, the prices of the inputs and production factors, *i.e.*, the production costs being used as basis for the producers' prices, are determined in the same way as the prices of the final products¹⁵⁴. They do not necessarily reflect their scarcity. Indeed, quite often, the planning authorities set the price of production factors and inputs at an unusually low level¹⁵⁵. Finally, profit has a different meaning in the two economic systems. In a ME system, profits are the net earnings and, therefore, the incentive for the producer to produce as efficiently as possible. In a NME system, they are, in principle, mere accounting devices to ensure that companies try to cover their costs out of their own resources, where possible¹⁵⁶; moreover, the planning authorities may manipulate profit margins in order to set prices at a level they consider to be appropriate¹⁵⁷.

¹⁵¹ CHAVANCE, B., *Le système économique soviétique*, Paris, Le Sycomore, 1983, 52-53; SCHNITZER, M.C., and NORDYKE, J.W., *Comparative Economic Systems*, Cincinnati, South-Western Publishing Co., 1977, 359; WILCZYNSKI, J., *Socialist Economic Development and Reforms. From Extensive to Intensive Growth under Central Planning in the USSR, Eastern Europe and Yugoslavia*, London, Mac Millan, 1972, 79.

¹⁵² CHAVANCE, B., *Le système économique soviétique*, Paris, Le Sycomore, 1983, 52-54; SCHNITZER, M.C., and NORDYKE, J.W., *Comparative Economic Systems*, Cincinnati, South-Western Publishing Co., 1977, 359-360; WARES, W.A., *The Theory of Dumping and American Commercial Policy*, Lexington, Lexington Books, 1977, 104; WILCZYNSKI, J., *Socialist Economic Development and Reforms. From Extensive to Intensive Growth under Central Planning in the USSR, Eastern Europe and Yugoslavia*, London, Mac Millan, 1972, 81.

¹⁵³ With regard to the difference between full-cost pricing and marginal pricing, see : *infra*, 161-162.

¹⁵⁴ SCHUNK, E.H., «Soviet Bloc Dumping, the Revenue Act of 1916, and Economic Policy», *UCLA Law Review*, 1979-1980, (1985), 1382.

¹⁵⁵ WILCZYNSKI, J., «Dumping and Central Planning», *Journal of Political Economy*, 1966, (250), 254-256.

¹⁵⁶ SCHNITZER M.C., and NORDYKE, J.W., *Comparative Economic Systems*, Cincinnati, South-Western Publishing Co., 1977, 360.

¹⁵⁷ WILCZYNSKI, J., «Dumping and Central Planning», *Journal of Political Economy*, 1966, (250), 256.

2.4.2.2. The trading mechanism in NME-countries

Trade of ME countries is based on comparative advantage and profit maximization. Trade of NME countries, on the other hand, is characterised by trade aversion (*i.e.*, NME countries reduce their imports coming from third countries to the minimum required for obtaining the goods they cannot produce themselves) and based on foreign currency maximization (*i.e.*, to earn the largest possible amount of foreign currency on their exports in order to finance their imports). In NME countries, the plan governs their trade with third countries. However, the planning authorities do not control the world market to the same extent as their domestic market. Moreover, they cannot predict the fluctuations and disturbances to which the world market is subject. Therefore, NME countries reduce trade to a minimum and have only recourse to imports in order to provide for the missing necessities and to fill up the deficits in the material balances of the plan. The convertible foreign currencies required to pay those imports, are gained by means of exports¹⁵⁸.

Though NME trade does not aim at profit maximization and is not based on comparative advantages, their exports to ME countries cannot be classified as exclusively having a NME character. Indeed, those exports are situated right in between ME and NME systems. This is illustrated by the fact that, in the trade with ME countries, export prices charged by NME countries are based on world market prices¹⁵⁹. NME export prices to ME countries are the combined result of the market mechanism in the importing ME countries and the specific objective of NME exporting, namely foreign currency maximization. Contrary to NME retail prices and producer's prices, NME export prices to ME countries can, thus, not be said to be totally arbitrary, as the NME planning authorities do not fully control export prices. However, NME export prices to other NME countries are not comparable to NME export prices to ME countries. Indeed, though, in trade between NME countries, world market prices are also used, world market prices are viewed as capitalist prices and, therefore, are usually cleansed of the capitalist elements and are adjusted to socialist principles¹⁶⁰.

¹⁵⁸ BERMAN, H.J., and BUSTIN, G.L., «The Soviet System of Foreign Trade», *Law and Policy in International Business*, 1975, (987), 1026-1041; BRENSCHIEDT, M., «The Legal Status of the Soviet Foreign Trade Monopoly in the Federal Republic of Germany», *International Lawyer*, 1975, (197), 198-199; DE JONG, H.W., «The Significance of Dumping in International Trade», *Journal of World Trade Law*, 1968, (162), 182; DENTON, R., «The Non-Market Economy Rules of the European Community's Anti-Dumping and Countervailing Duties Legislation», *International Comparative Law Quarterly*, 1987, (198), 202-203; GREGORY, P.R., and STUART, R.C., *Comparative Economic Systems*, Boston, Houghton Mifflin, 1980, 330-340; WILCZYNSKI, J., «Dumping and Central Planning», *Journal of Political Economy*, 1966, (250), 257-259.

¹⁵⁹ GREGORY, P.R., and STUART, R.C., *Comparative Economic Systems*, Boston, Houghton Mifflin, 1980, 335; NOVE, A., *The Economics of Feasible Socialism*, London, Allen & Unwin, 1984, 108-109; WILCZYNSKI, J., *Socialist Economic Development and Reforms*, London, MacMillan, 1972, 90.

¹⁶⁰ WILCZYNSKI, J., *Socialist Economic Development and Reforms*, London, MacMillan, 1972, 91.

2.4.2.3. Dumping as price discrimination and selling at a loss

Under GATT and European anti-dumping law, dumping occurs if the export price is below either the domestic market price charged by of the allegedly dumping exporter, his production costs or his export prices to third countries (Article VI(1) GATT ; Articles 2.1. and 2.2. GATT Anti-dumping Code ; Article 2(1) and (3) basic EC Regulation ; Article 2(2) and (3) basic ECSC Decision).

Obviously, export prices of NME countries may be below their domestic prices (retail prices as well as producers' prices) or their production costs¹⁶¹. However, those instances of price discrimination and sales at a loss should not be sanctioned under anti-dumping law since their export prices are not comparable to their domestic prices and production costs. Indeed, whereas their export prices are the result of foreign currency maximization, their domestic prices and production costs are completely laid down in the plan. As their export prices, on the one hand, and their domestic prices and production costs, on the other hand, are determined in a different way, it is quite possible that they will not coincide and that the NME country is either practising price discrimination or is selling at a loss. However, those instances of price discrimination and sales at a loss must not be considered as unfair. Calling them unfair would amount to calling all NME trade towards ME countries unfair as the export prices of NME countries are always determined in a different way than their domestic prices and production costs and, therefore, will only coincide by mere accident. In view of the incomparability between the NME country's export prices, on the one hand, and their domestic prices and production costs, on the other hand, it must be concluded that the notion of dumping in the sense of price discrimination between the exporting NME country and the Community, or in the sense of sales at a loss, is inapplicable to NME exports.

The export prices the NME countries charge to different ME countries are not necessarily identical either. Indeed, NME countries may practise price discrimination between different ME countries¹⁶². The export prices they charge to each ME country, are quite comparable as they all are the result of foreign currency maximization. Moreover, NME export prices to ME countries cannot be manipulated more than ME prices. If such price discrimination is the result of the NME country's foreign currency maximizing export policy, it should not be considered

¹⁶¹ For selling at prices below production costs, it is sufficient for the producer to be aiming at maximizing sales revenue instead of profits (DAVIES, S.W., and McGUINNESS, A.J., «Dumping at less than Marginal Cost», *Journal of International Economics*, 1982/12, (169), 176-177). NME countries' exports aim at maximizing foreign currency. Thus, they aim at maximizing sales revenues, because the higher the sales revenues are, the higher the foreign currency revenues will be.

¹⁶² It has, for instance, been shown that spatial price discrimination may be optimal, if firms aim at maximizing sales revenues. More specifically, it will be optimal if there is no profit constraint (NORMAN, G., «Uniform Pricing as an Optimal Spatial Pricing Policy», *Economica*, 1981, (87), 87-91). Maximizing sales revenue comes down to the same as maximizing foreign currency revenue. Thus, MNE countries will find it optimal to spatially price discriminate, for they do not have to attain a certain profit level.

unfair. But, perhaps, NME planning authorities could adopt a strategic export policy, rather than their foreign currency maximizing export policy, just like ME producers do when adopting a predatory pricing policy. Such a strategic export policy could also be of a predatory nature. Indeed, in order to earn a higher amount of foreign currencies afterwards, NME countries could try to monopolize their export markets by charging prices which are temporarily below the prices they would have charged under short-run foreign currency maximization. Only such cases of export predation should be sanctioned under anti-dumping law.

2.4.3. *Legal theory and economic theory compared*

2.4.3.1. Domestic prices and production costs

From an economic point of view, NME domestic prices (retail and producers' prices) and production costs, on the one hand, and NME export prices, on the other hand, are not comparable, as they are determined differently : NME domestic prices and production costs are determined by the plan, whereas NME export prices result from foreign currency maximization. In addition to their incomparability with NME export prices, NME domestic prices and production costs are also an unreliable basis for determining dumping, as the NME planning authorities may arbitrarily manipulate them in order to circumvent the application of anti-dumping law. Of course, producers established in ME countries may also try to manipulate the prices of their products in order to escape the application of anti-dumping law. But, contrary to NME planning authorities, their opportunity of price manipulation is limited by the fact that they have to attain some degree of profitability, at least in the long run. Moreover, ME producers will usually not be able to influence the prices of inputs and production factors, in order to conceal that they are actually selling at a loss. Therefore, production costs may be a reliable basis to assess dumping in respect of ME producers, if those producers are shown to have manipulated their domestic market prices. Because of both the incomparability and the unreliability of NME domestic prices and production costs, it should be concluded that dumping, in the sense of price discrimination between the NME exporting country and the Community, as well as in the sense of sales at a loss, is inapplicable to NME trade.

GATT anti-dumping law takes into account only part of this conclusion. It does not postulate the downright incomparability between NME domestic prices and production costs, on the one hand, and NME export prices, on the other hand. It only allows for the possibility that a strict comparison between NME domestic prices and NME export prices may not always be appropriate (Note No 2 *ad* Article VI(1) GATT). Thus, it does not preclude the use of NME domestic prices. As it provides that a comparison between the NME domestic prices and export prices may *not always* be appropriate (Note No 2 *ad* Article VI(1) GATT), *a contrario*, a comparison between NME domestic prices and export prices may sometimes (*i.e.*, not always) be appropriate. There

is, however, one instance in which a comparison will always be impossible under GATT anti-dumping law. Indeed, NME producers' prices do not meet the definition of the domestic prices taken into account for determining dumping : producers' prices are not the prices charged to consumers in NME countries, whereas, under GATT anti-dumping law, only the prices charged to consumers on the domestic market may be taken into account (Article VI(1) GATT).

GATT anti-dumping law does not treat explicitly of NME production costs. It does not refer to any incomparability between NME production costs and export prices. On the contrary, under a strict interpretation of GATT anti-dumping law, it seems that NME production costs may be used if a comparison between NME domestic prices and export prices is not appropriate. Indeed, as GATT anti-dumping law does not explicitly indicate what will happen when a strict comparison with domestic prices is inappropriate, the general rule should apply, according to which production costs may be used instead of the domestic prices, when no comparable sales are being made in the exporting country (Article VI(1)(b) GATT ; Article 2.2. GATT Anti-dumping Code).

European anti-dumping law, on the other hand, seems to have understood economic theory as it prohibits the use of all NME domestic prices (including retail prices) and production costs in all circumstances. Instead, though, it defines NME dumping as charging export prices below the prices (domestic or export prices) or the production costs of a third ME country (Article 2(7) basic EC Regulation ; Article 2(5) basic ECSC Decision). This is, however, not a solution for the problem caused by the incomparability between NME domestic prices and production costs, on the one hand, and NME export prices, on the other hand. European anti-dumping law only shifts the problem, since ME prices and production costs are not comparable either with NME export prices. Indeed, ME prices and production costs are the result of profit maximization, whereas NME export prices result from foreign currency maximization. From an economic point of view, the European notion of NME dumping, therefore, should be rejected. Moreover, it makes it impossible for the NME producers to know in advance whether they will be found to practise dumping, since they have no knowledge as to the prices and production costs in other, ME countries¹⁶³.

European anti-dumping law only remedies the unreliability of the NME domestic prices and production costs. Indeed, according to the Court of Justice, the object of European anti-dumping law is «to prevent account from being taken of prices and costs in NME countries, which are not

¹⁶³ VERMULST, E.A., and HOOIJER, J.J., «Annotation on Case C-69/89, *Nakajima All Precision Co. v. Council*, Judgment of 7 May 1991, not yet reported ; Case C-358/89, *Extramet v. Council*, Judgment of 16 May 1991, not yet reported ; Case C-49/88, *Al-Jubail Fertilizer Company (Samad) and Saudi Arabian Fertilizer Company (Safco) v. Council*, Judgment of 17 June 1991, not yet reported ; Case C-16/90, *Detlef Nölle v. Hauptzollamt Bremen-Freihafen*, Judgment of 22 October 1991, not yet reported», *Common Market Law Review*, 1992, (380), 392.

the normal result of market forces¹⁶⁴. On account of that, the European anti-dumping authorities do not rely on NME production costs¹⁶⁵ and always reject¹⁶⁶ adjustments to the prices or production costs of third ME countries for comparative advantages¹⁶⁷ as well as for

¹⁶⁴ C.J.E.C., joined cases 294/86 and 77/87, 5 October 1988, *Technointorg v Commission and Council*, E.C.R., 1988, (6077), 6102-6103 and 6113; C.J.E.C., joined cases C-305/86 and C-160/87, 11 July 1990, *Neotype Techmasexport GmbH v Commission and Council*, E.C.R., 1990, I, (2945), 3000; C.J.E.C., case C-157/87, 11 July 1990, *Electroimpex a.o. v Council*, E.C.R., 1990, I, (3021), 3023; C.J.E.C., case C-323/88, 11 July 1990, *SA Sermes v Directeur des services des douanes de Strasbourg*, E.C.R., 1990, I, (3027), 3052; C.J.E.C., case C-16/90, 22 October 1991, *Eugen Nölle v Hauptzollamt Bremen-Freihafen*, E.C.R., 1991, I, (5163), 5179 (Opinion of Advocate General VAN GERVEN) and 5203.

¹⁶⁵ Commission Regulation (EEC) No 1034/91 of 23 April 1991 imposing a provisional anti-dumping duty on imports of video tapes in cassettes originating in the People's Republic of China, O.J., 26 April 1991, No L 106/15; Council Regulation (EEC) No 2861/93 of 18 October 1993 imposing a definitive anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, and collecting definitively the provisional duty imposed, O.J., 21 October 1993, No L 262/4.

The refusal to take account of NME production costs must not be confused with adjustments made in order to account for (too) high production costs in the third ME country, the production costs of which are used for determining NME dumping. For, in European anti-dumping case law, only the production costs incurred in the ordinary course of trade in the third ME country are taken into account and adjustments are made for «extra-ordinary» production costs (see: *infra*, 224-226). They must not be confused either with adjustments for differences in physical characteristics between the dumped product and the product manufactured in that third ME country (see: *infra*, 310-313).

¹⁶⁶ In *dihydrostreptomycin from the People's Republic of China*, however, adjustments for differences in the manufacturing process between the reference country and the NME were refused because of lack of evidence (Council Regulation (EEC) No 3836/91 of 19 December 1991 imposing a definitive anti-dumping duty on imports of dihydrostreptomycin originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty, O.J., 31 December 1991, No 362/1). Hence, if there had been sufficient evidence, such adjustments would have been made and, thus, the production process in the NME country would have been taken into account. It was not made clear whether the adjustments were requested because of so-called «natural advantages», for which the European anti-dumping authorities allow adjustments. If they did not relate to such natural adjustments, this anti-dumping case deviates from the rule of principle according to which comparative advantages and economies of scale of NME countries must be disregarded.

¹⁶⁷ Commission Regulation (EEC) No 3541/82 of 22 December 1982 imposing a provisional anti-dumping duty on imports of natural magnesite, caustic-burned, originating in the People's Republic of China, O.J., 30 December 1982, No L 371/21; Commission Regulation (EEC) No 3542/82 of 22 December 1982 imposing a provisional anti-dumping duty on imports of natural magnesite, dead-burned (sintered), originating in the People's Republic of China and in North Korea, O.J., 30 December 1982, No L 371/25; Commission Regulation (EEC) No 985/83 of 26 April 1983 imposing a provisional anti-dumping duty on imports of barium chloride originating in the People's Republic of China and the German Democratic Republic, O.J., 27 April 1983, No L 110/11; Council Regulation (EEC) No 2370/83 of 19 August 1983 imposing a definitive anti-dumping duty on imports of barium chloride originating in the People's Republic of China and in the German Democratic Republic, O.J., 20 August 1983, No L 228/28; Commission Decision 84/129/EEC of 6 March 1984 terminating the anti-dumping proceeding concerning imports of caustic-burned natural magnesite originating in the People's Republic of China, O.J., 8 March 1984, No L 66/32; Commission Regulation (EEC) No 3019/86 of 30 September 1986 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania and the USSR, O.J., 1 October 1986, No L 280/68; Commission Decision 86/497/EEC of 7 October 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of silicon carbide originating in the People's Republic of China, Norway, Poland and the USSR, and terminating the investigation regarding imports of that product originating in the People's Republic of China, Norway, Poland, Czechoslovakia, the USSR and Yugoslavia, O.J., 10 October 1986, No L 287/25; Council Regulation (EEC) No 29/87 of 22 December 1986 imposing a definitive anti-dumping duty on imports of certain deep freezers originating in the Soviet Union, O.J., 8 January 1987, No L 6/1; Council Regulation (EEC) No 864/87 of 23 March 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union, and definitively collecting the amounts secured as provisional duties, O.J., 27 March 1987, No L 83/1; Commission Regulation (EEC) No 2623/88 of 24 August 1988 imposing a provisional anti-dumping duty on imports of urea originating in Austria, Hungary, Malaysia, Romania, the USA and Venezuela, O.J., 25 August 1988, No L 235/5; Council Regulation (EEC) No 3946/88 of 16 December 1988 imposing a definitive anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, O.J., 17 December 1988, No L 348/49; Commission Decision 89/143/EEC of 21 February 1989 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of urea originating in Austria, Hungary, Malaysia or Romania, confirming the undertakings accepted pursuant to Council Regulation (EEC) No 3339/87 and terminating the investigations, O.J., 24 February 1989, No L 52/37; Council Regulation (EEC) No 725/89 of 20 March 1989 imposing a definitive anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China and

economies of scale of NME countries¹⁶⁸. They only allow adjustments for so-called «natural advantages» of NME countries, because such advantages are not due to or influenced by the NME system¹⁶⁹. Natural advantages are mainly the easier access to raw materials (degree of purity of the raw material (ore/spoil ratio)) making the extraction and processing of the product easier or making some processing operations unnecessary in the NME country¹⁷⁰. They do not comprise, for instance, differences in labour costs¹⁷¹ or the proximity of the mines where the raw materials are being extracted, to the production plant¹⁷², because they are due to the economic system of the NME exporting country : the planning authorities determine labour

definitively collecting the provisional anti-dumping duty on such imports, *O.J.*, 22 March 1989, No L 79/24.

However, in *polyester fibres from Romania*, the Romanian producer claimed to have a comparative advantage in terms of oil supply. The European anti-dumping authorities replied that any advantage enjoyed by the Romanian producer was not significant because the producers established in the third ME country, whose production costs were used to assess the alleged NME dumping, could obtain low-cost raw materials on their domestic market (Council Regulation (EEC) No 3017/92 of 19 October 1992 modifying the anti-dumping duties following the review of the anti-dumping measures applicable to imports of synthetic polyester fibres originating in Romania, Taiwan, Turkey and the Republics of Serbia and of Montenegro and the former Yugoslav Republic of Macedonia and terminating the said review in respect of imports of synthetic polyester fibres originating in Mexico and the United States of America, *O.J.*, 22 October 1992, No L 306/1 (corrigendum, *O.J.*, 6 February 1993, No L 30/68)). Here, the European anti-dumping did take account of the comparative advantage of the NME country, for they would have allowed an adjustment if the third NME country did not enjoy a comparative advantage offsetting the NME comparative advantage. Perhaps, however, the NME comparative advantage was considered to be a so-called «natural advantage» for which adjustments are allowed, but this is rather unlikely in view of the implementation of the concept «natural advantages» in European anti-dumping case law (as demonstrated below in this section). Moreover, the European anti-dumping authorities did not classify them as natural advantages.

¹⁶⁸ Council Regulation (EEC) No 864/87 of 23 March 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union, and definitively collecting the amounts secured as provisional duties, *O.J.*, 27 March 1987, No L 83/1.

¹⁶⁹ Council Regulation (EC) No 486/94 of 4 March 1994 imposing definitive anti-dumping duties on imports of fluorspar originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 5 March 1994, No L 62/1 ; Council Regulation (EC) No 821/94 of 12 April 1994 imposing a definitive anti-dumping duty on imports of silicon carbide, originating in the People's Republic of China, Poland, the Russian Federation and Ukraine, *O.J.*, 13 April 1994, No L 94/21. See also : C.J.E.C., case C-16/90, 22 October 1991, *Eugen Nölle v Hauptzollamt Bremen-Freihafen*, E.C.R., 1991, I, (5163), 5184-5185 (Opinion of Advocate General VAN GERVEN) and 5206.

¹⁷⁰ Council Regulation (EEC) No 1473/93 of 14 June 1993 imposing a definitive anti-dumping duty on imports of magnesium oxide originating in the People's Republic of China, *O.J.*, 17 June 1993, No L 145/1 ; Commission Regulation (EEC) No 2463/93 of 1 September 1993 imposing a provisional anti-dumping duty on imports of fluorspar originating in the People's Republic of China, *O.J.*, 7 September 1993, No L 226/3 ; Council Regulation (EC) No 3386/93 of 6 December 1993 imposing a definitive anti-dumping duty on imports of dead-burned (sintered) magnesia originating in the People's Republic of China, *O.J.*, 11 December 1993, No L 306/16 ; Council Regulation (EC) No 486/94 of 4 March 1994 imposing definitive anti-dumping duties on imports of fluorspar originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 5 March 1994, No L 62/1 ; Commission Regulation (EC) No 892/94 of 21 April 1994 imposing a provisional anti-dumping duty on imports of calcium metal originating in the People's Republic of China and Russia, *O.J.*, 23 April 1994, No L 104/5 ; Commission Decision 94/389/EC of 6 June 1994 terminating the anti-dumping proceeding regarding imports of refined antimony trioxide originating in the People's Republic of China, *O.J.*, 9 July 1994, No L 176/41.

¹⁷¹ Commission Regulation (EEC) No 550/93 of 5 March 1993 imposing a provisional anti-dumping duty on imports of bicycles originating in the People's Republic of China, *O.J.*, 11 March 1993, No L 58/12 ; Council Regulation (EC) No 821/94 of 12 April 1994 imposing a definitive anti-dumping duty on imports of silicon carbide, originating in the People's Republic of China, Poland, the Russian Federation and Ukraine, *O.J.*, 13 April 1994, No L 94/21.

¹⁷² Council Regulation (EEC) No 1473/93 of 14 June 1993 imposing a definitive anti-dumping duty on imports of magnesium oxide originating in the People's Republic of China, *O.J.*, 17 June 1993, No L 145/1 ; Council Regulation (EC) No 3386/93 of 6 December 1993 imposing a definitive anti-dumping duty on imports of dead-burned (sintered) magnesia originating in the People's Republic of China, *O.J.*, 11 December 1993, No L 306/16.

wages, as well as the location of the production plants. Nevertheless, sometimes the European anti-dumping authorities take account of the transport costs within the NME country and, in order to calculate them, of the distance between the production centres and the ports¹⁷³, though the location of production centres - except for mines¹⁷⁴ - is also decided by the planning authorities and the transport costs too are determined by them¹⁷⁵. Though it is true that comparative advantages and economies of scale are not decision-making elements in a NME system, a NME country may be more efficient than a ME country in a specific branch of industry¹⁷⁶. Such higher efficiency, if effectively proven, should be taken into account. Otherwise, NME countries may be sanctioned for being more efficient than ME countries¹⁷⁷. As GATT anti-dumping law does not downright prohibit NME prices and production costs from being considered, it does not preclude that higher efficiency of NME countries be taken into account. Hence, there may be a problem as to the concordance of European and GATT anti-dumping law. From an economic point of view, the latter provides the approach to be preferred, at least within the framework of the European notion of NME dumping, which - it should be recalled - is economically unwarranted.

2.4.3.2. Export prices to third ME countries

As all NME export prices to ME countries are determined by foreign currency maximization, there is, from an economic point of view, no problem in comparing them. GATT anti-dumping law seems to allow the NME export price to the Community to be compared to the NME export price to third ME countries. As it does not explicitly treat of NME export prices, the general rule should apply and export prices to third countries may be used when domestic market prices do not permit a proper comparison (Article VI(1)(b) GATT ; Article 2.2. GATT Anti-dumping Code).

¹⁷³ Council Regulation (EC) No 486/94 of 4 March 1994 imposing definitive anti-dumping duties on imports of fluorspar originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 5 March 1994, No L 62/1.

¹⁷⁴ Council Regulation (EEC) No 3068/92 of 23 October 1992 imposing a definitive anti-dumping duty on imports of potassium chloride originating in Belarus, Russia or Ukraine, *O.J.*, 24 October 1992, No L 308/41.

¹⁷⁵ The European anti-dumping authorities have compared normal value and export price at fob level because they considered it to be the first appropriate stage of comparison given that costs in NME countries cannot be taken into account in determining prices on the basis of which the comparison between export prices and normal value is made (Commission Regulation (EC) No 3119/94 of 19 December 1994 imposing a provisional anti-dumping duty on imports of ferro-silico-manganese originating in Russia, Ukraine, Brazil and South Africa, *O.J.*, 21 December 1994, No L 330/15).

¹⁷⁶ DENTON, R., «The Non-Market Economy Rules of the European Community's Anti-Dumping and Countervailing Duties Legislation», *International Comparative Law Quarterly*, 1987, (198), 230 ; SPAK, G.J., «Georgetown Steel Corp v. United States : Applying the Countervailing Duty Law to Imports from Nonmarket Economy Countries», *Law and Policy in International Business*, 1986, (313), 335 ; VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 434 ; WARES, W.A., *The Theory of Dumping and American Commercial Policy*, Lexington, Lexington Books, 1977, 106.

¹⁷⁷ SCHUNK, E.H., «Soviet Bloc Dumping, the Revenue Act of 1916, and Economic Policy», *UCLA Law Review*, 1979-1980, (1365), 1384.

GATT anti-dumping law, though, also allows the use of NME export prices to third NME countries, since it does not make any distinction between them. As those export prices are not determined by foreign currency maximization, but mainly by political considerations, they are not comparable with NME export prices to the Community and should, therefore, not be taken into account. Contrary to economic theory and GATT anti-dumping law, European anti-dumping law, however, downright rejects the use of all NME export prices to third countries (Article 2(7) basic EC Regulation ; Article 2(5) basic ECSC Decision)¹⁷⁸.

The use of NME export prices to third ME countries has been criticized for several reasons : the export price to third countries may be a dumping price ; not all production costs may be covered ; there is no guarantee that their costs are rationally determined by productivity and factor abundance¹⁷⁹. As the first reason is equally valid for ME export prices and since export prices to third countries may be used for determining ME dumping, their use should also be allowed for determining NME dumping. The second reason does not hold if the same rule is applied to NME dumping as the one applicable to ME dumping and according to which export prices to third countries below production costs may be disregarded (Article 2.2.1. GATT Anti-dumping Code ; Article 2(4) basic EC Regulation) ; if, however, no such rule applies (see : basic ECSC Decision), this second reason does not hold either since, in the absence of such a rule, NME export prices, as well as ME export prices below production costs may be used. The third reason cannot be accepted either because it equates rationality to ME rationality, which amount to a mere condemnation of the economic system of NME countries. Moreover, what really matters in finding price discrimination is that prices are determined in the same way and are, therefore, comparable.

¹⁷⁸ Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5.

¹⁷⁹ WARES, W.A., *The Theory of Dumping and American Commercial Policy*, Lexington, Lexington Books, 1977, 106.

NME export prices to third ME countries are the best of all possible standards¹⁸⁰ for

180 Different standards for determining NME dumping have been proposed :

- (i) in the United States of America, the method of the simulated constructed value is used. It implies that that the production method of the NME country is used, but that the value of inputs and production factors is valued in terms of a third ME country (19 C.F.R. Section 153.7(c) (1979) ; see : MEUSER, R.L., « Dumping from 'Controlled Economy' Countries : The Polish Golf Car Case», *Law and Policy in International Business*, 1979, (777), 777-794 ; SCHUNK, E.H., «Soviet Bloc Dumping, the Revenue Act of 1916, and Economic Policy», *UCLA Law Review*, 1979-1980, (1365), 1385-1387 ; VERMULST, E.A., «Dumping in the United States and the European Community : A Comparative Analysis», *Legal Issues of European Integration*, 1984/2, (103), 110 ; VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 359-361).

In European anti-dumping case law, this method has been proposed once, but its application has been rejected (Regulation (EEC) No. 2495/86, August 1, 1986, imposing a provisional anti-dumping duty on potassium permanganate originating in Czechoslovakia, the German Democratic Republic and the People's Republic of China, *O.J.*, August 5, 1986, No. L 217/12). The European anti-dumping authorities have rejected also another method closely resembling the simulated constructed value. This method consists of determining a constructed value by taking account of the costs of the components the NME producer sourced from related companies in ME countries, the remaining costs being established on the basis of a ME country (Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5).

The method of the simulated constructed value is a step in the right direction, for it allows to take account of certain specific features of the NME country. However, it is not the best solution. It introduces, to a large extent, arbitrariness (FELLER, P.B., «The Antidumping Act and the Future of East-West Trade», *Michigan Law Review*, 1967, (114), 129-133 ; G.J. SPAN («Georgetown Steel Corp v. United States : Applying the Countervailing Duty Law to Imports from Nonmarket Economy Countries», *Law and Policy in International Business*, 1986, (313), 334) is of the opinion that this arbitrariness would still meet the standard or reasonableness, especially in view of the fact that it is difficult to determine the comparative advantage of NME countries because of the weaknesses of their domestic price system (GREGORY, P.R., and STUART, R.C., *Comparative Economic Systems*, Boston, Houghton Mifflin, 1980, 340). But even if the opposite was true, the method of the simulated constructed value would not make it possible to reflect the differences in endowments and, thus, in value of inputs and production factors between the third ME country and the NME country. Those differences, indeed, seem to be a non-negligible problem for in European anti-dumping case law every time when reference was made to differences in comparative advantage, it concerned differences concerning the endowment and value of inputs and production factors.

- (ii) Another proposal consists of using the NME domestic price when it has been established that the domestic price is not affected by governmental controls. The test proposed for determining whether the domestic price is not affected by governmental controls, consists in establishing a price ratio between the domestic price of the product concerned and the domestic price of a basket of different products for the NME country in question and for a ME country ; only if these price ratios are equal to each other, the domestic price of the NME country may be used (ANTHONY, R.A., «The American Response to Dumping from Capitalist and Social Countries : Substantive Premises and Restructured Procedures after the 1967 GATT Code», *Cornell Law Review*, 1969, (159), 205-210).

This proposal cannot be accepted for several reasons. First, it still contains a reference to a ME country. Second, the administrative feasibility of the test within a reasonable period can be questioned. Third, it has been demonstrated that relative prices in different countries do not necessarily coincide, although there is a same level of governmental control (MEUSER, R.L., « Dumping from 'Controlled Economy' Countries : The Polish Golf Car Case», *Law and Policy in International Business*, 1979, (777), 797 ; WARES, W.A., *The Theory of Dumping and American Commercial Policy*, Lexington, Lexington Books, 1977, 105).

In European anti-dumping case law certain exporters claimed a treatment different from that of State-owned companies because they operated on a ME basis. The Commission rejected this claim because these exporters' production costs were also largely influenced by the general economic environment prevailing in the NME country (Commission Regulation (EEC) No 1034/91 of 23 April 1991 imposing a provisional anti-dumping duty on imports of video tapes in cassettes originating in the People's Republic of China, *O.J.*, 26 April 1991, No L 106/15).

- (iii) A third proposal is based on a comparison of four sets of prices :
- (a) the price charged by domestic Community suppliers ;
 - (b) the price charged by the NME exporter under investigation ;
 - (c) the lowest price charged by ME suppliers ; and
 - (d) the price charged by the largest ME supplier.

If the largest foreign supplier to the Community is a ME country, NME dumping will occur, if the NME export price to the Community is lower than the prices charged by both domestic Community suppliers and the cheapest ME supplier. If the largest foreign supplier is the NME exporter under investigation, there will be NME dumping, if the NME export price is lower than the prices charged by both domestic Community producers and the largest ME supplier (HIRSCH, S., «Anti-

determining NME dumping¹⁸¹. Besides their comparability with NME export prices to the Community, they should be used because of two other reasons. First, NME countries will not be sanctioned for being more efficient than ME countries (or, conversely, they will not be rewarded for being less efficient than ME countries), since their own export prices will be taken into account. Second, NME countries will have the opportunity of knowing in advance whether or not they are practising dumping, as they determine or, at least, are informed of the prices they get for their exports to ME countries.

Another advantage of NME export prices to third ME countries is that, in terms of price discrimination, NME countries will be treated the same way as ME countries since NME dumping will not, as under European anti-dumping law, have a different meaning than ME dumping; instead, they will both refer to price discrimination. However, contrary to ME dumping, NME dumping does not cover sales at a loss, but this difference in meaning is the mere consequence of the inapplicability of dumping in the sense of sales at a loss to NME countries.

More importantly, though, is that NME dumping, when confined to price discrimination, will be over-inclusive and under-inclusive at the same time. It will be over-inclusive because action is warranted only against predatory dumping and not all price discrimination is predatory. It will be under-inclusive, because there may be instances of predatory pricing occurring without price discrimination. As in respect of ME dumping, a rule-of-reason test seems to be appropriate in order to detect NME predatory dumping. However, contrary to ME dumping, cost-based rules cannot offer any indication as to whether NME dumping is predatory since NME production costs, being determined by the planning authorities, are not comparable with NME export prices and may also be unreliable. As a result, predatory NME dumping will be even harder to establish, but this should not be an excuse for applying other standards, such as the prices and production costs of third ME countries, in order to assess NME dumping. In view of the trade aversion, characteristic to NME countries, and, more importantly, because of the fact that NME countries usually align their export prices to world market prices, it seems safe to conclude that predatory NME dumping will be rather exceptional. Indeed, by aligning their export prices to

dumping Actions in Brussels and East-West Trade», *World Economy*, 1988, (465), 479).

The fundamental problem arising with this proposal is that it denies that NME countries can be more efficient than ME countries. In fact, it is not fundamentally different from existing European anti-dumping law. The only difference is that it limits the discretion of the European anti-dumping authorities in choosing the third ME country. For, in this proposal, the ME country has to be either the country with the lowest price or the country with the largest supply to the Community, whereas in European anti-dumping law not any criterion is determined in this respect. As it reduces arbitrariness, it is a step in the right direction. The question, however, is whether they are relevant criteria for determining the ME country. The fact that, in this proposal, the NME export price has to be compared also with the prices of the Community producers, will have no substantial impact on European anti-dumping practice. Indeed, if the NME export prices do no undercut the Community producers' prices either, the Community industry will not file an anti-dumping complaint or no injury will be found.

¹⁸¹ FELLER, P.B., «The Antidumping Act and the Future of East-West Trade», *Michigan Law Review*, 1967, (114), 126-129.

world market prices, they do not engage in price undercutting in order to drive their competitors out of the world market or to prevent them from entering it. This price alignment also shows that they do not control the market price, whereas the ability to control the market price is characteristic of markets conducive to predatory pricing¹⁸².

3. DUMPING AND FREE TRADE

3.1. INTRODUCTION

GATT is intended to enhance a free-trade system, but, at the same time, allows trade-restrictive remedies against dumping which injures the importing country's industry. It considers such injurious dumping to be unfair and to contradict free trade. This alleged unfairness of dumping does not refer to unfair trade in the sense of unbalanced bilateral trade and, thus, does not contradict GATT which provides a framework for organising a multilateral free-trade system in which trade flows are based on comparative advantages and imbalances in bilateral trade flows may occur.

The claimed unfairness of dumping rather refers to its effects on the competition in the importing country's market between foreign exporters and domestic producers. The previous section has shown that, from an economic point of view, only predatory pricing goes against free trade, as it distorts (international) competition, and that the alleged unfairness of dumping does not refer to unfair trade in the sense of unbalanced bilateral trade. GATT clearly ignores this economic point of view. First, it does not define dumping as predatory pricing, but rather defines it as price discrimination, sales at a loss and NME dumping. As shown in the previous section, those three cases of dumping are not necessarily predatory and predatory pricing does not require dumping, as defined by GATT.

Second, ~~GATT does not pay any attention to the effects of dumping on (international) competition.~~ Instead, it focuses on the injurious effects dumping has on the importing country's industry. There is, however, a great difference between ~~anti-competitive or predatory dumping,~~ on the one hand, and injurious dumping, on the other hand. Predatory dumping refers to a producer who obtains a monopoly position by adopting a strategy of charging prices below their

¹⁸² JOSKOW, P.L., and KLEVORICK, A.K., «A Framework for Analyzing Predatory Pricing Policy», *Yale Law Journal*, 1979-1980, (213), 225-227.

short-run profit-maximizing level to drive his competitors out of the market or to prevent them from entering it, and eventually to reap monopoly profits. It results in a reduction or even in the elimination of competition, but not because the predating producer is more efficient than his competitors or enjoys economies of scale. The notion of «injurious dumping», on the other hand, only pays attention to the effect of imports on the importing country's industry (e.g., declining market shares or profitability of the importing country's industry because of the dumping), irrespective of whether competition on the importing country's market is being reduced or not. For instance, the importing country's industry may be driven out of the market because foreign producers are more efficient, but competition on the importing country's market is not reduced because a large number of foreign producers who are more efficient, have entered it.

By condemning injurious dumping, regardless of whether or not it is predatory, GATT allows free trade to be distorted by protective measures and, thus, implies protectionism. Indeed, trade-restrictive remedies against non-predatory, but injurious dumping distort free trade, as they grant protection to less efficient industries in importing countries, which should, in the ordinary free play of competition, disappear.

This section will investigate the said internal contradiction in GATT between free trade and protectionism. First, it will try to answer the question why GATT, which is intended to organise and promote free trade, nevertheless opens the door for protectionism, by allowing and regulating anti-dumping relief (sub-section 3.2.). Second, it will show that such legally allowed and regulated protectionism jeopardises free trade more than forbidden and unregulated protectionism. Indeed, legally allowed and regulated protectionism may be alleged to be in conformity with the free-trade system of GATT and, accordingly, may even be said to enhance free trade (sub-section 3.3.).

3.2. *THE CONTRADICTION WITHIN GATT : FREE TRADE AND ANTI-DUMPING LAW*

3.2.1. *Introduction*

The overall idea of GATT is to organise and enhance free trade. Therefore, it has created a mechanism, based on the most-favoured-nation standard¹⁸³ and the national treatment

¹⁸³ By means of the most-favoured-nation clause States agree to extend to each other the advantages, favours, privileges and immunities granted to third States. See Article I GATT.

standard¹⁸⁴, which, in combination with the principle of reciprocity, gradually should lead to freer trade¹⁸⁵. It also restrains its Contracting Parties in enacting trade restrictive remedies, such as quantitative restrictions, or in increasing tariff rates.

Remarkably, however, GATT allows anti-dumping relief taking the shape of anti-dumping duties and undertakings. As these measures restrict trade, GATT seems to incorporate protectionism and to negate its own free trade spirit and goal. This contradiction is generally done with as being only apparent, for dumping is said to be an unfair trade practice which contradicts and endangers free trade. However, since dumping, as defined by GATT, does not coincide with predatory pricing, the contradiction between free trade and dumping is not apparent. Only predatory pricing can be considered to be unfair: it does not result from competition, but aims at destroying competition. For dumping to be unfair, the GATT definition of dumping is simultaneously over-inclusive and under-inclusive. It is over-inclusive since dumping, as defined by GATT, will frequently be the result of ordinary international competition, even if it injures the importing country's industry. It is under-inclusive since there are many instances of predatory pricing which do not meet the GATT definition of dumping.

In order to explain this contradiction in GATT, the question why States have concluded GATT and, thus, have agreed to limit their sovereignty in the field of economic policy, should be answered first (sub-section 3.2.2.). The answer to that question will help explain why GATT allows trade restrictive measures against dumping (sub-section 3.2.3.).

3.2.2. *The conclusion of GATT : its rationality*

In economics, it is generally agreed upon that free trade usually is the best system to preserve the interests of each country individually and of the whole of the world as well. By enabling each country to specialise its production where it has comparative advantages, free trade results in the optimal use of the world's scarce resources. As it also enables each country to buy products

¹⁸⁴ The national treatment clause requires a State to grant foreign citizens and products the same treatment as its own citizens and products. See Article III GATT.

¹⁸⁵ The most-favoured-nation clause is usually considered to be the best instrument for liberalizing international trade. However, the most-favoured-nation clause does not guarantee trade liberalization. It is quite possible that it reinforces protectionism. States could not be willing to grant concessions, merely because they fear that some parties would enjoy these concessions without returning the favour by means of equivalent concessions. Reciprocity was introduced in order to prevent the possible protectionist effect of the most-favoured-nation clause. Through reciprocity, each nation is guaranteed that its own concessions are balanced by equivalent concessions. CURZON, G., *Multilateral Commercial Diplomacy. The General Agreement on Tariffs and Trade and Its Impact on National Commercial Policies and Techniques*, London, Michael Joseph, 1965, 59; FINGER, J.M., «Trade Liberalization : A Public Choice Perspective» in *Challenges to a Liberal International Economic Order*, AMACHER, R.C., HABERLER, G., and WILLETT, T.D. (eds.), Washington, American Enterprise Institute for Public Policy Research, 1979, (421), 426-427.

where they are the cheapest, it maximizes global welfare¹⁸⁶. In view of this well-known free trade theory, one would expect that countries spontaneously behave accordingly, *i.e.*, that they would not interfere with free trade and would freely refrain from trade-restrictive measures. In reality, however, countries do interfere with free trade and do enact trade-restrictive measures, yet they have concluded GATT which is, in general, precisely the embodiment of free trade theory.

This contradiction requires some explanation. One explanation might be that countries have no knowledge of free trade theory or do not understand it. As free trade theory is generally known and is quite easy to understand, this explanation does not hold, especially not since free trade theory lies at the basis of GATT. The real explanation is far more complex and is to be found on two levels : a domestic and an international one.

3.2.2.1. On the domestic level

On the domestic level, a distinction should be made between a country and its government : though free trade is generally in the country's interests, the government will not always view it as being in its interests. The import-competing industries want to be sheltered from foreign competition and thus to sell more or to charge higher prices on their domestic market. Accordingly, the government is confronted with the demand for protection of import-competing industries against that foreign competition. As the government wants to stay in power and, in a democratic regime, to be reelected, it may grant protection in order to gain the support of those import-competing industries. Whereas protection benefits import-competing industries, it reduces the welfare of consumers. Indeed, protection will affect the consumers, because of its price-increasing effects : the consumers will have to pay more or to consume less. The consumers' demand for free trade is, however, not as clearly pronounced as the import-competing industries' demand for protection. This is because, compared to import-competing industries, consumers are, primarily for two reasons, less able to get organised, to lobby and to set up common actions. First, consumers are far more numerous and dispersed than firms and workers in import-competing industries. Second, the import-competing industries' attention is focused on a limited scale of products, whereas those products represent only a small fraction of the products consumers buy. For both reasons, the loss of each individual consumer is smaller than the gain of each individual firm or worker in import-competing industries and, as a consequence, the consumers will have a weaker incentive than import-competing industries to get organised, to

¹⁸⁶ Recent economic theory, which dates from the late 1980s, shows that in some instances free trade does not maximize a country's welfare. However, as its conclusions depend on highly sensitive assumptions, it is extremely difficult to deduce general criteria for government intervention from this recent theory. Therefore, it has not challenged seriously free trade theory on the level of international trade policy : free trade is still advocated as the policy to be pursued, even though free trade does not always serve a country's interests the best (ABBOTT, K.W., «The Trading Nation's Dilemma : The Functions of the Law of International Trade», *Harvard International Law Journal*, 1985, (501), 510 ; KRUGMAN, P.R., and OBSTFELD, M., *International Economics. Theory and Policy*, Glenview (Illinois), Scott, Foresman and Company, 1988, 206-207 ; RUIGROK, W., «Paradigm Crisis in International Trade Theory», *Journal of World Trade*, 1991/1, (77), 78-80).

lobby and to set up common actions. This disequilibrium biases the government's policy towards protectionism.

This view may create the impression that governments, on the domestic level, are never confronted with demands for a more liberal trade policy. It is, however, a very simplistic caricature of political reality. First, within a country, there are also domestic industries which use the imported product as input, as well as exporting industries. Both industries benefit from free trade and are injured by protection. As import-competing industries, domestic industries which use the imported product as input, are less numerous and dispersed than consumers, and are also interested in a limited scale of products. Therefore, they feel an as sharp incentive as import-competing industries to get organised and to lobby¹⁸⁷. Exporting industries, on the other hand, are less able to get organised and to lobby : they seldom perceive the causal relationship between protection and its negative effect on their export performance, and this negative effect is slight since it is dispersed over all exporting firms¹⁸⁸. Second, a country's policy is not restricted to economic welfare. Generally, its policy is based on a mixture of political, social, economic and military considerations, and pursues goals other than economic welfare, such as national security and social objectives¹⁸⁹. Some of these goals may support a protectionist policy. For example, the effort to strengthen the balance of payments may urge a country to adopt import restrictive measures¹⁹⁰. Other goals may require a free trade policy, such as the maximization of the strength of the national economy or maintaining friendly relations with other countries¹⁹¹. In this respect, academic and other studies on free trade theory may bolster a country's free trade policy¹⁹². Generally, however, only long-term goals require a free-trade policy, whereas governments have a short-run perspective, because of the political aspirations to stay in power and, in democratic regimes, to be reelected¹⁹³. As a result, a government's policy will be predominantly protectionist which long-term, free-trade considerations may have only a mitigating effect on.

¹⁸⁷ ABBOTT, K.W., «The Trading Nation's Dilemma : The Functions of the Law of International Trade», *Harvard International Law Journal*, 1985, (501), 519-520.

¹⁸⁸ ETHIER, W., *Modern International Economics*, New York, Norton, 1983, 217.

¹⁸⁹ RUIGROK, W., « Paradigm Crisis in International Trade Theory », *Journal of World Trade*, 1991/1, (77), 83-85.

¹⁹⁰ COOPER, R.N., «National Economic Policy in an Interdependent World Economy», *Yale Law Journal*, 1966-1967, (1273), 1285-1287.

¹⁹¹ ABBOTT, K.W., «The Trading Nation's Dilemma : The Functions of the Law of International Trade», *Harvard International Law Journal*, 1985, (501), 516.

¹⁹² RIEGER, H.C., «Game Theory and the Analysis of Protectionist Trends», *World Economy*, 1986, (171), 175.

¹⁹³ ABBOTT, K.W., «The Trading Nation's Dilemma : The Functions of the Law of International Trade», *Harvard International Law Journal*, 1985, (501), 516-517.

3.2.2.2. On the international level¹⁹⁴

This view, however, explains but half of the problem, *i.e.*, why, contrary to free trade theory, governments pursue protectionist trade policies. In order to explain why governments conclude agreements on free trade, a closer look at the international scene is necessary. Though governments generally think a protectionist policy to be the most appropriate instrument for serving their interests, they know that such a policy probably will provoke retaliatory actions by other governments. Indeed, as such a protectionist policy will reduce the export opportunities of the other countries, the governments of those countries will be faced not only with the already existing demand for protecting their import-competing industries, but also with the displeasure of their exporting industries about their lost export opportunities. Those governments will want to show their exporting industries that they do something about the foreign protectionist action. They will retaliate by means of trade-restrictive measures, as they think protectionism to be the best policy to respond to their import-competing industries' request and, in view of the displeasure of their exporting industries, to break through the foreign protectionist action.

Governments now will find themselves in a game theory situation known as Prisoner's Dilemma. The Prisoner's Dilemma is a game in which each player acts in his own interest and has a dominant strategy. It is an oligopolistic game where each player's action affects the condition of the other. Its equilibrium outcome is a situation in which each player is worse off than if each had chosen the alternative strategy. On the assumption that there are only two countries, figure 3 depicts the Prisoner's dilemma in which their governments find themselves on the international trade scene.

In figure 3, each government may choose one of two strategies, either a free trade or a protectionist one. Government A plays the rows : it chooses either the top or bottom row. Government B plays the columns : it chooses either the right or left column. Figure 3 shows the pay-offs of each strategy, as viewed by the governments : B (best outcome for a government), S (second-best outcome), T (third-best outcome) and W (worst outcome).

¹⁹⁴ Based on : ABBOTT, K.W., «The Trading Nation's Dilemma : The Functions of the Law of International Trade», *Harvard International Law Journal*, 1985, (501), 501-532 ; KRUGMAN, P.R., and OBSTFELD, M., *International Economics. Theory and Policy*, Glenview (Illinois), Scott, Foresman and Company, 1988, 216-218.

Figure 3

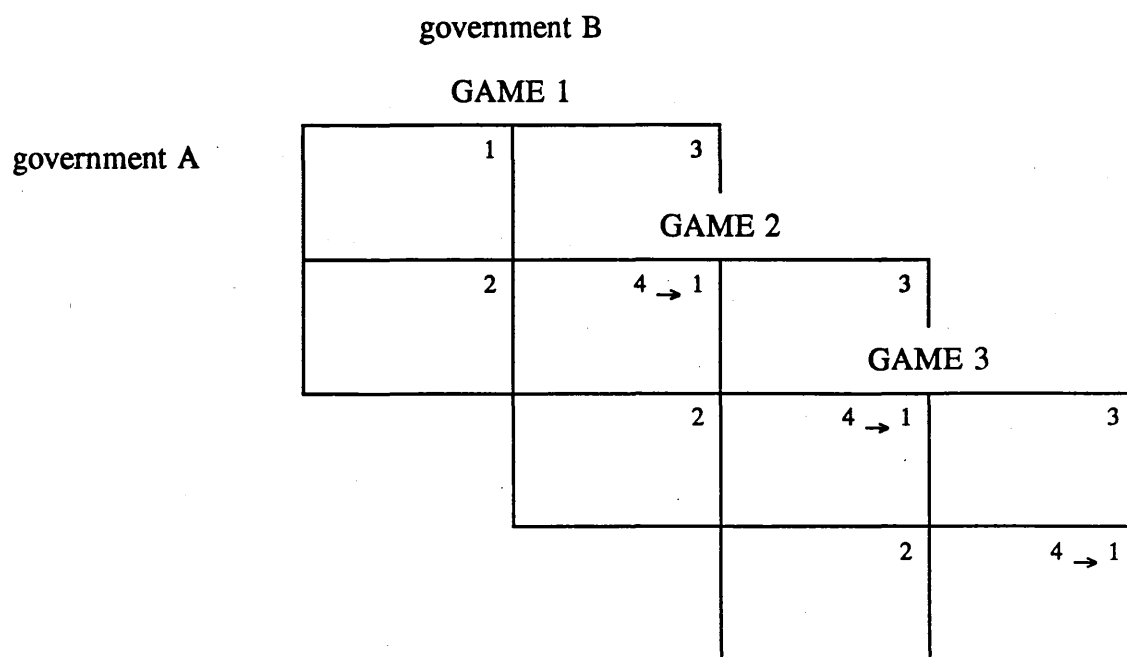
		gouvernement B	
		free trade	protectionism
gouvernement A	free trade	1 S, S	3 W, B
	protectionism	2 B, W	4 T, T

Source : ABBOTT, K.W., «The Trading Nation's Dilemma : The Functions of the Law of International Trade», *Harvard International Law Journal*, 1985, (501), 505.

Clearly, to each government, protectionism is the dominant strategy, whatever strategy the other government chooses. Indeed, if government B plays the free trade strategy, government A must choose between B (protectionism) and S (free trade); as B is superior, it will choose protectionism. If government B plays the protectionist strategy, government A must choose between T (protectionism) and W (free trade); as T is superior, it will choose protectionism. The same line of reasoning holds for government B. Thus, both governments will choose protectionism and for both of them the pay-off will be T (square 4 in figure 3). If, on the other hand, they both had played the free trade strategy, their pay-off would have been S, which is superior to T (square 1 in figure 3). But, they are faced with a dilemma: even if they know that the pay-off of each is higher when both adopt a free-trade policy, each of them fears and anticipates the defection of the other, since the pay-off of unilateral defection is B, which is the highest. As a consequence, they will still adopt a protectionist policy either in self-defense or as a pre-emptive strike.

This game will be infinitely repeated. The retaliation of the other governments will provoke a counter-retaliation by the former government. Moreover, the succes of the first import-competing industries will attract an increasing number of import-competing industries requesting protection, and, as protectionist actions multiply, the exporting industries' displeasure increases. Thus, by acting unilaterally, governments will end up in a trade war. As each new game starts in the square where the previous game has ended (*i.e.*, square 4, see figure 4), the situation for each government steadily deteriorates. Eventually, the long-term disadvantages may outweigh the short-run benefits of protection as a trade war may conflict with the other policy goals of a government: for example, as the protectionist era of the 1930s shows, it may undermine economic growth and friendly relations with other governments.

Figure 4



Source : ABBOTT, K.W., «The Trading Nation's Dilemma : The Functions of the Law of International Trade», *Harvard International Law Journal*, 1985, (501), 529.

From the moment on that long-term disadvantages begin to outweigh the short-run advantages of protectionism, governments will seek to eliminate protectionism. The only effective way to attain this goal, is to cooperate and to conclude an agreement to refrain from protection, such as GATT, as only an agreement can take away the fears of a unilateral defection. Indeed, such an agreement offers governments a valid argument against the demand for protection of their import-competing industries, as it enables them to argue that they must honour the agreement. This argument may also reduce the short-run political costs for governments as they may point to their obligations under the agreement and, at the same time, criticize them. Moreover, as the agreement will also provide sanctions for defections and since those sanctions generally take the shape of retaliatory trade-restrictive measures, the agreement reduces the benefits of unilateral defection, as well as the uncertainty of whether and how other governments will react against protectionist actions.

3.2.3. GATT anti-dumping law : its rationality

GATT meets exactly the rationality of international trade agreements. It was concluded in order to put a stop to protectionism as it existed during the 1930s and to its disastrous economic effects. Therefore, it did not create free trade as such by abolishing immediately all protectionist

measures. Instead, it allowed many existing trade-restrictive measures, but refrained governments to go further on the path towards protectionism and created mechanisms which gradually make trade freer.

GATT anti-dumping law, however, seems to contradict this rationality as it allows trade-restrictive measures in a field where protectionism nearly existed at that time. Then, indeed, only a few countries had enacted anti-dumping legislation¹⁹⁵ which they seldom applied¹⁹⁶. By legitimizing anti-dumping law, GATT now incited all Contracting Parties to adopt their own anti-dumping legislation and to enforce it. Dumping, as defined by GATT, though, is frequently not predatory, but rather the result of free trade. Hence, anti-dumping law seems not to fit within GATT, as it allows to sanction dumping by allowing the adoption of trade-restrictive measures.

A closer look, however, shows that GATT anti-dumping law relies on the same rationality as GATT. First, even when governments see that the long-term costs of protectionism outweigh its short-run benefits and decide to conclude an agreement to refrain from protectionism, they will continue to have a protectionist reflex as they will go on seeing unilateral protectionism as providing them the highest pay-off. GATT anti-dumping law precisely offers such unilateral protectionism. It allows a government to enact trade-restrictive measures against dumping and guarantees that the government of the exporting country does not retaliate.

Second, even if governments did not intend to legitimize anti-dumping law by international agreement, it was difficult for them to resist the argument that import-competing industries must be protected against unfair export practices of selling products abroad at a lower price than at home. Of course, the argument that it is not fair for a domestic industry to have to face such harsh competition which does not exist on the domestic market of the exporting country, is intuitively appealing¹⁹⁷. But, more fundamentally, economic theory since the 1920s provides elements for legitimizing anti-dumping law. First, dumping was associated with the exploitation of monopoly power or, especially since Joan ROBINSON's outstanding work on «*The Economics of Imperfect Competition*»¹⁹⁸, of oligopoly or even monopolistic competition. Joan

¹⁹⁵ WARES, W.A., *The Theory of Dumping and American Commercial Policy*, Lexington, Lexington Books, 1977, 12-22.

¹⁹⁶ CLUBB, B.E., «Conflicting Assumptions about International Trade : Neo-Protectionism or Reasonable Accommodation or National Interests ?», *Proceedings of the American Society of International Law*, Sixty-Fifth Annual Meeting, Washington D.C., April 29 - May 1, 1971, in *American Journal of International Law*, 1971, (192), 195.

¹⁹⁷ J. BHAGWATI (*Protectionism*, Cambridge (Mass.), MIT Press, 1988, 35) rendered this argument by means of an analogy : «Would one be wise to receive stolen property simply because it is cheaper, or would one rather vote to prohibit such transactions because of their systemic consequences ?».

¹⁹⁸ ROBINSON, J., *The Economics of Imperfect Competition*, London, MacMillan, 1954 (reprint ; original date of publication : 1933), 352 p.

ROBINSON, indeed, shows that any producer who has some control over its domestic price, will charge prices above marginal costs and will charge lower prices in markets where he has less market power. This association with imperfect competition and exploitation of market power, gave dumping a bad connotation¹⁹⁹. Second, Jacob VINER's exceptionally thorough book on «*Dumping : A Problem in International Trade*»²⁰⁰ provided another impulse for enacting anti-dumping law. He distinguishes three types of dumping :

- sporadic dumping is occasional and casual, occurs only in scattered instances and at irregular intervals and is not the manifestation of a deliberately established price policy on the part of the dumping exporter. It may occur merely unintentionally or in order to dispose of a casual overstock ;
- short-run or intermittent dumping is continued steadily and systematically for a period of limited duration. It is practised in accordance with a definitively established export policy and involves the deliberate production of products to be dumped. It is practised in order to obtain or maintain a market position or to prevent or eliminate competition ;
- long-run or continuous dumping is carried on continuously over a prospectively permanent period. It may be caused by economies of scale which the dumping producer wants to obtain or maintain.

According to Jacob VINER, sporadic dumping is not dangerous, for it lasts so shortly that it will not have any significant effect on the importing country. Continuous dumping has the advantage of providing consumers in the importing country permanently with cheap supply of the dumped products. He considers only intermittent dumping as being dangerous to the economic welfare of the importing country, for it may result in great injury being done to the domestic industry in the importing country without providing the consumers with a permanent source of cheap products²⁰¹. Though he only warns against the negative effects of intermittent dumping, Jacob VINER, nevertheless, opened the door widely for anti-dumping law against all kinds of dumping. After having admitted that the distinction on the basis of continuity is difficult to make in advance, he noted - curiously without offering any proof - that the «fact that foreign producers are exporting at dumping prices affords a strong presumption that these prices are temporarily and abnormally low»²⁰². Of course, governments, the dominant policy of which is protectionist, did not ignore this clear language in economics and agreed upon anti-dumping law applicable to all kinds of dumping. Joan ROBINSON, though, has shown that price discrimination is frequently

¹⁹⁹ WARES, W.A., *The Theory of Dumping and American Commercial Policy*, Lexington, Lexington Books, 1977, 8-10.

²⁰⁰ VINER, J., *Dumping : A Problem in International Trade*, New York, Kelly, 1966 (reprint ; original date of publication : 1923), 381 p.

²⁰¹ VINER, J., *Dumping : A Problem in International Trade*, New York, Kelly, 1966 (reprint ; original date of publication : 1923), 23-31.

²⁰² VINER, J., *Dumping : A Problem in International Trade*, New York, Kelly, 1966 (reprint ; original date of publication : 1923), 146.

permanent as it results from imperfect competition. The contradiction between VINER's presumption as to the temporary nature of dumping and Joan ROBINSON's conclusion that price discrimination is permanent, seemingly did not bother them : to them, dumping was unfair for both the reasons of its temporary nature and its resulting from imperfect competition, regardless of whether these reasons contradicted each other.

Third, anti-dumping law may offset the import-competing industries' opposition against free trade, without offending the exporting industries. Indeed, even if governments are convinced of the necessity to conclude an agreement on free trade, they will still be faced with the import-competing industries' demand for protection. They may meet this demand by means of anti-dumping law which guarantees import-competing industries protection against the presumably unfair trade practice of dumping. *Vis-à-vis* their exporting industries, they may argue that anti-dumping relief will not provoke retaliation and that even economic theory, which promotes the case of free trade, recommends anti-dumping law. Thus, anti-dumping law seems to be one of the necessary escape valves for the import-competing industries' pressure for protectionism. Without such escape valves, governments are probably unable to conclude agreements on free trade²⁰³.

Thus, GATT anti-dumping law, as an instance of unilateral protectionism, clearly relies on the same rationality as GATT, where it enhances free trade. As governments consider unilateral protectionism to grant them the highest pay-off and know that the payoff of mutual protectionism is lower than free trade, they will try to guarantee, in the first place, unilateral protectionism and, only when this is not feasible, free trade. If economic theory, moreover, provides them rather convincing arguments in favour of unilateral protectionism, nothing can stop them to conclude an agreement on such unilateral protectionism, especially not when such unilateral protectionism is necessary as an escape valve for overcoming the opposition of their import-competing industries against free trade.

²⁰³ BHAGWATI, J., *Protectionism*, Cambridge (Mass.), MIT Press, 1988, 35 ; CLUBB, B.E., «Conflicting Assumptions about International Trade : Neo-Protectionism or Reasonable Accommodation or National Interests ?», *Proceedings of the American Society of International Law*, Sixty-Fifth Annual Meeting, Washington D.C., April 29 - May 1, 1971, in *American Journal of International Law*, 1971, (192), 196-197 ; FINGER, J.M., «That Old GATT Magic No More Costs Its Spell (How the Uruguay Round Failed)», *Journal of World Trade*, 1991/2, (19), 21-22 ; LOWENFELD, A.F., «Fair or Unfair Trade : Does it Matter ?», *Cornell International Law Journal*, 1980, (205), 209-210 ; MATSUSHITA, M., «Coordinating International Trade with Competition Policies», in *The New GATT Round of Multilateral Trade Negotiations. Legal and Economic Problems*, PETERSMANN, E.-U., and HILF, M. (eds.), Deventer, Kluwer, 1988, (395), 403.

3.3. *ANTI-DUMPING LAW : A DANGER TO FREE TRADE ?*

3.3.1. *The problem : procedural protectionism*

Anti-dumping law is probably one of the elements without which it would have been impossible to conclude GATT. The question which will be investigated in this sub-section, is whether GATT has not opened the door all too widely for unilateral protectionism. The issue is even worsened, since GATT severely restricts the use of the traditional protectionist measures, such as tariffs and quantitative restrictions, whereas the pressure of import-competing industries on their governments for protection does not alter at all. Governments seem to be faced with a difficult choice to obey GATT or to grant protection in violation of GATT. Their wish, however, is to reconcile both alternatives : to grant protection and, at the same time, to obey GATT.

In order to obtain this, governments seek to exploit the loopholes in GATT, and loopholes there are. In fact, they have found two lucrative loopholes. The first loophole concerns the fact that GATT does not impose free trade as such, but only regulates and restricts the use of a limited number of well-specified trade-restrictive measures, in particular those which were used at the time of the conclusion of GATT. It also pertains to the fact that GATT originally only regulated trade in products and not in services. Governments have managed to find other instruments which GATT originally did not regulate. Of these, voluntary export restraints (so-called VERs) were the most prominent example. Governments argued that they did obey GATT when they applied such instruments, since GATT did not explicitly forbid or restrict their use. Thereby, - consciously or not - they ignore that such instruments are against the free trade spirit of GATT. Another application of this loophole is the Community Regulation on unfair pricing practices in maritime transport which renders, to a great extent, GATT anti-dumping law applicable to services. At the time this Regulation was being enacted, the Community did not have to worry about a violation of GATT, as services did not fall within the scope of GATT. It could even refer to GATT in order to strengthen its position, by arguing that dumping in services required the same repair as dumping of products and its anti-dumping law applicable to services closely resembles GATT anti-dumping law.

The second loophole concerns the trade remedy laws provided under GATT. Besides anti-dumping law, countervailing duties against subsidized imports (Article VI GATT) and safeguard measures against abnormally increased imports (Article XIX GATT) are examples of such trade remedy laws : they allow trade-restrictive remedies against trade practices which are presumed to be unfair or to distort international competition. This loophole has resulted in «procedural protectionism», which consists in the enactment and enforcement of national trade remedy laws by the Contracting Parties of GATT in a protectionist manner. These laws are represented as an

application of GATT and, therefore, may claim a certain degree of legitimacy²⁰⁴. The question, however, is whether they really are but a mere application of GATT and do not involve a protectionist-biased interpretation of it. If the latter is true, the fact that they seem to be part of the GATT free trade system, makes this kind of protectionism highly dangerous : it looks like free trade, but it is actually straightforward protectionism. If, on the other hand, it does not look to be in accordance with GATT, Contracting Parties will try to amend GATT so as to convert their illegal interpretations into GATT law. This has been the case with anti-dumping law on the occasion of the Uruguay Round. For instance, many protectionist-biased interpretations applied by some of its Contracting Parties have been incorporated into GATT anti-dumping law by means of the 1994 GATT Anti-dumping Code. However, protectionist interpretations probably will attain their maximum from the moment on that their illegality is obvious and must be legalized by means of amendments of GATT law. Indeed, from then on, the Contracting Parties will realise that their protectionist interpretations, once they are incorporated in GATT law, are available to all Parties and may be used against their exports. It seems that this turning point has not yet been reached²⁰⁵.

As anti-dumping law may lend itself to procedural protectionism, the next sub-section will investigate the characteristics of procedural protectionism, with special regard to European anti-dumping law.

3.3.2. *Procedural protectionism : legal certainty or one-way flexibility ?*

3.3.2.1. Legal certainty ?

Procedural protectionism seems to enhance legal certainty, as it replaces discretion by objective legal criteria. A characteristic of trade remedy laws, indeed, is that they allow trade-restrictive measures only if certain legally defined conditions are being met. As compared with tariffs and quantitative restrictions, the imposition of which is not subject to any legal criteria but results from a pure political decision, trade remedy laws prevent or, at least, reduce discretion in the enactment of trade restrictive measures²⁰⁶.

204 GRINOLS, E.L., «Procedural Protectionism : The American Trade Bill and the New Interventionist Mode», *Weltwirtschaftliches Archiv*, 1989, (501), 518.

205 HORLICK, G.N., «How the GATT Became Protectionist. An Analysis of the Uruguay Round Draft Final Antidumping Code», *Journal of World Trade*, 1993/5, (5), 16-17 ; PETERSMANN, E.-U., «Need for Reforming Antidumping Rules and Practices. The Messy World of Fourth-Best Policies», *Aussenwirtschaft*, 1990, (179), 194.

206 See : BOURGEOIS, J.H.J., «EC Anti-dumping Enforcement - Selected Second Generations Issues», in *Antitrust and Trade Policy in the United States and the European Community*, HAWK, B.E. (ed.), New York, Bender, 1986, (563), 584-585 ; GRINOLS, E.L., «Procedural Protectionism : The American Trade Bill and the New Interventionist Mode», *Weltwirtschaftliches Archiv*, 1989, (501), 518-519 ; PETERSMANN, E.-U., «Need for Reforming Antidumping Rules and Practices. The Messy World of Fourth-Best Policies», *Aussenwirtschaft*, 1990, (179), 191-193.

However, to the degree that national trade remedy laws are only a mere application of GATT, discretion is only marginally reduced. Indeed, GATT contains many open-ended and even vague provisions which are open to interpretation and, thus, to discretion²⁰⁷. In order to really reduce or even exclude discretion, national trade remedy laws must be more than a mere application of GATT. They must further specify GATT. In doing so, they may either exclude discretion totally, or leave some room for it.

In some respects, European anti-dumping law seems to have further specified GATT anti-dumping law, but has not substantially reduced discretion. Indeed, on several occasions, the Court of Justice has underscored the discretion of the European anti-dumping authorities in applying European anti-dumping law and, therefore, only marginally controls the way it is applied²⁰⁸. European anti-dumping law, thus, only marginally contributes to legal certainty. Only a consistent anti-dumping case law may increase legal certainty. But, of course, case law can never guarantee legal certainty as much as legislation, since it is easier and less conspicuous to modify

207 C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, E.C.R., 1991, I, (2069), 2086 (Report for the hearing : conclusions of the applicant), 2089 (Report for the hearing : conclusions of the Council), and 2130 and 2134 (Opinion of Advocate-General LENZ); THARAKAN, P.K.M., and WAELBROECK, J., «Antidumping and countervailing duty decisions in the E.C. and in the U.S. An experiment in comparative political economy», *European Economic Review*, 1994, (171), 172.

208 C.J.E.C., case 240/84, 7 May 1987, *NTN Toyo Bearing Company Limited a.o. v Council*, E.C.R., 1987, (1809), 1854-1855; C.J.E.C., case 255/84, 7 May 1987, *Nachi Fujikoshi Corporation v Council*, E.C.R., 1987, (1861), 1890-1891; C.J.E.C., case 258/84, 7 May 1987, *Nippon Seiko KK v Council*, E.C.R., 1987, (1923), 1964-1965 and 1967; C.J.E.C., case 260/84, 7 May 1987, *Minebea Company Limited v Council*, E.C.R., 1987, (1975), 2005-2006; C.J.E.C., joined cases 260/85 and 106/86, 5 October 1988, *Tokyo Electric Company Ltd (TEC) a.o. v Council*, E.C.R., 1988, (5855), 5920; C.J.E.C., case 121/86, 28 November 1989, *Anonymos Etaireia Epicheiriseon Metalleftikon Viomichanikon kai Naftiliakon AE a.o. v Council*, E.C.R., 1989, (3919), 3952; C.J.E.C., joined cases 133/87 and 150/87, 14 March 1990, *Nashua Corporation v Commission and Council*, E.C.R., 1990, I, (719), 760-762 and 777; C.J.E.C., case C-156/87, 14 March 1990, *Gestetner Holdings plc v Council and Commission*, E.C.R., 1990, I, (781), 839; C.J.E.C., case C-189/88, 27 March 1990, *Cartorobica SpA v Ministero delle Finanze dello Stato*, E.C.R., 1990, I, (1269), 1286 and 1298; C.J.E.C., joined cases C-305/86 and C-160/87, 11 July 1990, *Neotype Techmasheexport GmbH v Commission and Council*, E.C.R., 1990, I, (2945), 3002 and 3006-3007; C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, E.C.R., 1991, I, (2069), 2186, 2189-2191, 2195 and 2200; C.J.E.C., case C-16/90, 22 October 1991, *Eugen Nölle v Hauptzollamt Bremen-Freihafen*, E.C.R., 1991, I, (5163), 5203; C.J.E.C., case C-171/87, 10 March 1992, *Canon Inc. v Council*, E.C.R., 1992, I, (1237), 1289 and 1294; C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, E.C.R., 1992, I, (1335), 1400, 1402, 1404 and 1406; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, E.C.R., 1992, I, (1409), 1483, 1485, 1487 and 1489; C.J.E.C., case C-176/87, 10 March 1992, *Konishiroku Photo Industry Co. Ltd v Council*, E.C.R., 1992, I, (1493), 1527, 1529, 1531 and 1533; C.J.E.C., case C-177/87, 10 March 1992, *Sanyo Electric Co. Ltd v Council*, E.C.R., 1992, I, (1535), 1569, 1570, 1573 and 1574; C.J.E.C., case C-178/87, 10 March 1992, *Minolta Camera Co. Ltd v Council*, E.C.R., 1992, I, (1577), 1631; C.J.E.C., case C-179/87, 10 March 1992, *Sharp Corporation v Council*, E.C.R., 1992, I, (1635), 1681, 1682, 1685 and 1686.

See also : C.J.E.C., joined cases 113 and 118-121/77, 29 March 1979, *NTN Toyo Bearing Company Ltd a.o. v Council*, E.C.R., 1979, (1185), 1266 (opinion of Advocate General J.P. WARNER); C.J.E.C., case C-323/88, 11 July 1990, *SA Sermes v Directeur des services des douanes de Strasbourg*, E.C.R., 1990, I, (3027), 3041 (opinion of Advocate General VAN GERVEN); C.J.E.C., case C-49/88, 27 June 1991, *Al-Jubail Fertilizer Company and Saudi Arabian Fertilizer Company v Council*, E.C.R., 1991, I, (3187), 3208 and 3226 (Opinion of Advocate General DARMON); C.J.E.C., case C-16/90, 22 October 1991, *Eugen Nölle v Hauptzollamt Bremen-Freihafen*, E.C.R., 1991, I, (5163), 5179, 5186-5187 and 5193-5194 (Opinion of Advocate General VAN GERVEN); C.J.E.C., case C-315/90, 27 November 1991, *Groupeement des Industries de Matériels d'Équipement Electrique et de l'Electronique Industrielle Associée (Gimelec) a.o. v Commission*, E.C.R., 1991, I, (5589), 5605 (Opinion of Advocate General VAN GERVEN); C.J.E.C., case C-105/90, 13 February 1992, *Goldstar Co. Ltd v Council*, E.C.R., 1992, I, (677), 709 and 712 (Opinion of Advocate General VAN GERVEN); C.J.E.C., case C-171/87, 10 March 1992, *Canon Inc. v Council*, E.C.R., 1992, I, (1237), 1268 (Opinion of Advocate General MISCHO); C.J.E.C., case C-172/87, 10 March 1992, *Mita Industrial Co. Ltd v Council*, E.C.R., 1992, I, (1301), 1321 (Opinion of Advocate General MISCHO); C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, E.C.R., 1992, I, (1335), 1377 (Opinion of Advocate General MISCHO); C.J.E.C., case C-178/87, 10 March 1992, *Minolta Camera Co. Ltd v Council*, E.C.R., 1992, I, (1577), 1618 (Opinion of Advocate General MISCHO).

it, as it is not required to go through the whole legislative process. Moreover, case law is less accessible than legislation : it consists of a countless number of particular cases which have to be traced and studied in order to have a good knowledge of case law²⁰⁹.

This low degree of legal certainty will affect the foreign exporters' behaviour. They know that, under uncertainty, there is a probability that non-dumping exporters may be held to practise dumping. As they will try to avoid a finding of dumping, especially when they do not engage in dumping, exporters will take more precaution than they would under certainty, and charge export prices which are well above their domestic market prices or production costs²¹⁰. Thus, one might expect that only few exporters will be found to dump. Many exporters charged with dumping, though, are actually found to have been practising dumping. In view of the vagueness of anti-dumping law, they may have underestimated the probability of being found dumping and the precaution they have taken may not be sufficient²¹¹. In particular, they may have underestimated the probability that anti-dumping authorities apply their discretion in a protectionist way and, thus, find dumping in cases where in fact it is not being practised.

3.3.2.2. One-way flexibility

As GATT leaves a large room for discretion, the question arises how the Contracting Parties will make use of that discretion when enacting and enforcing their trade remedy laws. The discretion which GATT leaves, offers them the opportunity to respond in a flexible manner to the complexity of economic reality²¹². As GATT contains open-ended and even vague provisions, they may apply it to the most divergent circumstances and take into account all aspects of economic reality. Thereby, they may either stay within the free trade spirit of GATT or choose the protectionist way. For two reasons, they will probably apply GATT in a «one-way flexible» manner, *i.e.*, they will make use of the flexibility of GATT in one and the same protectionist direction.

First, as has already been noted, import-competing industries keep demanding protection, even when a treaty on free trade has been concluded. In order to predispose them, governments will

²⁰⁹ See : THARAKAN, P.K.M., and WAELEBROECK, J., «Antidumping and countervailing duty decisions in the E.C. and in the U.S. An experiment in comparative political economy», *European Economic Review*, 1994, (171), 172.

²¹⁰ See : COOTER, R., and ULEN, T., *Law and Economics*, Glenview, Scott, Foresman and Company, 1988, 401-402 ; JOSKOW, P.L., and KLEVORICK, A.K., «A Framework for Analyzing Predatory Pricing Policy», *Yale Law Journal*, 1979-1980, (213), 237-239.

²¹¹ See : COOTER, R., and ULEN, T., *Law and Economics*, Glenview, Scott, Foresman and Company, 1988, 415-417.

²¹² BOURGEOIS, J.H.J., «EC Anti-dumping Enforcement - Selected Second Generations Issues», in *Antitrust and Trade Policy in the United States and the European Community*, HAWK, B.E. (ed.), New York, Bender, 1986, (563), 587-588.

try to exploit the trade remedy laws provided by GATT in a protectionist manner through placing a broad interpretation on the opportunities given by GATT to enact trade-restrictive measures.

Second, trade remedy laws, such as anti-dumping law, are of a highly technical nature. This high technicality reduces their transparency and accessibility, as a good understanding of such laws requires a profound investigation. Since such an investigation requires time and is costly, those who have little at stake, such as consumers and domestic exporting industries, will not have the incentive to overcome this technical entry barrier. In fact, probably only import-competing industries, who have much to gain from protection, will make the effort to obtain the necessary technical skills in order to get the desired protection, in pursuance of the trade remedy laws²¹³. The other group who has much to lose from protection, involves the foreign exporting industries. However, the accessibility for them is even smaller as they will have to make efforts to understand foreign trade remedy laws. Moreover, if they export to several countries, they will have to understand the various trade remedy laws of all those countries. If those trade remedy laws are to a great extent embodied in case law, this will be an almost hopeless task. The disequilibrium between import-competing and exporting industries will affect case law, and eventually legislation. As the import-competing industries are best informed on all aspects, particularities and loopholes of their country's trade remedy laws, they will be able to develop the most sophisticated and convincing arguments and to bend trade remedy laws to their protectionist will. A good proof of this disequilibrium is the fact that the mere initiating of an anti-dumping proceeding has a «chilling effect» on the volume of the allegedly dumped imports : even if eventually no injurious dumping is found and the exporter, thus, had nothing to be afraid of, it puts a stop to the increase in volume²¹⁴. This proves that exporters expect the enactment of anti-dumping measures, whenever an anti-dumping proceeding is initiated, regardless of whether or not they actually dump. They, thus, view anti-dumping law as protectionist-biased. Their perception will eventually result in a vicious circle : as the initiation of an anti-dumping proceeding generates uncertainty as to the profitability of their export market, their already low incentive to study the importing country's anti-dumping law will further shrink ; consequently, their defence will not be adequately underbuilt and the import-competing industries will have more free play to influence the anti-dumping authorities to adopt an increasingly protectionist interpretation. The more anti-dumping law becomes protectionist, the more it will have a

²¹³ See : THARAKAN, P.K.M., and WAELEBROECK, J., «Antidumping and countervailing duty decisions in the E.C. and in the U.S. An experiment in comparative political economy», *European Economic Review*, 1994, (171), 183 and 187.

²¹⁴ MESSERLIN, P., «The EC Antidumping Regulations : A First Economic Appraisal, 1980-85», *Weltwirtschaftliches Archiv*, 1989, (563), 572.

«chilling» effect on allegedly dumped imports and, eventually, the import-competing industries may even initiate anti-dumping proceedings merely to harass import competition²¹⁵.

3.3.2.3. Legal remedies against one-way flexibility

If «one-way flexibility» actually renders anti-dumping law increasingly protectionist, it probably will eventually reach a point at which anti-dumping case law becomes illegal. Indeed, the open-ended and vague rules of GATT and European anti-dumping law are unlikely to be infinitely elastic. If the point of illegality is reached, legal remedies should be available. It should be pointed out, from the very beginning, that those legal remedies do not provide an effective remedy against the main deficiency of GATT and European anti-dumping law, *i.e.*, that their scope is not limited to predatory pricing²¹⁶. They offer no protection either against «one-way flexible», but legal interpretations of GATT and European anti-dumping law. They can only provide a remedy against illegal interpretations. It will be investigated hereinafter which legal remedies are available and whether they actually do put a stop to «one-way flexibility». A distinction is being made between European and GATT anti-dumping law.

3.3.2.3.1. Legal remedies guaranteeing the observance of European anti-dumping law

European anti-dumping law does not provide specific legal remedies against unlawful anti-dumping determinations. Only the ordinary legal remedies provided under the EC Treaty and the ECSC Treaty²¹⁷ are available. Thus, the Court of Justice and, since 15 March 1994, the Court of First Instance²¹⁸ play a crucial role in reviewing alleged infringements of European anti-dumping law. Those legal remedies seem to comply with the GATT Anti-dumping Code, which requires the Contracting Parties having domestic anti-dumping legislation to provide for judicial review of domestic anti-dumping determinations (Article 13).

Since the first judgement given in 1979 by the Court of Justice on anti-dumping law, the number of judgements has considerably increased, especially since 1987 (see : table 2).

²¹⁵ FINGER, J.M., and MURRAY, T., «Policing Unfair Imports : The United States Example», *Journal of World Trade*, 1990/4, (39), 47-48.

²¹⁶ PETERSMANN, E.-U., «GATT Dispute Settlement Proceedings in the Field of Antidumping Law», *Common Market Law Review*, 1991, (69), 112.

²¹⁷ Hereinafter, attention will only be paid to the legal remedies provided under the EC Treaty, because the legal remedies laid down under the ECSC Treaty are identical and the majority of the cases introduced before the Court of Justice concern the basic EC Regulation.

²¹⁸ Article 168A EC Treaty ; Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (*O.J.*, 25 November 1988, No L 319/1), as amended by Council Decision 93/350/ECSC, EEC, Euratom of 8 June 1993 (*O.J.*, 16 June 1993, No L 144/21) and by Council Decision 94/149/ECSC, EC of 7 March 1994 (*O.J.*, 10 March 1994, No L 66/29).

Table 2 - Number of judgements passed by the Court of Justice on anti-dumping law (excluding orders of the President of the Court)

Year	Number of judgements
1979	5
1982	1
1984	1
1985	4
1986	1
1987	12
1988	7
1989	4
1990	9
1991	5
1992	11
1993	4
Total	64

Source : European Court Reports.

Most cases concern actions for annulment introduced by individuals before the Court of Justice (Article 173(4) EC Treaty) and references for preliminary rulings by domestic courts before which the legality of anti-dumping decisions is raised (Article 177 EC Treaty). There has been only one action for annulment introduced by a Member State (Article 173(2) EC Treaty), and only one objection of inapplicability has been raised by an individual (Article 184 EC Treaty). Furthermore, only one action has been introduced by an individual against the European anti-dumping authorities for damages, caused by those institutions or their servants in the performance of their duties (Articles 178, *iuncto* 215(2) EC Treaty). Of course, the other ordinary actions are also available in the field of anti-dumping law (actions introduced by a Member State, a Community institution or an individual against the failure of the Council or the Commission to take a decision (Article 175 EC Treaty) ; actions introduced by the Commission or a Member State against the failure of a Member State to comply with its obligations under the EC Treaty (Articles 169 and 170 EC Treaty)).

In its five 1979 judgements, the Court, moreover, held that all anti-dumping decisions should comply with basic EC legislation. The European anti-dumping authorities must not deviate from basic EC legislation by making anti-dumping determinations *sui generis*, based directly on Article

113 EC Treaty, without interfering with the legislative system of the Community and destroying the equality before the law of those to whom the law applies²¹⁹.

It, thus, would seem that there are broad opportunities for securing the observance of European anti-dumping law and for restricting «one-way flexibility». Indeed, the Court of Justice, being an independent judiciary body, will probably place a more objective interpretation on anti-dumping law than the European anti-dumping authorities do²²⁰. The Court of Justice, however, exercises only a marginal judicial control : its review is largely restricted to manifest errors in assessing the facts, violations of procedural anti-dumping law and abuses of the wide margin of discretion which the Court grants to the European anti-dumping authorities²²¹. This reticence probably explains the low number of cases in which the Court upholds the claims of the applicant (see table 3).

Table 3 shows that only 22 % of the lawsuits were gained by the applicant. It also shows that most cases were brought by those categories of applicants who are disadvantaged by anti-dumping relief and, thus, by a «one-way flexible» interpretation of anti-dumping law. Indeed, actions brought by dumping exporters, importers and consumers represent 92 % of all judgements given by the Court of Justice. As those categories of applicants may be presumed to have challenged a «one-way flexible» interpretation of anti-dumping law, table 3 may offer an indication of the Court of Justice not being a waterproof guarantee against cases of «one-way flexibility» which are not manifestly illegal²²².

²¹⁹ C.J.E.C., case 113/77, 29 March 1979, *NTN Toyo Bearing Company Ltd a.o. v Council*, E.C.R., 1979, (1185), 1209 ; C.J.E.C., case 118/77, 29 March 1979, *Import Standard Office (ISO) v Council*, E.C.R., 1979, (1277), 1298 ; C.J.E.C., case 119/77, 29 March 1979, *Nippon Seiko KK a.o. v Council and Commission*, E.C.R., 1979, (1303), 1331 ; C.J.E.C., case 120/77, 29 March 1979, *Koyo Seiko Co. Ltd a.o. v Council and Commission*, E.C.R., 1979, (1337), 1357-1358 ; C.J.E.C., case 121/77, 29 March 1979, *Nachi Fujikoshi Corporation a.o. v Council*, E.C.R., 1979, (1363), 1383.

²²⁰ SCHERMERS, H.G., «The Direct Application of Treaties with Third States : Note Concerning the Polydor and Pabst Cases», *Common Market Law Review*, 1982, (563), 564-565.

²²¹ FEENSTRA, J., «Annotation on case C-121/86, *Epikhiriseon Metallefikon Viomikhanikon Kai Nafiliakon AE and Others v. Council*, Judgment of 28 November 1989, not yet reported ; Case C-122/86, *Epikhiriseon Metallefikon Viomikhanikon Kai Nafiliakon AE and Others v. Commission and Council*, Judgment of 28 November 1989, not yet reported ; Case C-129/86, *Hellenic Republic v. Council*, Judgment of 28 November 1989, not yet reported», *Common Market Law Review*, 1991, (200), 202 ; PETERSMANN, E.-U., «Need for Reforming Antidumping Rules and Practices. The Messy World of Fourth-Best Policies», *Aussenwirtschaft*, 1990, (179), 193 ; PETERSMANN, E.-U., «GATT Dispute Settlement Proceedings in the Field of Antidumping Law», *Common Market Law Review*, 1991, (69), 101.

²²² In the same sense : PETERSMANN, E.-U., «GATT Dispute Settlement Proceedings in the Field of Antidumping Law», *Common Market Law Review*, 1991, (69), 107 and 109.

Table 3 - Number of judgements of the Court of Justice on anti-dumping law by category of applicant and number of lawsuits gained by the applicant (excluding orders of the President of the Court) (1979-1993)

Category of applicants	Number of judgements*	Number of lawsuits gained*
Dumping exporters	34	7
Importers	24 (11)	6 (4)
Consumers	1	0
Community producers	4	1
Member States	1	0
Total	64 (11)	14 (4)

* The number between brackets refer to actions brought by dumping exporters and their associated importers together.

Source : European Court Reports.

Since 15 March 1994 the Court of First Instance became empowered to exercise at first instance the jurisdiction conferred on the Court of Justice by the EC Treaty in actions brought by individuals for annulment (Article 173(4)EEC Treaty) or for damages (Article 178 EC Treaty) and against the failure of the Council or the Commission to take a decision (Article 175 EC Treaty) and relating to cases of dumping²²³. The Court of First Instance has not yet passed any judgement on anti-dumping law, so it is not yet clear whether the Court of First Instance will only exercise a marginal judicial control, leaving much discretion to the European anti-dumping authorities, and whether its judgements will eventually affect the case law of the Court of Justice²²⁴.

3.3.2.3.2. Legal remedies guaranteeing the observance of GATT anti-dumping law

On two levels, remedies have been provided, guaranteeing the observance of GATT anti-dumping law. On the Community level, actions may be brought before the Court of Justice or the Court of First Instance²²⁵ for reviewing the compatibility of the European anti-dumping law with GATT

²²³ Article 168A EC Treaty ; Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (*O.J.*, 25 November 1988, No L 319/1), as amended by Council Decision 93/350/ECSC, EEC, Euratom of 8 June 1993 (*O.J.*, 16 June 1993, No L 144/21) and by Council Decision 94/149/ECSC, EC of 7 March 1994 (*O.J.*, 10 March 1994, No L 66/29).

²²⁴ The fear that the Court of First Instance may alter the case law of the Court of Justice is probably the reason why the Commission and France have tried to oppose the transfer of anti-dumping cases to the Court of First Instance (see : PETERSMANN, E.-U., «Need for Reforming Antidumping Rules and Practices. The Messy World of Fourth-Best Policies», *Aussenwirtschaft*, 1990, (179), 194).

²²⁵ Hereinafter, attention will be paid exclusively to the Court of Justice since the Court of First Instance has not yet examined the compatibility of European anti-dumping law with GATT anti-dumping law.

anti-dumping law. On the GATT level, dispute settlement proceedings between Contracting Parties are available, whenever a Contracting Party is being alleged by another Contracting Party of having infringed on GATT law. However, not one of them seems to be able to prevent or to remedy all instances of «one-way flexibility» infringing upon GATT anti-dumping law.

3.3.2.3.2.1. Community level

According to the Court of Justice²²⁶, international agreements, which are binding on the Community, are «an integral part of Community law». Therefore, as GATT and the GATT Anti-dumping Code are binding on the Community, they must be considered to be Community acts.

However, GATT and the GATT Anti-dumping Code may not always be relied upon in cases brought before the Court of Justice. Indeed, with regard to the legal remedies available on the Community level guaranteeing the observance of GATT anti-dumping law, a distinction must be made between, on the one hand, references for preliminary rulings (Article 177 EC Treaty) and, on the other hand, actions for annulment (Article 173 EC Article) and objections of inapplicability (Article 184 EC Treaty) of Community acts.

(i) References for preliminary rulings

In several cases, GATT has been invoked before the domestic courts of Member States, resulting in references for preliminary rulings before the Court of Justice (Article 177 EC Treaty) concerning the conformity of Community acts with GATT. According to the Court of Justice, in its 1972 *International Fruit case* and its 1973 *Schlüter case*, the validity, within the scope of Article 177 EC Treaty, of measures taken by the Community institutions may be judged with reference to a provision of international law, when that provision binds the Community and is capable of conferring on individuals rights which they can invoke before the courts. The Court found GATT, in view of its «spirit, general scheme and terms», not to have such direct effect. In this respect, the Court pointed out that GATT «is characterized by the great flexibility of its provisions, in particular those conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between the

²²⁶ C.J.E.C., case 181/73, 30 April 1974, *Haegeman v Belgian State*, E.C.R., 1974, (449), 460 ; C.J.E.C., case 104/81, 26 October 1982, *Hauptzollamt Mainz v Kupferberg*, E.C.R., 1982, (3641), 3662.

Contracting Parties»²²⁷. In 1983, the Court reaffirmed that GATT and, in particular, Article IV (the anti-dumping provision of GATT) do not have direct effect²²⁸.

In the meantime, however, the Court of Justice has passed two dissenting judgements. Indeed, in the *Nederlandse Spoorwegen* case, the Court of Justice has stated that «the Community authorities have not, in any sense, unilaterally increased a duty bound under GATT»²²⁹. Similarly, after having noted that the allegedly illegal measure was legally justified by the provisions of Community law, the Court of Justice, in the *Dürbeck* case, has concluded that «(l)ikewise, the argument advanced by the plaintiff in the main action that the protective measures in issue are contrary to the commitments entered into by the Community under GATT (was) not capable in this case of putting the validity of those measures in question»²³⁰. In both cases, which are an application of Article 177 EC Treaty, the Court has in fact reviewed the conformity of Community law to GATT law without examining whether GATT confers rights on individuals within the Community which they can invoke before the courts. Whereas they initially might have been considered to be a mitigation of the prior *International Fruit* case and *Schlüter* case, they, since 1983, are considered as the obvious exceptions to the rule²³¹.

²²⁷ C.J.E.C., joined cases 21 to 24/72, 12 December 1972, *International Fruit Company NV, Kooy Rotterdam NV, Velleman en Tas NV and Jan Van den Brink's Im- en Exporthandel NV v Produktschap voor Groenten en Fruit*, E.C.R., 1972, (1219), 1227; C.J.E.C., case 9/73, 24 October 1973, *Carl Schlüter v Hauptzollamt Lörrach*, E.C.R., 1973, 1135.

²²⁸ C.J.E.C., joined cases 267 to 269/81, 16 March 1983, *Amministrazione delle Finanze dello Stato v Società Petrolifera Italiana (SPI) and SpA Michelin Italiana (SAMI)*, E.C.R., 1983, (801), 830.

On the same grounds, direct effect has been denied to :

- Article II (C.J.E.C., case 9/73, 24 October 1973, *Carl Schlüter v Hauptzollamt Lörrach*, E.C.R., 1973, (1135), 1157-1158; C.J.E.C., joined cases 267 to 269/81, 16 March 1983, *Amministrazione delle Finanze dello Stato v Società Petrolifera Italiana (SPI) and SpA Michelin Italiana (SAMI)*, E.C.R., 1983, (801), 830; C.J.E.C., joined cases 290 and 291/81, 16 March 1983, *Compagnia Singer SpA and Geigy SpA v Amministrazione delle Finanze dello Stato*, E.C.R., 1983, (847), 861);
- Article III (C.J.E.C., joined cases 267 to 269/81, 16 March 1983, *Amministrazione delle Finanze dello Stato v Società Petrolifera Italiana (SPI) and SpA Michelin Italiana (SAMI)*, E.C.R., 1983, (801), 830);
- Article V (C.J.E.C., case 266/81, 16 March 1983, *Società Italiana per l'Oleodotto Transalpino (SIOT) v Ministero delle Finanze, Ministero della Marina Mercantile, Circonscrizione doganale di Trieste and Ente Autonomo del Porto di Trieste*, E.C.R., 1983, (731), 780);
- Article VIII (C.J.E.C., joined cases 267 to 269/81, 16 March 1983, *Amministrazione delle Finanze dello Stato v Società Petrolifera Italiana (SPI) and SpA Michelin Italiana (SAMI)*, E.C.R., 1983, (801), 830.);
- Article XI (C.J.E.C., joined cases 21 to 24/72, 12 December 1972, *International Fruit Company NV, Kooy Rotterdam NV, Velleman en Tas NV and Jan Van den Brink's Im- en Exporthandel NV v Produktschap voor Groenten en Fruit*, E.C.R., 1972, (1219), 1227-1228); and
- the Tariff Protocols (C.J.E.C., joined cases 267 to 269/81, 16 March 1983, *Amministrazione delle Finanze dello Stato v Società Petrolifera Italiana (SPI) and SpA Michelin Italiana (SAMI)*, E.C.R., 1983, (801), 830).

²²⁹ C.J.E.C., case 38/75, 19 November 1975, *Douaneagent der NV Nederlandse Spoorwegen v Inspecteur der invoerrechten en accijnzen*, E.C.R., 1975, (1439), 1450.

²³⁰ C.J.E.C., case 112/80, 5 May 1981, *Firma Anton Dürbeck v Hauptzollamt Frankfurt am Main-Flughafen*, E.C.R., 1981, (1095), 1120.

²³¹ See : BEBR, G., «Gemeinschaftsabkommen und ihre mögliche unmittelbare Wirksamkeit», *Europarecht*, 1983, 128-160; MARCH HUNNINGS, N., «Enforceability of the EEC-EFTA Free Trade Agreements», *European Law Review*, 1977, (163), 176-177; PETERSMANN, E.-U., «Application of GATT by the Court of Justice of the European Communities», *Common Market Law Review*, 1983, 397-437.

As a result, individuals cannot rely on GATT in actions before the domestic courts in order to limit too extreme and illegal «one-way flexibility» in the European anti-dumping authorities' case law. This is all the more regrettable since the Court of Justice has denied direct effect to GATT for the wrong reasons. On several occasions, the Court of Justice has found international agreements other than GATT to have direct effect because of the high degree of specificity of their provisions²³². However, the provisions of those international agreements are characterized by at least the same high flexibility as the GATT provisions²³³. The only valid reason to deny direct effect to GATT is that the majority of the Member States has not promulgated GATT in accordance with their domestic constitutional laws²³⁴.

Only in the 1990 *Cartorobica* case, the problem of the conformity of Community acts with the GATT Anti-dumping Code has been referred to the Court of Justice for a preliminary ruling. Here, the Court held that it was not necessary to consider whether the provisions of the GATT Anti-dumping Code, to which the domestic court had referred, were capable of giving rise to the right for individuals to rely on them in legal proceedings, since those provisions were not relevant to the question referred to the Court for a preliminary ruling²³⁵. This judgement probably explains why the *Nederlandse Spoorwegen* case and the *Dürbeck* case should be considered as not reversing the Court's case law on GATT : if European law is not at variance with GATT, it is not necessary to examine whether or not GATT has direct effect. For the same reason, the 1993 *Findling Wälzlager* case, in which the Court held that the GATT Anti-dumping Code and

²³² MASTELLONE, C., «Annotation on Case 266/81, *S.I.O.T. (Società Italiana per l'Oleodotto Transalpino) s.p.a. v Ministero delle Finanze, Ministero della Marina Mercantile, Circoscrizione doganale di Trieste, Ente autonome del porto di Trieste*, and Joined Cases 267-269/81, *Amministrazione delle Finanze dello Stato v S.P.I. (Società Petroliera Italiana) s.p.a.* (267/81) and *Amministrazione delle Finanze dello Stato v S.A.M.I. (S.p.a. Michelin Italiana)* (268-269/81)», *Common Market Law Review*, 1983, (568), 576-578.

²³³ See e.g. : CAEIROS, A., «L'effet direct des accords internationaux conclus par la CEE», *Revue du Marché Commun*, 1984, (526), 531-533 ; GROUX, J., «L'invocabilité en justice" des accords internationaux des Communautés européennes à propos de plusieurs arrêts récents de la C.J.C.E.», *Revue Trimestrielle de Droit Européen*, 1983, (203), 217-223 ; HILF, M., «The Application of GATT within the Member States of the European Community, with Special Reference to the Federal Republic of Germany», in *The European Community and GATT*, HILF, M., JACOBS, F.G., and PETERSMANN, E.-U. (eds.), Deventer, Kluwer, 1986, (153), 179 ; MASTELLONE, C., «Annotation on Case 266/81, *S.I.O.T. (Società Italiana per l'Oleodotto Transalpino) s.p.a. v Ministero delle Finanze, Ministero della Marina Mercantile, Circoscrizione doganale di Trieste, Ente autonome del porto di Trieste*, and Joined Cases 267-269/81, *Amministrazione delle Finanze dello Stato v S.P.I. (Società Petroliera Italiana) s.p.a.* (267/81) and *Amministrazione delle Finanze dello Stato v S.A.M.I. (S.p.a. Michelin Italiana)* (268-269/81)», *Common Market Law Review*, 1983, (568), 576-578 ; MCGOVERN, E., «Dispute Settlement in the GATT - Adjudication or Negotiation ?», in *The European Community and GATT*, HILF, M., JACOBS, F.G., and PETERSMANN, E.-U. (eds.), Deventer, Kluwer, 1986, (73), 81 ; PETERSMANN, E.-U., «The EEC as a GATT Member - Legal Conflicts between GATT Law and European Community Law», in *The European Community and GATT*, HILF, M., JACOBS, F.G., and PETERSMANN, E.-U. (eds.), Deventer, Kluwer, 1986, (23), 58 ; TAGARAS, H.N., «L'effet direct des accords internationaux de la Communauté», *C.D.E.*, 1984, (15), 32-49 ; MARCH HUNNINGS, N., «Enforceability of the EEC-EFTA Free Trade Agreements», *European Law Review*, 1977, (163), 180-181. See, however : MARESCEAU, M., «The GATT in the Case-Law of the European Court of Justice», in *The European Community and GATT*, HILF, M., JACOBS, F.G., and PETERSMANN, E.-U. (eds.), Deventer, Kluwer, 1986, (107), 122.

²³⁴ HILF, M., «The Application of GATT within the Member States of the European Community, with Special Reference to the Federal Republic of Germany», in *The European Community and GATT*, HILF, M., JACOBS, F.G., and PETERSMANN, E.-U. (eds.), Deventer, Kluwer, 1986, (153), 175-176.

²³⁵ C.J.E.C, case C-189/88, 27 March 1990, *Cartorobica SpA v Ministero delle Finanze dello Stato*, *E.C.R.*, 1990, I, (1269), 1297.

European anti-dumping law imposed the same principle as to the amount of anti-dumping duties²³⁶, should probably not be considered as a change in the Court's case law²³⁷.

The Court's judgement in the *Cartorobica* case, though, does not answer the question whether the GATT Anti-dumping Code has direct effect. If the Court's case law established in respect of GATT is applied to the GATT Anti-dumping Code, the Court probably will deny the GATT Anti-dumping Code to have direct effect²³⁸. For, according to the Court of Justice, the GATT Anti-dumping Code is characterized by the same «great flexibility» as the provisions of the GATT. Indeed, the dispute settlement proceedings under the GATT Anti-dumping Code closely resemble those of GATT (see : Article 17 GATT Anti-dumping Code)²³⁹.

However, if the case law of the Court of Justice established in respect of other international agreements is applied to the GATT Anti-dumping Code, the Code should have direct effect. First, in comparison with Article VI GATT, the provisions of the GATT Anti-dumping Code are more specific²⁴⁰. Second, many provisions of the GATT Anti-dumping Code are not less specific than the provisions of European anti-dumping law (e.g., the provisions concerning the injury requirement), the latter being applied by the Court of Justice as legal standard for individual anti-dumping determinations²⁴¹. Third, unlike GATT, the GATT Anti-dumping Code has been formally concluded by the Community and duly promulgated²⁴².

²³⁶ C.J.E.C., case C-136/91, 1 April 1993, *Findling Wälzlager Handelsgesellschaft mbH v Hauptzollamt Karlsruhe*, consideration 13 (not yet reported).

²³⁷ *Contra* : C.J.E.C., case C-136/91, 1 April 1993, *Findling Wälzlager Handelsgesellschaft mbH v Hauptzollamt Karlsruhe*, recital 11 (Opinion of Advocate General VAN GERVEN) (not yet reported).

²³⁸ See also : CARREAU, D., «Les négociations commerciales multilatérales au sein du GATT : Le "Tokyo Round" (1973-1979)», *Cahiers de Droit Européen*, 1980, (145), 154.

²³⁹ The only essential difference is the role the GATT Committee on Anti-dumping Practices plays within the scope of the dispute settlement proceedings under the GATT Anti-dumping Code (FLORY, T., «Le code anti-dumping du G.A.T.T.», *Droit et pratique du commerce international*, 1991, (6), 14).

²⁴⁰ VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 9-10.

²⁴¹ *Supra*, 85-86.

²⁴² HILF, M., «The application of GATT within the Member States of the European Community, with Special Reference to the Federal Republic of Germany», in *The European Community and GATT*, HILF, M., JACOBS, F.G., and PETERSMANN, E.-U. (eds.), Deventer, Kluwer, 1986, (153), 179.

(ii) *Actions for annulment and objections of inapplicability*

When the Court of Justice, in the 1989 *Fediol III* case, in which an action for annulment of a Community act (Article 173(4) EC Treaty) was brought, reaffirmed that GATT does not have direct effect, it seemed that the Court would apply the same case law as the one it had elaborated in its judgements on references for preliminary rulings. In the 1989 *Fediol III* case, though, the Court of Justice did investigate whether the Commission had not violated GATT. As the Commission decision, which was being challenged, was based on Community legislation which made its application dependent on the observance of GATT by the Community institutions, it seemed that the Court of Justice was of the opinion that GATT does confer rights onto individuals, when Community law entitles them to rely on GATT, whereby a simple reference to GATT may be sufficient²⁴³.

As a consequence, when the Court, in the 1990 *Electroimpex* case, found that the Community definition of the notion of dumping corresponded to GATT and to the GATT Anti-dumping Code²⁴⁴, this judgement seemed to apply the same line of thinking as the 1990 *Cartoribica* case : as long as Community law does not infringe upon GATT or upon the GATT Anti-dumping Code, the question of their not having direct effect may be disregarded, since the outcome will always be the same.

The turning point was the 1991 *Nakajima* case, which concerned an objection of inapplicability of the basic EC anti-dumping legislation, because of it being incompatible with the GATT Anti-dumping Code (Article 184 EC Treaty). The Court held it necessary to examine whether the basic EC legislation went beyond the legal framework laid down under the GATT Anti-dumping Code²⁴⁵. As the Court pointed out that the applicant did not rely on the direct effect of the Code²⁴⁶, it thus probably agreed with the applicant, who argued that individuals do not have a

²⁴³ C.J.E.C., case 70/87, 22 June 1989, *Fédération de l'industrie de l'huilerie de la CEE (Fediol) v Commission*, E.C.R., 1989, 1781.

Advocate-General W. VAN GERVEN in his opinion regarding this case makes an interesting and clarifying comparison between such a reference to GATT and the legal concept of *renvoi* in private international law. By such a reference, the provisions of the GATT are made applicable and, as a consequence, are granted direct effect, in the sense that they may be invoked by individuals in any event as an interpretative criterion but also as a criterion for assessing the validity of inferior norms and measures (C.J.E.C., case 70/87, 22 June 1989, *Fédération de l'industrie de l'huilerie de la CEE (Fediol) v Commission*, E.C.R., 1989, (1781), 1806-1808 (Opinion of Advocate General VAN GERVEN) See also : CASTILLO DE LA TORRE, F., «The Status of GATT in EEC Law. Some New Developments», *Journal of World Trade*, 1992/5, (35), 40.

²⁴⁴ C.J.E.C., case C-157/87, 11 July 1990, *Electroimpex a.o. v Council*, E.C.R., 1990, I, (3021), 3022.

²⁴⁵ C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, E.C.R., 1991, I, (2069), 2178. See also : C.J.E.C., case C-104/90, 13 October 1993, *Matsushita Electric Industrial Co. Ltd v Council*, recital 19 (Opinion of Advocate General VAN GERVEN) (not yet reported) ; C.J.E.C., case C-216/91, 7 December 1993, *Rima Electrometalurgia SA v Council*, recital 37 (Opinion of Advocate General LENZ) (not yet reported).

²⁴⁶ C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, E.C.R., 1991, I, (2069), 2178.

subjective right to invoke the provisions of GATT and the GATT Anti-dumping Code before domestic courts, but that they do have the possibility, in actions for annulment or by means of an objection of inapplicability, to request the Court of Justice to examine whether a Community act is lawful in the light of those provisions²⁴⁷. Thus, the Court seems to make a distinction between that subjective right of individuals and the objective duty of the Community institutions to observe their international obligations²⁴⁸.

As the grounds for review of legality, such as an infringement on the EC Treaty or on any rule of law relating to its application, are identical for actions for annulment (Article 173 EC Treaty) and objections of inapplicability, it should not come as a surprise that, since then, the Court of Justice has, on several occasions, reviewed the compatibility of the basic EC legislation with the GATT Anti-dumping Code with regard to actions for annulment (Article 173 EC Treaty). However, in none of those cases, the Court has found any breach of GATT or of the GATT Anti-dumping Code²⁴⁹. This is not surprising since GATT and the GATT Anti-dumping Code are at least as imprecise and vague as the basic EC anti-dumping legislation. Indeed, frequently, basic EC legislation is almost completely identical to the GATT Anti-dumping Code²⁵⁰.

It was only in the 1994 *Banana* case that the Court of Justice summarized its case law coherently : it held that, as GATT does not have direct effect, the Court cannot take into consideration provisions of GATT to assess the lawfulness of a Community act in an action for annulment²⁵¹, unless the Community intended to implement a particular obligation entered into within the framework of GATT, or unless the Community act expressly refers to specific provisions of GATT²⁵². Hence, the fact that the basic EC legislation, according to its preambles, is intended to transpose GATT anti-dumping law into European law and many of its provisions are an exact copy of the GATT Anti-dumping Code, explains why the Court of Justice

²⁴⁷ C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, E.C.R., 1991, I, (2069), 2086 (Report for the Hearing : conclusions of the applicant).

²⁴⁸ *Contra* : C.J.E.C., case C-136/91, 1 April 1993, *Findling Wälzlager Handelsgesellschaft mbH v Hauptzollamt Karlsruhe*, recital 11 (Opinion of Advocate General VAN GERVEN) (not yet reported).

²⁴⁹ C.J.E.C., case C-105/90, 13 February 1992, *Goldstar Co. Ltd v Council*, E.C.R., 1992, I, (677), 723-726 ; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, E.C.R., 1992, I, (1409), 1477-1478 ; C.J.E.C., case C-188/88, 10 March 1992, *NMB (Deutschland) GmbH a.o. v Commission*, E.C.R., 1992, I, (1689), 1735 and 1739-1741. See also : C.J.E.C., case C-178/87, 10 March 1992, *Minolta Camera Co. Ltd v Council*, E.C.R., 1992, I, (1577), 1630 ; C.J.E.C., case C-179/87, 10 March 1992, *Sharp Corporation v Council*, E.C.R., 1992, I, (1635), 1675.

²⁵⁰ C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, E.C.R., 1991, I, (2069), 2128 (Opinion of Advocate General LENZ).

²⁵¹ The same prevails for objections of illegality, since the grounds for review of legality are the same as those in respect of actions for annulment.

²⁵² C.J.E.C., case C-280/93, 5 October 1994, *Federal Republic of Germany v Council*, E.C.R., 1994, I, (5039), 5071-5074.

has assessed the lawfulness of European anti-dumping law from the point of view of GATT anti-dumping law.

3.3.2.3.2.2. *GATT level*

If the Community infringes upon Article VI GATT, the other Contracting Parties may have recourse to the consultation, conciliation and dispute settlement procedures provided under Articles XXII and XXIII GATT. The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations encompasses a new Understanding on Rules and Procedures on Dispute Settlement (hereinafter : the Understanding). This Understanding elaborates the consultation, conciliation and dispute settlement procedures as provided under Articles XXII and XXIII GATT, and imposes deadlines throughout the process, provides appellate review and establishes rules to govern adoption and implementation of GATT rulings. For example, the so-called Dispute Settlement Body which the Understanding has created, will settle all disputes on GATT law on the basis of reports drafted by independent panels composed of specialists in the matter under dispute. As the Dispute Settlement Body may only by consensus refuse to adopt those reports, the Understanding will enhance the settlement of disputes in a way in which political considerations, in principle, should not play a (dominant) role.

The Understanding provides, moreover, an integrated dispute settlement system which also applies to, *inter alia*, disputes under the GATT Anti-dumping Code, but for the specific provisions explicitly provided under this Code (see : Article 17 GATT Anti-dumping Code). In this respect, the Dispute Settlement Body will, *inter alia*, decide whether the specific dispute settlement rules of the GATT Anti-dumping Code apply, if the parties to the dispute do not agree.

Before the Uruguay Round, no such integrated dispute settlement system existed. In principle, infringements upon Article VI GATT had to be settled under the consultation, conciliation and dispute settlement procedures under Articles XXII and XXIII GATT²⁵³. For violations of the GATT Anti-dumping Code, specific consultation, conciliation and dispute settlement procedures were provided for (Article 15 1980 GATT Anti-dumping Code). Those procedures were largely modelled on those of the Articles XXII and XXIII GATT²⁵⁴. The Parties to the Code had to complete the dispute settlement procedures under the Code before invoking any rights which they have under GATT (Note No 1 *ad* Article 15 GATT Anti-dumping Code). However, as there seemed to be a broad agreement within the GATT Committee on Anti-dumping Practices that

²⁵³ The practices which have arisen from the application of the Articles XXII and XXIII GATT have been incorporated into the «Understanding regarding Notification, Consultation, Dispute Settlement and Surveillance» of 28 November 1979.

²⁵⁴ MCGOVERN, E., «Dispute Settlement in the GATT - Adjudication or Negotiation ?», in *The European Community and GATT*, HILF, M., JACOBS, F.G., and PETERSMANN, E.-U. (eds.), Deventer, Kluwer, 1986, (73), 77 ; PETERSMANN, E.-U., «GATT Dispute Settlement Proceedings in the Field of Antidumping Law», *Common Market Law Review*, 1991, (69), 84.

there was no legally binding obligation to complete the dispute settlement procedures under the Code before invoking rights under GATT²⁵⁵, disputes about the GATT Anti-dumping Code have been settled under Articles XXII and XXIII GATT instead of under Article 15 GATT Anti-dumping Code.

As to disputes regarding anti-dumping law under the former regime, the dispute settlement proceeding under GATT has only been applied in three cases, whereas the dispute settlement proceeding under the GATT Anti-dumping Code has been applied seven times²⁵⁶. This low number may be explained by the fact that those proceedings are only open to States Parties to GATT, respectively to the GATT Anti-dumping Code. States will only criticize infringements on GATT anti-dumping law, which they consider contrary to their own government interests, but they will not always consider their government interests to coincide with the interests of their exporters²⁵⁷. Moreover, the interests of importers, domestic consumers and processing industries located in the importing State which commits the infringement of GATT anti-dumping law, will find no protection under the GATT dispute settlement proceedings²⁵⁸. Their only protection against such illegal anti-dumping acts is to be found in their domestic law.

Problems in connection with anti-dumping law are usually discussed within the GATT Committee on Anti-dumping Practices (Article 16 GATT Anti-dumping Code), apart from the dispute settlement proceeding of the GATT Anti-dumping Code. States may hold that, if they do not apply the GATT dispute settlement proceedings, they will avoid exposure to attacks of other States and condemnations. Discussions in the GATT Committee on Anti-dumping Practices appear to be a more friendly method to settle their disputes as it requires a consensus.

Both the dispute settlement procedures and the discussions in the GATT Committee on Anti-dumping Practices are usually but an indication for future amendments of GATT anti-dumping law. As, during the Uruguay Round negotiations, there was a marked increase in dispute settlement procedures on anti-dumping law (namely one under Article XXIII GATT and all seven under the GATT Anti-dumping Code), it even seems that recently disputes were filed to increase

²⁵⁵ PETERSMANN, E.-U., «GATT Dispute Settlement Proceedings in the Field of Antidumping Law», *Common Market Law Review*, 1991, (69), 86-87.

²⁵⁶ STEWART, T.P. (ed.), *The GATT Uruguay Round. A Negotiating History (1986-1992)*, Deventer, Kluwer Law and Taxation Publishers, 1993, vol. II, 1642-1644.

²⁵⁷ BRONCKERS, M.C.E.J., «Non-Judicial and Judicial Remedies in International Trade Disputes : Some Reflections at the Close of the Uruguay Round», *Journal of World Trade*, 1990/6, (121), 121 ; PETERSMANN, E.-U., «GATT Dispute Settlement Proceedings in the Field of Antidumping Law», *Common Market Law Review*, 1991, (69), 101-102.

²⁵⁸ BRONCKERS, M.C.E.J., «Non-Judicial and Judicial Remedies in International Trade Disputes : Some Reflections at the Close of the Uruguay Round», *Journal of World Trade*, 1990/6, (121), 122 ; PETERSMANN, E.-U., «GATT Dispute Settlement Proceedings in the Field of Antidumping Law», *Common Market Law Review*, 1991, (69), 94-95.

leverage in the negotiations. Concerns existed also that decisions made under the dispute settlement procedure were blocked or not implemented to increase leverage in the negotiations²⁵⁹. Indeed, if, under the dispute settlement procedures, a Party was found to infringe upon GATT anti-dumping law, or if, within the GATT Committee on Anti-dumping Practices, the majority of the Parties were convinced that a Party had been breaching GATT anti-dumping law, several aspects of GATT anti-dumping law have been amended, on the occasion of the following GATT rounds, in order to legalize those illegal practices. At least, serious attempts are normally being made to obtain such amendments²⁶⁰.

In 1954, for example, Italy, under Article XXIII GATT, lodged a complaint against Sweden which levied anti-dumping duties whenever the export price was lower than the relevant minimum price fixed by the Swedish Government. Under the GATT dispute settlement procedure, the Swedish basic price system was found not to be inconsistent with GATT anti-dumping law. It was held that, in practice, the administration of that system might easily run into conflict with GATT anti-dumping law, unless the basic prices were constantly kept under review to make sure that they did not exceed the actually prevailing domestic market prices in the exporting country²⁶¹. On the first occasion which arose to amend GATT anti-dumping law, *i.e.*, the Kennedy Round, the 1968 GATT Anti-dumping Code was concluded, Article 8(d) of which encompassed specific provisions on basic price systems which were identical to the finding on the Swedish basic price system. Those provisions were deleted, though, from the 1994 GATT Anti-dumping Code.

Another good example in this respect pertains to the lack of implementation of the injury requirement contained in the 1968 GATT Anti-dumping Code by the United States of America. Under United States anti-dumping law injury which is not immaterial was being considered as material. Several Parties to the 1968 Anti-dumping Code were of the opinion that the United States thereby did not comply with the injury requirement of the 1968 Anti-dumping Code. The 1968 Anti-dumping Code imposed a strict injury requirement: the dumped imports had demonstrably to be the principal cause of the injury suffered by the domestic industry of the importing country; therefore, the effect of the dumping had to be weighted against the other factors which could adversely affect the domestic industry (Article 3(a) 1968 GATT Anti-dumping Code). In the published reports of the GATT Committee on Anti-dumping Practices, traces may be found since 1972 of the discussion about the implementation of the injury requirement by the United States of America²⁶². This discussion resulted in the review of the injury requirement. For, in the 1980 GATT Anti-dumping Code, the injury requirement was watered down: it must be demonstrated that the dumping causes material injury, whereas the injurious effects of other factors must not be attributed to the dumping (Article 3(4) 1980 GATT Anti-dumping Code).

In 1990, on a complaint lodged by Japan against the Community, the European anti-circumvention measures, allowing to impose anti-dumping duties on products assembled in the Community, using parts imported from the dumping

²⁵⁹ STEWART, T.P. (ed.), *The GATT Uruguay Round. A Negotiating History (1986-1992)*, Deventer, Kluwer Law and Taxation Publishers, 1993, vol. II, 1679. See also: PETERSMANN, E.-U., «Need for Reforming Antidumping Rules and Practices. The Messy World of Fourth-Best Policies», *Aussenwirtschaft*, 1990, (179), 181-182.

²⁶⁰ *Contra*: PETERSMANN, E.-U., «GATT Dispute Settlement Proceedings in the Field of Antidumping Law», *Common Market Law Review*, 1991, (69), 112, who points out that «the GATT dispute settlement proceedings have been of decisive importance for the progressive development of the GATT legal system on a step-by-step basis by incorporating agreed dispute settlement rulings and well-tried GATT practices into GATT law».

²⁶¹ *B.I.S.D.*, Third Supplement, Geneva, GATT, 1955, 86, recital 17.

²⁶² See: *B.I.S.D.*, Eighteenth Supplement, Geneva, GATT, 1972, 47, recital 7; *B.I.S.D.*, Nineteenth Supplement, Geneva, GATT, 1973, 16-17, recitals 9-10; *B.I.S.D.*, Twentieth Supplement, Geneva, GATT, 1974, 44, recital 7; *B.I.S.D.*, Twenty-first Supplement, Geneva, GATT, 1975, 31-32, recital 8; *B.I.S.D.*, Twenty-second Supplement, Geneva, GATT, 1976, 24-25, recital 12.

country, were found to infringe upon GATT law²⁶³. During the next GATT round, *i.e.*, the Uruguay Round, the Community, along with the United States of America, Australia and Canada, made serious efforts to insert its anti-circumvention measures into the new GATT Anti-dumping Code²⁶⁴. Indeed, the United States of America had only accepted the conclusion that the European anti-circumvention measures were illegal on the proviso that the Uruguay Round negotiations on anti-dumping law would address the circumvention issue²⁶⁵. Nonetheless, the 1994 GATT Anti-dumping Code does not contain any anti-circumvention measures, but the Community has not yet given in. Indeed, it has obtained that the desirability of the applicability of uniform rules in this area is recognized and that the matter is referred to the GATT Committee for Anti-dumping Practices for resolution (Part III of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations).

In those examples, chosen because of their having been one of the main topics during the negotiations of each of the three successive GATT Anti-dumping Codes, GATT anti-dumping law has been or probably will be amended in a «one-way flexible» way, since those amendments relax the conditions for granting anti-dumping relief.

Notwithstanding their many welcome innovations mentioned above, the new Understanding on Rules and Procedures on Dispute Settlement nor the new GATT Anti-dumping Code can remedy such an improper use of the dispute settlement procedures and the GATT Committee on Anti-dumping Practices resulting in «one-way flexible» amendments of GATT anti-dumping law. In fact, there exists no such remedy. It seems, though, that the specific provisions of the new GATT Anti-dumping Code provide broader standards of review of GATT violations. Under this Code, it must be examined whether the establishment of the facts was proper and whether the assessment was unbiased and objective ; such an unbiased and objective evaluation must not be overturned, even if a different conclusion might be reached. It must, moreover, be examined whether the interpretation placed by the Contracting Party on the GATT Anti-dumping Code, is permissible, it being admitted that more than one permissible interpretation is possible (Article 17.6.). Especially, the standard of «permissible interpretations» may result in a broad interpretation of GATT anti-dumping law²⁶⁶, probably allowing «one-way flexible» interpretations bordering on illegality.

²⁶³ GATT Doc. No. L/6657, 22 March 1990.

²⁶⁴ STEWART, T.P. (ed.), *The GATT Uruguay Round. A Negotiating History (1986-1992)*, Deventer, Kluwer Law and Taxation Publishers, 1993, vol. II, 1617-1640.

²⁶⁵ PETERSMANN, E.-U., «GATT Dispute Settlement Proceedings in the Field of Antidumping Law», *Common Market Law Review*, 1991, (69), 109 ; STEWART, T.P. (ed.), *The GATT Uruguay Round. A Negotiating History (1986-1992)*, Deventer, Kluwer Law and Taxation Publishers, 1993, vol. II, 1620.

²⁶⁶ WAER, P., and VERMULST, E., «EC Anti-Dumping Law and Practice after the Uruguay Round. A New Lease of Life ?», *Journal of World Trade*, 1994/2, (5), 9.

4. CONCLUSION

Economic theory submits free trade as the best device to maximize the welfare of the world as a whole. It also shows that free trade generally maximizes the welfare of each country individually, except in a number of specific cases of imperfect competition and market imperfections. GATT seems to translate economic theory in law: it has created a mechanism aimed at reducing protectionism and, thus, at freeing ever increasingly trade.

It seems that the Contracting Parties to GATT had a complete knowledge of economic theory prevailing in 1947. Economic theory had not only demonstrated that, in principle, free trade is the best system. Imperfect competition had also just been studied and was shown to possibly result in price discrimination. When such price discrimination occurred between national markets, it was called «dumping». Those new developments in economic theory were very welcome to governments which felt it hard to resist the demand of their import-competing industries to shelter them from foreign competition. The argument, the import-competing industries used, that it was not fair that they were exposed to competition at extraordinarily low prices, whereas their foreign competitors could gain high profits on their home markets, was very persuasive. However, it did not correspond to the conclusions of economic theory. Indeed, from the very start, economic theory had only objected against predatory price discrimination and had pointed out that it was very difficult to distinguish predation from competitive price discrimination.

However, such nuances were not heard - or, perhaps, even consciously ignored - by the governments when signing GATT. They agreed to incorporate the possibility to sanction dumping in GATT and, from the start, placed a broad interpretation on the notion «dumping». Indeed, dumping would include not only all instances of price discrimination, but also all instances of sales at a loss. Later on, GATT allowed special provisions in respect of NME countries and the Community made use of this possibility to provide dumping with a third meaning, namely by defining NME dumping as sales at prices below the prices or production costs of other countries having a ME system.

At first sight, recent economic theory has given in to those legislative developments, as it has started by defining dumping not only as price discrimination, but also as sales at a loss. However, economic theory has not withdrawn its general conclusion that only predatory dumping should be sanctioned and that sales at a loss are not necessarily predatory.

Economic theory, moreover, got further refined. In respect of price discrimination, it has pointed out that it is not necessary for the price discriminating producer to be a monopolist on his home market and that it is not necessary either for his home market to be protected against foreign competition. Instead, the difference in distance between producers and customers in the various

countries may result in (spatial) price discrimination or (second-degree) price discrimination may be caused by differences in the preferences of the customers located in the various countries. Moreover, for price discrimination to occur, it is not necessary that the export market be less competitive, as the producers established in the most competitive market may practise (spatial) price discrimination when exporting to a less competitive market. Economic theory has also shown that the quite persuasive argument of cross-subsidization between the price discriminating producer's home and export market will only seldom hold. Indeed, as economic theory has shown, predatory price discrimination will only be successful, if the predator can commit to a certain price path over an extended period of time, but such a commitment is difficult to sustain.

In respect of sales at a loss, the initial and sole wisdom was that only sales which do not cover variable costs, are not the result of short-run profit maximization. Economic theory now points out that, in the face of uncertainty, adjustment costs or economies of scale, sales at prices below variable costs too are not necessarily predatory.

In respect of NME trade, economic theory shows that price discrimination between the NME exporting country and a ME importing country, as well as sales at a loss are not applicable. NME domestic prices and production costs are not comparable with NME export prices as they are determined by different economic systems. NME domestic prices and production costs are entirely determined within the NME system, *i.e.*, by the plan which, contrary to a ME system, is not aimed at profit maximization, but at other ideological, social and economic goals. NME export prices, on the other hand, are right in between ME and NME systems and are the result of foreign currency maximization. They too, thus, differ from ME prices and production costs, which are the result of profit maximization. Therefore, unlike under European anti-dumping law, NME export prices should not be compared with ME prices and production costs : they are just not comparable. Instead, from an economic point of view, NME export prices are comparable and, therefore, in respect of NME exports, the notion of dumping should be confined to instances of NME price discrimination between various ME countries.

Economic theory also shows that predation may occur without any price discrimination or sales at a loss. Consequently, GATT and European anti-dumping law provide too broad and, at the same time, too narrow a definition of dumping. There is, however, a problem as no bright-line rules are available which make it possible to distinguish predatory dumping. Contrary to what economic theory initially presumed, there may be instances of predation. Indeed, recent economic theory, especially game theory, shows that, in the face of market imperfections and imperfect information, predatory pricing may be rational, but that it is extremely difficult to distinguish it from competitive pricing. ~~Therefore, a rule-or-reason test is suggested : all evidence available should be taken into account in order to assess whether an exporter has engaged in predation.~~ Predatory pricing should not be confined to price discrimination and sales at a loss. On the other

hand, price discrimination and sales at a loss, as well as all the bright-line rules which have been suggested, may be indicative of predatory pricing, without being decisive.

Of course, the rule-of-reason test is not as easy to apply as a bright-line rule, such as, for instance, GATT and European anti-dumping law, under which price discrimination and sales at a loss are actionable. Moreover, it grants a country's government a broad room for discretion : the government will have to decide on a case-by-case basis which factors are taken into account and which of those factors are decisive. In comparison with bright-line rules, a rule-of-reason test offers less legal certainty and, when applied to trade matters, more room for «one-way flexibility». Indeed, under the rule-of-reason test, each case must be assessed on its own merits and all factors and indications must be taken into account. Obviously, as each instance of alleged predation will be different, each investigation into alleged predation will be specific and complex and it will be difficult to draw general conclusions and to know in advance how the authorities will apply such a test to a particular case. Moreover, though free trade may usually be assumed to maximize a country's welfare, that country's government may not consider free trade to be in its own interests. Indeed, governments are faced with the demand for protection of their import-competing industries, but do not perceive such a strong demand for free trade of consumers. As a consequence, the flexibility of the rule-of-reason test, leaving a wide margin of discretion to the government, may well result in protectionism. Moreover, the more complex the rule is which regulates the conditions for providing protection against import competition, the easier it is for the government to conceal a protectionist application of it. Through such a protectionist-biased, «one-way flexible» interpretation, predation may even be found, though the pricing was not predatory at all.

This is no overstatement. Indeed, GATT and European anti-dumping law apparently contain bright-line rules as it is fairly easy to distinguish price discrimination and sales at a loss : there will be price discrimination if different prices are charged and sales will be made at a loss if prices are below production costs. Nevertheless, as will be shown in the next Chapter, GATT and European anti-dumping law offer little legal certainty and allow much «one-way flexibility». This is especially so, as there are no judicial remedies available providing a waterproof guarantee against all instances of «one-way flexibility» violating GATT or European anti-dumping law. Thus, apparently bright-line anti-dumping laws have not prevented the European anti-dumping authorities from pursuing a protectionist policy. Or, perhaps, GATT and European anti-dumping law are not that simple as they appear. But, then they show that complex rules result in little legal certainty and much «one-way flexibility». If that is the case, the complexity of the rule-of-reason test and its inherent opportunity for «one-way flexibility» are no obstacle to adopting it and to repealing legal provisions which, from an economic point of view, are not correct.

CHAPTER III

DETERMINATION OF DUMPING

1. INTRODUCTION

In Chapter I it is stated that anti-dumping law, as an instrument of procedural protectionism, is characterised by «one-way flexibility». Through «one-way flexibility» anti-dumping law may apply to cases of no-dumping. The present Chapter investigates whether GATT and European anti-dumping law are interpreted broadly to encompass cases of no-dumping.

As is being pointed out in Chapter I, anti-dumping law, as an instrument of procedural protectionism, is said to enhance legal certainty. Seemingly, it only allows anti-dumping relief under strictly specified conditions, such as the existence of dumping. However, legal certainty requires the exporters to be able to predict whether or not those conditions have been fulfilled. The present Chapter examines whether GATT and European anti-dumping law allow exporters to ascertain in advance whether or not they will be found to practise dumping.

The determination of dumping involves four stages, which will be discussed in this chapter : the determination of normal value (section 2), the determination of export price (section 3), the adjustments to normal value and export price in order to make them comparable (section 4), and the determination of the dumping margin on the basis of a comparison between normal value and export price (section 5).

2. NORMAL VALUE STANDARDS

2.1. INTRODUCTION

As dumping is found when normal value exceeds the export price, normal value may be said to be the minimum price for exports.

In the present section, normal value determination will be examined from four different angles. First, the present section examines the hierarchy among the different normal value standards and the way they have to be determined. Second, it investigates whether normal value determination is tainted by «one-way flexibility», *i.e.*, whether it is a search for a normal value as high as possible. For the higher normal value, the more probable dumping will be found. Third, the present section inquires whether normal value determination guarantees legal certainty, *i.e.*, that exporters are able to know in advance whether they are dumping. The latter requires that they must have the opportunity of knowing in advance which normal value will be used. Fourth, at the same time, the present section examines whether the products are valued in an economically justified way, *i.e.*, whether normal value is determined in the same way as market prices are under short-run profit maximization.

For normal value determination, European anti-dumping law makes a distinction between exports coming from market economy countries (hereinafter called ME countries) and non-market economy countries (hereinafter called NME countries). Section 2.2., therefore, investigates normal value determination for ME countries, together with the determination of the prices and production costs of the reference country. Section 2.3. focuses on the aspects in which normal value determination for NME countries differs from normal value determination for ME countries.

2.2. NORMAL VALUE STANDARDS FOR MARKET ECONOMY COUNTRIES

2.2.1. Hierarchy

In GATT anti-dumping law seven different normal value standards are being distinguished :

- (i) the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country (Article VI(1) GATT ; Article 2.1. GATT Anti-dumping Code) ;
- (ii) a comparable price of the like product when exported to a third country (Article VI(1) GATT ; Article 2.2. GATT Anti-dumping Code) ;
- (iii) the cost of production in the country of origin, plus a reasonable amount for administrative, selling and general costs and for profits based on actual data pertaining to production and sales on the ordinary course of trade of the like product by the exporter or producer under investigation (Article VI(1) GATT ; Articles 2.2. and 2.2.2. GATT Anti-dumping Code) ;
- (iv) the cost of production in the country of origin, plus a reasonable amount for administrative, selling and general costs and for profits, determined on the basis of the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products (Article VI(1) GATT ; Articles 2.2. and 2.2.2.(i) GATT Anti-dumping Code) ;

- (v) the cost of production in the country of origin, plus a reasonable amount for administrative, selling and general costs and for profits determined on the basis of the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin (Article VI(1) GATT ; Articles 2.2. and 2.2.2.(ii) GATT Anti-Dumping Code) ;
- (vi) the cost of production in the country of origin, plus a reasonable amount for administrative, selling and general costs and for profits determined on the basis of any other reasonable method (Article VI(1) GATT ; Articles 2.2. and 2.2.2.(iii) GATT Anti-dumping Code) ;
- (vii) a normal value determined on the basis of the facts available (Article 6.8. GATT Anti-dumping Code).

Because it was thought «desirable to lay down clear and detailed rules on the calculation of normal value» (recital in the preamble to basic EC legislation ; see also : preamble to basic ECSC Decision), the number of normal value standards has been increased in European anti-dumping law :

	EC anti-dumping law	ECSC anti-dumping law
(i)	the comparable price paid or payable to the exporter, in the ordinary course of trade for the like product, by independent customers in the exporting country (Articles 1(2) and 2(1) basic EC Regulation), hereinafter called the domestic market price	the comparable price actually paid or payable in the ordinary course of trade for the like product intended for consumption in the exporting country or the country of origin (Article 2(3)(a) basic ECSC Decision), hereinafter called the domestic market price
(ii)	the comparable price of the like product when exported to a third country (Articles 1(2) and 2(3) basic EC Regulation ; Article 2(3)(b)(i) basic ECSC Decision), hereinafter called the export price to third countries	
(iii)	the constructed value, on the basis of the production cost in the country of origin, plus a reasonable amount for selling, administrative and other general expenses and for profits based on actual data pertaining to production and sales, in the ordinary course of trade, of the like product, by the exporter or producer under investigation (Article 2(3) and (6) basic EC Regulation)	the constructed value, on the basis of the production cost in the country of origin plus a reasonable amount for selling, administrative and other general expenses and a reasonable margin of profit of the producer or exporter of the like product in the country of origin or export (Article 2(3)(b)(ii) basic ECSC Decision)

(iv)	the constructed value, on the basis of the production cost in the country of origin, plus a reasonable amount for selling, administrative and other general expenses and for profits determined on the basis of the weighted average of the actual amounts for selling, administrative and other general expenses and the weighted average actual profit margins determined for other exporters or producers subject to the anti-dumping investigation in respect of production and sales of the like product in the domestic market of the country of origin (Article 2(3) and 2(6)(i) basic EC Regulation)	the constructed value, on the basis of the production cost in the country of origin, plus a reasonable amount for selling, administrative and other general expenses and a reasonable margin of profit of other producers or exporters of the like product in the country of origin or export (Article 2(3)(b)(ii) basic ECSC Decision)
(v)	the constructed value, on the basis of the production cost in the country of origin, plus a reasonable amount for selling, administrative and other general expenses and for profits determined on the basis of the actual amounts of selling, administrative and other general expenses and the actual profit margin applicable to production and sales, in the ordinary course of trade, of the same general category of products for the exporter or producer in question in the domestic market of the country of origin (Article 2(3) and 2(6)(ii) basic EC Regulation)	the constructed value, on the basis of the production cost in the country of origin, plus a reasonable amount for selling, administrative and other general expenses and a reasonable margin of profit of the exporter in the same business sector in the country of origin or export (Article 2(3)(b)(ii) basic ECSC Decision) ²⁶⁷
(vi)	/	the constructed value, on the basis of the production cost in the country of origin, plus a reasonable amount for selling, administrative and other general expenses and a reasonable margin of profit of other producers or exporters in the same business sector in the country of origin or export (Article 2(3)(b)(ii) basic ECSC Decision)

²⁶⁷ See e.g. : *urea ammonium nitrate solution from Poland*, where the Polish exporter did not sell the dumped product on his domestic market. Therefore, his selling, administrative and general expenses, as well as his profit margin were based on his domestic sales of fertilizer, the dumped product being a fertilizer (Commission Regulation (EC) No 1506/94 of 27 June 1994 imposing provisional duties on imports of urea ammonium nitrate solution originating in Bulgaria and Poland, O.J., 30 June 1994, No L 162/16).

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| (vii) | the constructed value, on the basis of the production cost in the country of origin, plus a reasonable amount for selling, administrative and other general expenses and for profits determined on the basis of any other reasonable method (Article 2(3) and 2(6)(iii) basic EC Regulation ; Article 2(3)(b)(ii) basic ECSC Decision) ²⁶⁸ |
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268 The following have been used as reasonable basis :

- the selling, administrative and general expenses relating to sales of the like product of the producer/exporter to third countries (Council Regulation (EEC) No 3522/90 of 4 December 1990 amending Regulation (EEC) No 1768/89 with regard to the imposition of a definitive anti-dumping duty on imports of video cassettes originating in the Republic of Korea and Hong Kong, *O.J.*, 7 December 1990, No L 343/1) ;
- the selling, administrative and general expenses of the only producer having sales on the domestic market of the exporting country, though those sales are not made in the same business sector (Commission Regulation (EC) No 534/94 of 9 March 1994 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, *O.J.*, 11 March 1994, No L 68/5) ;
- the selling, administrative and general expenses in the product sector in the dumping country, which must be distinguished from the business sector as the European anti-dumping authorities held that those expenses were established on the basis of data available «since there were no domestic sales in representative quantities (of the dumped product) or of products in the same business sector» (Council Regulation (EC) No 3359/93 of 2 December 1993 imposing amended anti-dumping measures on imports of ferro-silicon originating in Russia, Kazakhstan, Ukraine, Iceland, Norway, Sweden, Venezuela and Brazil, *O.J.*, 9 December 1993, No L 302/1) ;
- the selling, administrative and general expenses, and a profit on the basis of the costs borne and profits made by the dumping producers' associated exporter in a third country (Commission Regulation (EC) No 1076/94 of 6 May 1994 imposing a provisional anti-dumping duty on imports of certain watch movements originating in Malaysia and Thailand, *O.J.*, 11 May 1994, No L 120/3) ;
- the selling, administrative and general expenses, and profit established for another dumping country, which, among the markets investigated, was considered to be the one most comparable to the dumping country in question, in particular in terms of size and level of market development in the like product sector (Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50) ;
- the weighted average profit margin realized by the exporters on their profitable sales to third countries (Commission Decision 90/138/EEC of 16 March 1990 accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of certain diesel engines originating in Finland and Sweden, and terminating the investigation, *O.J.*, 22 March 1990, No L 76/28) ;
- the profit realized on certain product types exported from the allegedly dumping country, but re-imported into this country by an independent company which incorporates them into a finished product (Commission Regulation (EEC) No 1613/90 of 13 June 1990 imposing a provisional anti-dumping duty on imports of ball bearings with a greatest external diameter not exceeding 30 mm originating in Thailand, *O.J.*, 16 June 1990, No L 152/24) ;
- «a» profit margin which was considered reasonable in view of the higher profit realized by other exporters from other countries and in view of the fact that the research and development costs incurred in the country in question were very low (Commission Regulation (EEC) No 1386/91 of 23 May 1991 imposing a provisional anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in Japan, the People's Republic of China, the Republic of Korea and Thailand, *O.J.*, 28 May 1991, No L 133/20) .
- a profit margin considered reasonable in the light of the productive investment requirements of the kind of industry involved (Commission Regulation (EEC) No 1808/92 of 30 June 1992 imposing a provisional anti-dumping duty on imports of ferro-silicon originating in Poland and Egypt, *O.J.*, 3 July 1992, No L 183/8. See also : Council Regulation (EEC) No 341/90 of 5 February 1990 accepting undertakings and imposing a definitive anti-dumping duty on imports of ferro-silicon originating in Iceland, Norway, Sweden, Venezuela or Yugoslavia, except those sold for export to the Community by companies whose undertakings have been accepted, *O.J.*, 10 February 1990, No L 38/1) ;
- a profit margin determined on the basis of factors which determine the profit rate for the world-wide business of the product, in particular the market situation in the exporting country (research and development costs, capital expenditures necessary for mass production, duration of innovation cycles, the risky nature of a cyclical business sector), as well as on the basis of the Commission's experience in the product sector concerned in previous anti-dumping proceedings (Commission Regulation (EEC) No 2686/92 of 16 September 1992 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea, *O.J.*, 17 September 1992, No L 272/13) ;
- a profit margin considered reasonable in view of «all the relevant established facts of the investigation» (Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50) ;
- a profit margin as alleged by the complainants (Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5).

(viii)	the comparable price for the like product of other sellers or producers (Articles 1(2) and 2(1)(a) basic EC Regulation)	the prices or costs of other sellers or producers, and especially of the exporter's supplier, in the country of origin in the same manner as mentioned in (i) until (vii) (Article 2(3)(c) basic ECSC Decision)
(ix)	/	basic prices, if the above mentioned normal value standards do not produce a significantly different result (Article 2(6)(b) basic ECSC Decision)
(x)	when necessary, exact and reliable information is not available, the normal value on the basis of the facts available (Article 18 basic EC Regulation ; Article 7(7)(b) basic ECSC Decision)	

No full hierarchy exists between the various normal value standards. In principle, the domestic market price must be used as normal value standard under GATT and European anti-dumping law (Article VI(1) GATT ; Article 2.1. GATT Anti-dumping Code ; Article 2(1) basic EC Regulation ; Article 2(3)(a) basic ECSC Decision). If there are no comparable sales in the ordinary course of trade, either the export price to third countries or the constructed value must be used (Article VI(1) GATT ; Article 2.2. GATT Anti-dumping Code ; Article 2(3) basic EC Regulation ; Article 2(3)(b)(ii) basic ECSC Decision)²⁶⁹ as there is no hierarchy between the

The actual expenses incurred upon exportation to the Community and a reasonable export profit margin have also been suggested. The starting point of this is the idea that the constructed value may and should be the reasonable value of the exported products, instead of being a surrogate of the domestic market price, when there are no sales at all (not even uncomparable sales or sales not being made in the ordinary course of trade) on the domestic market of the country of origin or the exporting country (C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, E.C.R., 1991, I, (2069), 2139-2145 (opinion of Advocate General LENZ)). This starting point, however, cannot be accepted (*infra*, 159-161). Nevertheless, the suggestion is useful: although the constructed value is a surrogate for the domestic market price, there may be circumstances in which the export expenses and profits may constitute a reasonable basis for constructing normal value.

²⁶⁹ C.J.E.C., joined cases 277 and 300/85, 5 October 1988, *Canon Inc. a.o. v Council*, E.C.R., 1988, (5731), 5799 ; C.J.E.C., case C-105/90, 13 February 1992, *Goldstar Co. Ltd v Council*, E.C.R., 1992, I, (677), 720 ; C.J.E.C., case C-171/87, 10 March 1992, *Canon Inc. v Council*, E.C.R., 1992, I, (1237), 1287 ; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, E.C.R., 1992, I, (1409), 1472 ; C.J.E.C., case C-179/87, 10 March 1992, *Sharp Corporation v Council*, E.C.R., 1992, I, (1635), 1674 ; Council Regulation (EEC) No 738/92 of 23 March 1992 imposing a definitive anti-dumping duty on imports of cotton yarn originating in Brazil and Turkey, O.J., 27 March 1992, No L 82/1.

Contrary to the clear wording of GATT and European anti-dumping law, the European anti-dumping authorities seemingly think that there is no legally binding hierarchy between, on the one hand, the domestic market price and, on the other, the constructed value and the export price to third countries :

- as to the suggestion to use the export price to third countries, the Council, however, has replied that it is «preferable» (sic) to use the domestic market price when even possible (Council Regulation (EEC) No 117/91 of 16 January 1991 imposing a definitive anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, O.J., 19 January 1991, No L 14/1) ;
- for the sake of easy administrability and in order not to delay the investigation unduly unduly, the Commission has used the constructed value, although there were comparable sales in to ordinary course of trade (Commission Regulation (EEC) No 550/93 of 5 March 1993 imposing a provisional anti-dumping duty on imports of bicycles originating in the People's Republic of China, O.J., 11 March 1993, No L 58/12 ; Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, O.J., 1 October 1994, No L 255/50).

export price to third countries and the constructed value²⁷⁰. Under GATT and EC anti-dumping law, there is no hierarchy either between the different constructed values which are not determined on the basis of the actual selling, general and administrative expenses and profits of the exporter or producer under investigation (Article VI(1) GATT ; Articles 2.2. and 2.2.2. GATT Anti-dumping Code ; Article 2(3) and (6) basic EC Regulation) ; under ECSC anti-dumping law, though, there is a strict hierarchy among the different constructed values (Article 2(3)(b)(ii) basic ECSC Decision)²⁷¹. Moreover, under ECSC anti-dumping law, basic prices may be used instead of one of the above mentioned normal value standards, if they do not produce a significantly different result (Article 2(6)(b) basic ECSC Decision). Furthermore, normal value may be determined on the basis of the best facts available, if the producer/exporter does not cooperate or acts in bad faith so that the information available does not enable the European anti-dumping authorities to establish normal value on one of the bases mentioned in European anti-

270 According to the GATT Group of Experts, a hierarchy between the export price and the constructed value cannot be imposed. Although usually the export price can be determined more readily, they hold it may sometimes be preferable to use the constructed value. In their view, the use of the export price may result in errors, because it is normal and reasonable that different prices are used in different markets (*B.I.S.D.*, Eight Supplement, Geneva, GATT, 1960, 147-148. See also : GATT Panel on Complaints, February 26, 1954, *Swedish anti-dumping duties*, *B.I.S.D.*, Third Supplement, Geneva, GATT, 1955, 89, consideration 28. See also : C.J.E.C., joined cases 277 and 300/85, 5 October 1988, *Canon Inc. a.o. v Council*, *E.C.R.*, 1988, (5731), 5800 ; C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, *E.C.R.*, 1991, I, (2069), 2139 (Opinion of Advocate General LENZ) ; BELLIS, J.-F., «La réglementation anti-dumping de la Communauté Economique Européenne», *Cahiers de Droit Européen*, 1979, (495), 505 ; BESELER, J.-F., «EEC Protection against Dumping and Subsidies from Third Countries», *Common Market Law Review*, 1968-1969, (327), 333 ; BOUDANT, J., *L'anti-dumping communautaire*, Paris, Economica, 1991, 80 ; BRIET, L.A.E., «Antidumping in de EEG - De kinderschoenen ontgroeid ?», *S.E.W.*, 1982, (145), 149 ; LANDSITTEL, R., *Dumping in Außerhandels- und Wettbewerksrecht*, Baden-Baden, Nomos, 1987, 23 ; LESGUILLONS, H., «Le régime anti-dumping de la Communauté européenne», *Droit et pratique du commerce international*, 1978, (459), 466 ; LESGUILLONS, H., *Le régime communautaire de protection contre le dumping et les subventions*, Paris, F.E.D.U.C.I., 1983, 46 ; STANBROOK, C., *Dumping. A Manual of the EEC Anti-Dumping Law and Procedure*, Chequers, European Business Publications, 1980, 20-21 ; VAN BAEI, I., «The E.E.C. Antidumping Rules - A Practical Approach», *International Lawyer*, 1978, 525 ; VERMULST, E.A., «Dumping in the United States and the European Community : A Comparative Analysis», *Legal Issues of European Integration*, 1984/2, (103), 107 ; VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 419-422).

271 C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, *E.C.R.*, 1991, I, (2069), 2139 (Opinion of Advocate General LENZ), 2175 and 2186 ; C.J.E.C., case C-105/90, 13 February 1992, *Goldstar Co. Ltd v Council*, *E.C.R.*, 1992, I, (677), 725.

For an application, see : Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 24 November 1988, No L 317/33 ; Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27) ; Council Regulation (EEC) No 112/90 of 16 January 1990 imposing a definitive anti-dumping duty on imports of certain compact disc players originating in Japan and the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 17 January 1990, No L 13/21 ; Commission Regulation (EEC) No 2064/90 of 17 July 1990 imposing a provisional anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 20 July 1990, No L 188/10 (corrigendum, *O.J.*, 21 November 1990, No L 321/19) ; Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7 ; Council Regulation (EEC) No 3017/92 of 19 October 1992 modifying the anti-dumping duties following the review of the anti-dumping measures applicable to imports of synthetic polyester fibres originating in Romania, Taiwan, Turkey and the Republics of Serbia and of Montenegro and the former Yugoslav Republic of Macedonia and terminating the said review in respect of imports of synthetic polyester fibres originating in Mexico and the United States of America, *O.J.*, 22 October 1992, No L 306/1 (corrigendum, *O.J.*, 6 February 1993, No L 30/68).

dumping law (Article 6.8. GATT Anti-dumping Code ; Article 18 basic EC Regulation ; Article 7(7)(b) basic ECSC Decision)²⁷².

ECSC anti-dumping law, moreover, states that, in the case of sales at a loss which may be considered as not having been made in the ordinary course of trade, normal value may be determined on the basis of :

- (i) the comparable price actually paid or payable for the remaining sales which have been made in the ordinary course of trade for the like product intended for consumption in the exporting country or the country of origin ;
- (ii) the comparable price of the like product when exported to third countries ;
- (iii) the constructed value ;
- (iv) the adjusted sub-production-cost price in order to eliminate loss and provide for a reasonable profit (Article 2(4) basic ECSC Decision).

Under GATT anti-dumping law, the domestic market price must always be used, unless there are no sales in the ordinary course of trade. As it does not impose any hierarchy between those various normal value standards²⁷³, which are in fact identical to either the domestic market price, the constructed value or the export price to third countries²⁷⁴, European anti-dumping law violates GATT anti-dumping law because it allows the use of the constructed value and the export price to third countries in cases where the (remaining) sales have been made in the ordinary course of trade and where, accordingly, the domestic market price should be used.

²⁷² C.J.E.C., case 53/83, 23 May 1985, *Allied Corporation a.o. v Council*, E.C.R., 1985, (1621), 1658 ; VAN BAEL, I., and BELLIS, J.-F., *Anti-Dumping and other Trade Protection Laws of the EEC*, Bicester, CCH Editions, 1990, 42.
For an application, see : Council Regulation (EEC) No 993/93 of 26 April 1993 imposing a definitive anti-dumping duty on imports of certain electronic weighing scales originating in Japan, O.J., 29 April 1993, No L 104/4.

²⁷³ KRETSCHMER, H., *Das Antidumping- und Antisubventionsrecht der Europäischen Gemeinschaften*, Frankfurt/Main, VWV-Verlag, 1980, 31.

²⁷⁴ In respect of sales at a loss, European anti-dumping law seems to introduce two additional, alternative normal value standards, i.e., the comparable price actually paid or payable for the remaining sales which have been made in the ordinary course of trade for the like product intended for consumption in the exporting country or the country of origin, and the adjusted sub-production-cost price in order to eliminate loss and provide for a reasonable profit

The first normal value standard is an application the domestic market price. Indeed, the price of the remaining sales which are not made at a loss, may be used as normal value standard only if these sales have been made in the ordinary course of trade (VAN BAEL, I., and BELLIS, J.-F., *Anti-Dumping and other Trade Protection Laws of the EEC*, Bicester, CCH Editions, 1990, 63).

The second normal value standard coincides with the constructed value for it equals the costs of production plus a reasonable amount for overheads and profits. Indeed, like the constructed value, the adjusted sub-production-cost price must cover all production costs, including general expenses, and provide a reasonable profit. Otherwise it would not eliminate loss and provide a reasonable profit (Commission Decision 82/881/EEC of 23 December 1982 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of perchlorethylene originating in Czechoslovakia, Romania, Spain and the United States of America and terminating that proceeding, O.J., 30 December 1982, No L 371/47, where the «constructed value» was obtained by adjusting the sub-production-cost price with an amount corresponding to the losses made. See also : Commission Regulation (EEC) No 1337/81 of 18 May 1981 imposing a provisional anti-dumping duty on imports of certain textured polyester fabrics originating in the United States of America, O.J., 20 May 1981, No L 133/17 ; BRIET, L.A.E., «Antidumping in de EEG - De kinderschoenen ontgroeid ?», S.E.W., 1982, (145), 161, note 23 ; VAN BAEL, I., and BELLIS, J.-F., *International Trade Law and Practice of the European Community. EEC Anti-Dumping and other Trade Protection Laws*, Bicester, CCH Editions, 1985, 64).

Compared with GATT anti-dumping law, European anti-dumping law has not enhanced legal certainty substantially, although it has increased the number of normal value standards²⁷⁵. The producers/exporters are unable to know in advance which normal value standard will be used. First, it does not impose a stricter hierarchy between the different normal value standards. By imposing any hierarchy between the normal value standards in case of sales at a loss, ECSC anti-dumping law, moreover, looses the GATT hierarchy which grants the domestic market price the strict priority. Second, the hierarchy under ECSC anti-dumping law between the various general expenses and profit margins to be used for determining the constructed value depends on the availability of reliable and suitable data. ECSC anti-dumping law, though, does not provide when data are reliable and suitable. As to the Court of Justice, the requirement of reliable and suitable data, in essence, refers to reasonableness : data are not reliable or suitable when their being taken into consideration would not be reasonable²⁷⁶. This interpretation, however, does not make things much clearer. In the view of the Court of Justice, this requirement of reasonableness grants a broad room for discretion to the European antidumping authorities²⁷⁷.

European anti-dumping case law does not shed much more light on the way the European anti-dumping authorities implement their discretionary power. Only in respect of the choice between the constructed value and the export price to third countries, it reveals a general preference for the constructed value²⁷⁸ - a general preference which the European anti-dumping authorities can easily deviate from without violating GATT and European anti-dumping law.

Legal certainty is further reduced because European anti-dumping authorities do not hesitate to violate GATT and European anti-dumping law. Such violation results from their general

²⁷⁵ *Contra* : C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, E.C.R., 1991, I, (2069), 2096 (Report for the Hearing : conclusions of the Council).

The Court of Justice seems not to be fully convinced as it has held that present European anti-dumping law, by increasing the number of normal value standards, is «likely to increase legal certainty» (C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, E.C.R., 1991, I, (2069), 2184).

²⁷⁶ C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, E.C.R., 1991, I, (2069), 2179-2180. See also : BOUDANT, J., *L'anti-dumping communautaire*, Paris, Economica, 1991, 83 ; WAER, P., «Constructed Normal Values in EC Dumping Margin Calculations. Fiction, or a Realistic Approach», *Journal of World Trade*, 1993/3, (47), 49-50.

²⁷⁷ C.J.E.C., joined cases 260/85 and 106/86, 5 October 1988, *Tokyo Electric Company Ltd (TEC) a.o. v Council*, E.C.R., 1988, (5855), 5888 and 5898 (Opinion of Advocate General Sir Gordon SLYNN) and 5920.

Under former European anti-dumping law, as well as under present GATT anti-dumping law, European anti-dumping authorities were granted full discretion, by the provision that general expenses and profit margins must be calculated on «a reasonable basis» (C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, E.C.R., 1991, I, (2069), 2175 and 2177). Under present European anti-dumping law, the discretion has been limited, but still remains broad. Indeed, according to the Court of Justice, present European anti-dumping law «does not differ substantially from the earlier method» of determining general expenses and profit margins, but is a mere clarification of former anti-dumping law and «is for that reason likely to increase legal certainty» (C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, E.C.R., 1991, I, (2069), 2175-2177 and 2184) (emphasis added). See also : C.J.E.C., case C-105/90, 13 February 1992, *Goldstar Co. Ltd v Council*, E.C.R., 1992, I, (677), 724.

²⁷⁸ *Infra*, 155-159.

preference for the domestic market price, which is so marked that it results in a breach of the hierarchy of normal value standards. Indeed, if the domestic market price of the producer/exporter of the like product cannot be determined, the domestic market price of the producer/exporter of similar products will sometimes used²⁷⁹. However, under GATT and European anti-dumping law, the domestic market price must be the price of the like product (Article VI(1) GATT ; Article 2.1. GATT Anti-dumping Code ; Article 1(2) basic EC Regulation ; Article 2(3)(a) basic ECSC Decision). The domestic market price of similar products may be used only as best information available when no other normal value standard (*i.e.*, domestic market price (of the like product), constructed value, export price to third countries, and prices and costs of other producers/exporters) is available and when the producer/exporter does not cooperate in good faith (Article 6.8. GATT Anti-dumping Code ; Article 18 basic EC Regulation ; Article 7(7)(b) basic ECSC Decision). European anti-dumping case law did not

²⁷⁹ Commission Regulation (EEC) No 1633/82 of 23 June 1982 imposing a provisional anti-dumping duty on imports of fibre building board (hardboard) originating in Romania, repealing Commission Decision No 80/564/EEC of 4 June 1980 and accepting undertakings in connection with the proceeding in respect of imports of fibre building board from Czechoslovakia, Finland, Hungary, Norway, Poland, Spain, Sweden and the Soviet Union and terminating the proceeding with regard to those countries and Bulgaria, *O.J.*, 25 June 1982, No L 181/19 ; Commission Decision 82/397/EEC of 14 June 1982 accepting undertakings in connection with the anti-dumping procedure concerning imports of certain polypropylene film for capacitors originating in Japan and terminating that procedure, *O.J.*, 18 June 1982, No L 172/44 ; Commission Decision 84/259/EEC of 10 May 1984 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain sensitized paper for colour photographs originating in Japan and terminating that proceeding, *O.J.*, 11 May 1984, No L 124/45 ; Commission Regulation (EEC) No 3669/84 of 21 December 1984 imposing a provisional anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan, *O.J.*, 28 December 1984, No L 340/37 ; Council Regulation (EEC) No 1739/85 of 24 June 1985 imposing a definitive anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan, *O.J.*, 27 June 1985, No L 167/3 ; Commission Decision 86/36/EEC of 26 February 1986 accepting undertakings entered into in connection with the anti-dumping proceeding concerning imports into Greece of certain categories of glass originating in Turkey, Yugoslavia, Romania, Bulgaria, Hungary and Czechoslovakia and terminating the investigation, *O.J.*, 28 February 1986, No L 51/73 ; Commission Regulation (EEC) No 1361/87 of 18 May 1987 imposing a provisional anti-dumping duty on imports of ferro-silico-calcium/calcium silicide originating in Brazil, *O.J.*, 19 May 1987, No L 129/5 ; Commission Regulation (EEC) No 1695/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of polyester yarn originating in Mexico, South Korea, Taiwan and Turkey, *O.J.*, 17 June 1988, No L 151/39 (corrigendum, *O.J.*, 18 June 1988, No L 152/58) ; Commission Regulation (EEC) No 1696/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 June 1988, No L 151/47 ; Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 24 November 1988, No L 317/33 ; Council Regulation (EEC) No 3905/88 of 12 December 1988 imposing a definitive anti-dumping duty on imports of polyester yarn originating in Mexico, South Korea, Taiwan and Turkey, *O.J.*, 16 December 1988, No L 347/10 ; Council Regulation (EEC) No 3946/88 of 16 December 1988 imposing a definitive anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 December 1988, No L 348/49 ; Council Regulation (EEC) No 501/89 of 27 February 1989 imposing a definitive anti-dumping duty on imports of certain video cassette recorders originating in Japan and the Republic of Korea and definitively collecting the provisional duty, *O.J.*, 28 February 1989, No L 57/55. See also : *ball bearings originating in Japan and Singapore*, where the exporter did not sell on his domestic market a type identical to the type exported to the Community. The European anti-dumping authorities' intention to determine normal value on the basis of the domestic market price of the most similar type proved to be impossible because the differences in the production costs of the various types were not adequately reflected in the sales prices. Instead, normal value was determined on the basis of the constructed value (Council Regulation (EEC) No 3528/87 of 23 November 1987 amending Regulation (EEC) No 2089/84 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 26 November 1987, No L 336/1).

represent the domestic market price of similar products as the best information available, but only noted that the domestic market price of the like product could not be used²⁸⁰.

European anti-dumping law only clarifies GATT anti-dumping law in that it defines that, in principle, the domestic market price should be the price of the producer/exporter under investigation. Indeed, GATT anti-dumping law does not treat of this matter. EC anti-dumping law, on the other hand, stipulates that, where the producer/exporter does not produce or does not sell the like product, the normal value may be established on the basis of prices of other sellers or producers (Article 2(1)(a) basic EC Regulation). ECSC anti-dumping law allows the use of the prices or costs of other sellers or producers, and especially the producer/exporter's supplier when the producer/exporter neither produces nor sells the product in the country of origin (Article 2(3)(c) basic ECSC Decision)²⁸¹. The difference between EC and ECSC anti-dumping law consists in the fact that ECSC anti-dumping law also allows the use of the production costs of other sellers or producers, whereas EC anti-dumping law, like GATT anti-dumping law, does not clarify whose production costs must be taken into account for constructing normal value (Article 2.2. GATT Anti-dumping Code ; Article 2(3) basic EC Regulation). With regard to the place of the prices and costs of other sellers and producers, European anti-dumping law is rather obscure. The European anti-dumping authorities do not view the price of other producers/exporters as being a separate normal value standard, but they consider it to fall under the notion of «domestic

280 Even in cases where normal value is explicitly said to be based on the facts available, it is sometimes not inquired whether the domestic market price (of the like product), the export price to third countries, the constructed value, and the prices and costs of other producers/exporters are all unavailable nor any reference made to producers/exporters not cooperating or acting in bad faith :
 - only the absence of domestic sales was underscored in : Commission Regulation (EEC) No 1321/81 of 15 May 1981 amending Regulation (EEC) No 384/81 imposing a provisional anti-dumping duty on styrene monomer originating in the United States of America, *O.J.*, 19 May 1981, No L 132/17 ; Commission Regulation (EEC) No 2017/81 of 15 July 1981 imposing a provisional anti-dumping duty on phenol originating in the United States of America, *O.J.*, 18 July 1981, No L 195/22 ; Council Regulation (EEC) No 90/82 of 18 January 1982 imposing a definitive anti-dumping duty on phenol originating in the United States of America, *O.J.*, 18 January 1982, No L 12/1 ; Council Regulation (EEC) No 407/83 of 21 February 1983 amending Regulation (EEC) No 3439/80 imposing a definitive anti-dumping duty on imports of certain polyester yarn originating in the United States of America, *O.J.*, 23 February 1983, No L 50/1 ; Council Decision 83/162/EEC of 18 April 1983 terminating the anti-dumping proceeding in respect of imports of acrylonitrile originating in the United States of America, *O.J.*, 20 April 1983, No L 101/29 ; Commission Regulation (EEC) No 2823/85 of 7 October 1985 imposing a provisional anti-dumping duty on imports of certain clogs originating in Sweden, *O.J.*, 10 October 1985, No L 268/11 ; Council Regulation (EEC) No 264/86 of 4 February 1986 imposing a definitive anti-dumping duty on imports of certain clogs originating in Sweden and definitively collecting the provisional anti-dumping duty, *O.J.*, 7 February 1986, No L 32/1 ;
 - only the absence of domestic sales together with the absence of domestic production was underscored in : Council Regulation (EEC) No 101/83 of 17 January 1983 imposing a definitive anti-dumping duty on certain chemical fertilizer originating in the United States of America, *O.J.*, 19 January 1983, No L 15/1 ;
 - only the absence of domestic sales together with the absence of comparable export prices to third countries was underscored in : Commission Regulation (EEC) No 1591/81 of 10 June 1981 imposing a provisional anti-dumping duty on paraxylene (p-xylene) originating in Puerto Rico, the United States of America and the US Virgin Islands, *O.J.*, 16 June 1981, No L 158/7.
 Evidently, these cases also violate GATT and European anti-dumping law.

281 For an application in this respect, see : Commission Regulation (EEC) No 547/90 of 2 March 1990 imposing a provisional anti-dumping duty on imports of certain glutamic acid and its salts originating in Indonesia, the Republic of Korea, Taiwan and Thailand, and accepting undertakings in connection with imports of certain glutamic acid and its salts originating in these countries, *O.J.*, 3 March 1990, No L 56/23 ; Commission Regulation (EEC) No 2064/90 of 17 July 1990 imposing a provisional anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 20 July 1990, No L 188/10 (corrigendum, *O.J.*, 21 November 1990, No L 321/19) ; Council Regulation (EEC) No 117/91 of 16 January 1991 imposing a definitive anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 19 January 1991, No L 14/1.

market price» (*i.e.*, as an application of Article 2(1) basic EC Regulation ; Article 2(3)(a) basic ECSC Decision)²⁸². With regard to EC anti-dumping law, this interpretation may seem to be correct. Indeed, the possibility of using the prices of other sellers or producers is treated in the provision concerning the domestic market price (Article 2(1) basic EC Regulation). However, the condition upon which the prices of other sellers or producers may be used, is that «the exporter (under investigation) *does not produce* or does not sell the like product» (emphasis added). The wording «does not produce» may refer to the impossibility of using the constructed value as normal value standard. Indeed, if the producer/exporter does not produce, it will be impossible to calculate his production costs (there no production costs) and, thus, to determine his constructed value (unless the production costs of other producers are used). Consequently, it may be argued that the price of other sellers or producers may only be used if it is impossible to determine the constructed value on the basis of the production costs of the producer/exporter under investigation. This line of reasoning seems to be even more correct with regard to ECSC anti-dumping law, which treats of not only of the prices, but also of the costs of other sellers and producers in a separate legal provision (Article 2(3)(c) basic ECSC Decision) which follows the legal provisions on the domestic market price (Article 2(3)(a) basic ECSC Decision) and the constructed value (Article 2(3)(b)(ii) basic ECSC Decision).

Another question with regard to the place of the prices and costs of other sellers or producers in the hierarchy of normal value standards, is whether they may be used though the export price to a third country is also available as normal value standard. The answer is offered by the European anti-dumping authorities, according to whom the prices and costs of other sellers or producers may also be used when the producer/exporter does not sell or produce in the ordinary course of trade²⁸³. This interpretation appears to be legal : as European anti-dumping law prohibits the use of the domestic market price in such cases and requires the constructed value to be calculated on the basis of production costs in the ordinary course of trade, the absence of sales or production in the ordinary course of trade is legally the same as the absence of sales and production. However, as the absence of sales and the absence of sales in the ordinary course of trade are legally the same, not only the prices and costs of other sellers or producers, but also the export price to third countries of the producer/exporter may be used as normal value standard, when the producer/exporter does not sell or produce in his domestic market. Indeed, European anti-dumping law allows the use of the prices and, under ECSC anti-dumping law, of the costs of other sellers and producers when there are no sales nor production of the producer/exporter «in the country of origin» (Article 2(1)(a) basic EC Regulation ; Article 2(3)(c) basic ECSC Decision). If

²⁸² Council Regulation (EEC) No 117/91 of 16 January 1991 imposing a definitive anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 19 January 1991, No L 14/1.

²⁸³ Commission Decision 90/421/EEC of 6 August 1990 terminating the anti-dumping proceeding concerning imports of denim fabric originating in Turkey, Indonesia, Hong Kong and Macao, *O.J.*, 17 August 1990, No L 222/50.

there are no such sales, obviously, the exporter/producer cannot have sold in the ordinary course of trade. But this is the very condition allowing the use of the export price to third countries of the producer/exporter involved (Article 2(3) basic EC Regulation ; Article 2(3)(b)(i) basic ECSC Decision). Accordingly, when a producer/exporter does not sell or produce in the country of origin, but exports to third countries, European anti-dumping authorities may freely choose between either the export price to third countries of the producer/exporter involved or the prices or costs of other sellers or producers.

The use of the prices, production costs, including general expenses, and profit margins of other producers/exporters, whether or not in conformity with the hierarchy set up by European anti-dumping law, implies the rejection of the idea of «knowledge of dumping», *i.e.*, it is not required that the producer/exporter has decided to dump, or, at least, should have the opportunity of knowing in advance whether he will be found to dump²⁸⁴. This rejection results in some degree of uncertainty for the producer/exporter and disregards comparative advantages. First, the producer/exporter cannot know whose data will be used, especially because the European anti-dumping authorities consider this information to be confidential²⁸⁵. Second, he usually has no knowledge as to the prices, costs and profits of the other producers/exporters²⁸⁶. Third, comparative advantages, if any, and possible specificity of the producer/exporter are not taken

²⁸⁴ See in this respect the opinion of Advocate-General Sir GORDON SLYNN according to whom it is not «wholly accurate» that «an exporter could never know how to set (his) prices so as to avoid dumping and would find it impossible to take steps so as to avoid dumping». For he states that «(t)here will necessarily come a point at which the exporter is made aware that a finding of dumping is possible, and he can then offer to raise his prices so as to eliminate the dumping : Article 10 of the Basic Regulation. If he is too late to come within the time specified in Article 10 (1), he may still raise his prices voluntarily and request a review of the anti-dumping regulation under Article 14 of the Basic Regulation» (C.J.E.C., joined cases 260/85 and 106/86, 5 October 1988, *Tokyo Electric Company Ltd (TEC) a.o. v Council, E.C.R.*, 1988, (5855), 5890). His opinion, however, cannot be accepted. Advocate-General Sir GORDON SLYNN ignores that the European anti-dumping authorities are not obliged to accept undertakings, even if the undertakings offered are sufficient to stop the dumping. Thus, a producer/exporter who is willing to stop dumping, can be subjected to an anti-dumping duty. The producer/exporter can request the review of anti-dumping duties if he actually stops dumping. However, he can request a review only a full year after the imposition of the anti-dumping duty (Article 11(3) basic EC Regulation ; Article 14(1) basic ECSC Decision). Thus, he will be subjected to the anti-dumping duty during at least one year. Advocate-General Sir GORDON SLYNN also ignores the costs which an anti-dumping proceeding involves for the allegedly dumping exporter (*e.g.*, costs for legal representation). Nor does he take account of the chilling effect of the initiation of an anti-dumping proceeding on imports in cases where the anti-dumping proceeding results in a finding of no-dumping (MESSERLIN, P., «The EC Antidumping Regulations : A First Economic Appraisal, 1980-85», *Weltwirtschaftliches Archiv*, 1989, (563), 572).

²⁸⁵ BELLIS, J.-F., VERMULST, E.A., and WAER, P., «Further Changes in the EEC Anti-Dumping Regulation : A Codification of Controversial Methodologies», *Journal of World Trade*, 1989, (21), 26 ; VERMULST, E.A., and HOOIJER, J.J., «Annotation on Case C-69/89, *Nakajima All Precision Co. v. Council*, Judgment of 7 May 1991, not yet reported ; Case C-358/89, *Extramet v. Council*, Judgment of 16 May 1991, not yet reported ; Case C-49/88, *Al-Jubail Fertilizer Company (Samad) and Saudi Arabian Fertilizer Company (Safco) v. Council*, Judgment of 17 June 1991, not yet reported ; Case C-16/90, *Detlef Nölle v. Hauptzollamt Bremen-Freihafen*, Judgment of 22 October 1991, not yet reported», *Common Market Law Review*, 1992, (380), 392-393 ; VERMULST, E.A., and WAER, P., «De nieuwe EEG Anti-dumping Verordening 2423/88 : Een stille revolutie», *S.E.W.*, 1989, (151), 152-153. See also : C.J.E.C., joined cases 260/85 and 106/86, 5 October 1988, *Tokyo Electric Company Ltd (TEC) a.o. v Council, E.C.R.*, 1988, (5855), 5917, where the Court of Justice found the unpredictability of European anti-dumping law unavoidable.

²⁸⁶ VERMULST, E.A., and HOOIJER, J.J., «Annotation on Case C-69/89, *Nakajima All Precision Co. v. Council*, Judgment of 7 May 1991, not yet reported ; Case C-358/89, *Extramet v. Council*, Judgment of 16 May 1991, not yet reported ; Case C-49/88, *Al-Jubail Fertilizer Company (Samad) and Saudi Arabian Fertilizer Company (Safco) v. Council*, Judgment of 17 June 1991, not yet reported ; Case C-16/90, *Detlef Nölle v. Hauptzollamt Bremen-Freihafen*, Judgment of 22 October 1991, not yet reported», *Common Market Law Review*, 1992, (380), 392 ; WAER, P., «Constructed Normal Values in EC Dumping Margin Calculations. Fiction, or a Realistic Approach», *Journal of World Trade*, 1993/3, (47), 60.

into account, so that he may be found to practise dumping merely because he is more efficient or admits lower profits²⁸⁷. In the opinion of the Court of Justice, the use of data relating to the individual producer/exporter is the approach most suited to ensure that the normal value corresponds as closely as possible to the individual producer/exporter's own specific characteristics²⁸⁸. According to a strict interpretation, the use of the prices, costs and profits of other producers/exporters is, nevertheless, not contrary to GATT anti-dumping law. For GATT anti-dumping law does not specify whose prices, costs and profits must be taken into account²⁸⁹. As GATT anti-dumping law does not impose the use of the prices, costs and profits of other producers/exporters either, the use of these prices, costs and profits might be prohibited. Their use should even be banned if it is true that the underlying rationale of GATT anti-dumping law requires an investigation of individual producers/exporters and, thus, ensures that a finding of dumping regarding one producer/exporter does not affect another producer/exporter who does not engage in dumping practices²⁹⁰. At least, the hierarchy of normal value standards imposed by European anti-dumping law should be modified and, of course, strictly observed. In particular, there should be a hierarchy between the export price of the producer/exporter to third countries and the prices, costs and profits of other producers/exporters. Thus, the use of the constructed value determined on the basis of the general expenses and profit of other producers/exporters and the domestic market prices, the export prices to third countries and the constructed value determined on the basis of the production costs, including general expenses and a profit margin, of other producers/exporters should only be allowed if the export price of the producer/exporter involved to third countries cannot be used.

²⁸⁷ WAER, P., «Constructed Normal Values in EC Dumping Margin Calculations. Fiction, or a Realistic Approach», *Journal of World Trade*, 1993/3, (47), 60.

Advocate General MISCHO qualifies the use of costs and profits of other exporters as reasonable, though he admits that their use benefits exporters whose costs and profits are higher, but disadvantages exporters whose costs and profits are lower (C.J.E.C., case C-172/87, 10 March 1992, *Mita Industrial Co. Ltd v Council*, E.C.R., 1992, I, (1301), 1321-1322 (Opinion of Advocate General MISCHO)).

²⁸⁸ C.J.E.C., case C-105/90, 13 February 1992, *Goldstar Co. Ltd v Council*, E.C.R., 1992, I, (677), 725 and 728. This statement of the Court of Justice relates only to the costs and profits used for calculating the constructed value. Evidently, it also applies to all other data used for determining the normal value.

²⁸⁹ In respect of the costs and profits, see : C.J.E.C., case C-105/90, 13 February 1992, *Goldstar Co. Ltd v Council*, E.C.R., 1992, I, (677), 707 (Opinion of Advocate General VAN GERVEN) and 724. Only within the framework of the GATT Committee on Anti-dumping Practices, some members have expressed their concern about the practice of using the domestic market price of the allegedly dumping producer/exporter's competitors as normal value standard (B.I.S.D., Twenty-first Supplement, Geneva, GATT, 1975, 32-33).

²⁹⁰ About the underlying rationale of GATT anti-dumping law, see : C.J.E.C., case C-105/90, 13 February 1992, *Goldstar Co. Ltd v Council*, E.C.R., 1992, I, (677), 691 (Report for the Hearing : conclusions of the Council) and 707 (Opinion of Advocate General VAN GERVEN).

2.2.2. Which country's domestic market ?

2.2.2.1. Country of origin v exporting country

The exporting country does not always coincide with the country of origin. Products can be re-exported. The choice between the country of origin and the exporting country for determining normal value may be important. Domestic market prices and production costs may, indeed, differ between those two countries. Moreover, the scope of anti-dumping cases will also be affected. Indeed, if the country of origin is used as a reference, the anti-dumping case will cover all products originating in that country, regardless of the country of export²⁹¹. If the exporting country is used as a reference, the anti-dumping case will cover all the products exported from that country, regardless of their origin. Moreover, the country of origin and the exporting

²⁹¹ Commission Regulation (EEC) No 720/90 of 22 March 1990 imposing a provisional anti-dumping duty on imports of silicon metal originating in the People's Republic of China, *O.J.*, 27 March 1990, No L 80/9.

The scope of the provisional anti-dumping duties imposed on imports of *hematite graphite spheroidal pig iron from Brazil, steel plates and iron plates from Spain and steel angles, shapes and sections from Spain* was defined by the origin of the dumped products (Commission Recommendation No 267/79/ECSC of 9 February 1979 imposing a provisional anti-dumping duty on certain angles, shapes and U, I or H sections of iron or steel, not further worked than hot-rolled or extruded, originating in Spain, *O.J.*, 13 February 1979, No L 37/21; Commission Recommendation No 294/79/ECSC of 13 February 1979 imposing a provisional anti-dumping duty on certain hematite pig iron originating in Brazil, *O.J.*, 16 February 1979, No L 41/29; Commission Recommendation No 433/79/ECSC of 27 February 1979 imposing a provisional anti-dumping duty on certain sheets and plates of iron or steel originating in Spain and repealing certain suspended anti-dumping duties, *O.J.*, 3 March 1979, No L 53/21). Thus, they should apply to all imports originating in the dumping countries, including the imports exported from other countries. In regard to the imports originating in and exported from the dumping countries, the provisional anti-dumping duties were withdrawn because the Community had reached an agreement with the Government of the dumping countries (Commission Recommendation No 720/79/ECSC of 9 April 1979 providing for the termination of the application of the provisional anti-dumping duty established in relation to imports of certain hematite pig iron originating in Brazil, *O.J.*, 11 April 1979, No L 92/10; Commission Recommendation No 787/79/ECSC of 20 April 1979 providing for the termination of the provisional anti-dumping duties established in relation to imports of certain steel products originating in Spain, *O.J.*, 21 April 1979, No L 99/31). As to the imports originating in the dumping countries, but exported from other countries, on the other hand, definitive anti-dumping duties were imposed (Commission Recommendation No 935/79/ECSC of 8 May 1979 imposing a definitive anti-dumping duty on certain angles, shapes and U, I or H sections of iron or steel, not further worked than hot-rolled or extruded, originating in Spain but imported from some other non-member country, *O.J.*, 12 May 1979, No L 117/16; Commission Recommendation No 950/79/ECSC of 14 May 1979 imposing a definitive anti-dumping duty on certain hematite pig iron originating in Brazil but imported from some other non-member country, *O.J.*, 16 May 1979, No L 120/11; Commission Recommendation No 1083/79/ECSC of 30 May 1979 imposing a definitive anti-dumping duty on certain plates of iron or steel originating in Spain but imported from some other non-member country, *O.J.*, 1 June 1979, No L 135/54).

Undertakings the scope of which is also defined by the origin of the dumped products, also apply to imports originating in the dumping country which are exported from another country. Indeed, several undertakings oblige the exporter to take the necessary action in order to avoid circumvention of the undertaking by means of imports of his dumped products exported from another country (Council Regulation (EEC) No 101/83 of 17 January 1983 imposing a definitive anti-dumping duty on certain chemical fertilizer originating in the United States of America, *O.J.*, 19 January 1983, No L 15/1; Commission Regulation (EEC) No 14/88 of 23 December 1987 imposing a provisional anti-dumping duty on imports of roller chains for cycles originating in the People's Republic of China, *O.J.*, 6 January 1988, No L 3/5; Commission Regulation (EEC) No 3052/88 of 29 September 1988 imposing a provisional anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China, *O.J.*, 4 October 1988, No L 272/16; Council Decision 88/576/EEC of 14 November 1988 repealing Decision 87/104/EEC accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China and terminating the investigation, *O.J.*, 18 November 1988, No L 312/33; C.J.E.C., joined cases 133/87 and 150/87, 14 March 1990, *Nashua Corporation v Commission and Council*, E.C.R., 1990, I, (719), 742.).

country may fall under a different regime in GATT and European anti-dumping law if one of them is a ME country and the other a NME country²⁹².

²⁹² Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50.

In several cases, the country of origin was a NME country whose products were exported through a ME country. In all these cases, the origin was decisive. As a consequence, normal value was determined along the rules provided by law as to NME countries, i.e., on the basis of the prices or costs of a third ME country (the so-called reference country) (see : Article 2(7) basic EC Regulation ; Article 2(5) basic ECSC Decision ; *infra*, 191) :

- in *vacuum cleaners from Poland* the vacuum cleaners produced in Poland were exported to the Community via a Swiss enterprise. For normal value determination, Portugal was selected as reference country (Commission Decision 82/398/EEC of 14 June 1982 accepting undertakings given in connection with the anti-dumping procedure concerning cylinder vacuum cleaners originating in Czechoslovakia, the German Democratic Republic and Poland and terminating the procedure, *O.J.*, 18 June 1982, No L 172/47) ;
- in *artificial corundum from Hungary* the Hungarian exports to the Community had been delivered by a commercial enterprise having its seat in Austria. For normal value determination, Yugoslavia was selected as reference country. The fact that in *artificial corundum from Hungary* the Austrian enterprise, in which the Hungarian producer possessed less than half of the shares, acted as an agent can explain why the origin was decisive (Commission Decision 86/464/EEC of 17 September 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of artificial corundum originating in Hungary, Poland and the USSR, and terminating the investigation, *O.J.*, 23 September 1986, No L 271/26) ;
- in *potassium permanganate from the USSR* all the Soviet exports to the Community were indirectly made from Austria. For normal value determination, the United States of America were selected as reference country. The choice of the country of origin was found to be the most appropriate because the product appeared not to be produced in Austria, but was merely transhipped through this country. (Commission Regulation (EEC) No 1537/90 of 28 May 1990 imposing a provisional anti-dumping duty on imports of potassium permanganate originating in the USSR, *O.J.*, 8 June 1990, No L 145/9) ;
- in *polyester yarns from the People's Republic of China* a Chinese exporter made all of his sales to the Community through a company in Hong Kong. For normal value determination, India was selected as reference country. The fact that in *polyester yarns from the People's Republic of China* the Hong Kong company was financially related to the Chinese exporter can explain why the origin was decisive (Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7) ;
- in *gas-fuelled, non-refillable pocket flint lighters from the People's Republic of China* the Chinese products were imported to the Community via Hong Kong. As the products were merely transhipped through Hong Kong, the normal value was determined in respect of the People's Republic of China, i.e., a NME country, and Thailand was selected as reference country (Council Regulation (EEC) No 3433/91 of 25 November 1991 imposing a definitive anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in Japan, the People's Republic of China, the Republic of Korea and Thailand and definitively collecting the provisional anti-dumping duty, *O.J.*, 28 November 1991, No L 326/1) ;
- in *bicycles from the People's Republic of China* and *magnetic disks (3,5" microdisks) from the People's Republic of China*, a company established in Hong Kong exported the allegedly dumped products, which were declared to be of Chinese origin, to the Community. For normal value determination, Taiwan was selected as reference country (Commission Regulation (EEC) No 550/93 of 5 March 1993 imposing a provisional anti-dumping duty on imports of bicycles originating in the People's Republic of China, *O.J.*, 11 March 1993, No L 58/12 ; Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5 ; Council Regulation (EEC) No 2474/93 of 8 September 1993 imposing a definitive anti-dumping duty on imports into the Community of bicycles originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 9 September 1993, No L 228/1) ;
- in *photo albums from the People's Republic of China* the Chinese products were exported to the Community through a company established in Hong Kong. For normal value determination, South Korea was selected as reference country (Commission Regulation (EEC) No 2477/93 of 6 September 1993 imposing a provisional anti-dumping duty on imports of certain photo albums originating in the People's Republic of China, *O.J.*, 9 September 1993, No L 228/16).

See also : *brushes from the People's Republic of China*, where, in the provisional determination direct exports and indirect exports via Hong-Kong were taken into account to investigate whether the anti-dumping undertaking had been lived up (Commission Regulation (EEC) No 3052/88 of 29 September 1988 imposing a provisional anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China, *O.J.*, 4 October 1988, No L 272/16). In the definitive anti-dumping determination no mention was made of indirect exports. Reference was made to exports originating in China. Undoubtedly they included direct and indirect exports. Normal value was determined in the way as prescribed for NME countries, i.e., Sri Lanka, a third ME country, was selected as reference country (Council Regulation (EEC) No 725/89 of 20 March 1989 imposing a definitive anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty on such imports, *O.J.*, 22 March 1989, No L 79/24).

GATT anti-dumping law prefers the exporting country. Indeed, Article VI GATT refers only to the exporting country. Nevertheless, the use of the country of origin was not considered to be contrary to GATT²⁹³. Only since the conclusion of the 1968 Anti-dumping Code, the problem of indirect dumping through a third exporting country was explicitly taken into account²⁹⁴. Thus, according to GATT anti-dumping law, the exporting country should normally be used as a reference. However, the domestic market price in the country of origin may be taken into consideration if the products are merely transhipped through the exporting country, if such products are not produced in the exporting country, or if there is no comparable price for them in the exporting country (Article 2.5. GATT Anti-dumping Code).

Likewise, European anti-dumping law provides the same three examples of cases in which the use of the price in the country of origin might be appropriate. Contrary to GATT anti-dumping law, ECSC anti-dumping law does not express any preference for either the exporting country or the country of origin (Article 2(6)(a) basic ECSC Decision). Hence, the choice is up to the European anti-dumping authorities, who always define the scope of the anti-dumping proceeding by reference to the country of origin²⁹⁵ and use the price in that country, unless none of the three

²⁹³ Within the framework of GATT, the possibility that exporting country and country of origin are not the same, was first raised in 1955. In its report of 3 March 1955, the Working Party of GATT agreed that where goods are not imported directly from the country of origin, it would be in accordance with the terms of Article VI to determine the margin of dumping by comparing the price at which the products are sold from the exporting country to the importing country with the comparable price in either the exporting country or the country of origin (*B.I.S.D.*, Third Supplement, Geneva, GATT, 1955, 223, consideration 5). This view was also adopted by the GATT Group of Experts in its report of 1959 (*B.I.S.D.*, Eighth Supplement, Geneva, GATT, 1960, 148-149, consideration 11).

²⁹⁴ See Article 2(c) 1968 GATT Anti-dumping Code, of which Article 2(3) 1980 GATT Anti-dumping Code is an exact copy.

²⁹⁵ Though it is possible to define the scope of an anti-dumping proceeding by means of the exporting country (see : Article 14(2) basic EC Regulation ; Article 13(2) basic ECSC Decision), anti-dumping proceedings have been terminated because the origin of the allegedly dumped products could not be determined (Commission Decision 85/158/EEC of 22 February 1985 terminating the anti-dumping proceeding concerning imports of certain ball bearings originating in Thailand, *O.J.*, 27 February 1985, No L 59/30 ; Commission Decision 86/193/EEC of 23 May 1986 terminating the anti-dumping proceeding concerning imports of electronic typewriters originating in Taiwan, *O.J.*, 27 May 1986, No L 140/52), or because the products exported do not originate in the allegedly dumping country (Commission Regulation (EEC) No 761/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten ores and concentrates originating in the People's Republic of China, and terminating the proceeding concerning imports originating in Hong Kong, *O.J.*, 30 March 1990, No L 83/23 ; Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50).

Similarly, no dumping margin has been calculated for the exporting country when a dumping margin had already been determined for the country of origin (Commission Regulation (EEC) No 720/90 of 22 March 1990 imposing a provisional anti-dumping duty on imports of silicon metal originating in the People's Republic of China, *O.J.*, 27 March 1990, No L 80/9 ; Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7 ; Commission Regulation (EEC) No 550/93 of 5 March 1993 imposing a provisional anti-dumping duty on imports of bicycles originating in the People's Republic of China, *O.J.*, 11 March 1993, No L 58/12 ; Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5 ; Commission Regulation (EEC) No 2477/93 of 6 September 1993 imposing a provisional anti-dumping duty on imports of certain photo albums originating in the People's Republic of China, *O.J.*, 9 September 1993, No L 228/16).

Moreover, in the anti-dumping cases concerning *hematite graphite spheroidal pig iron from Brazil* (Commission Recommendation No 294/79/ECSC of 13 February 1979 imposing a provisional anti-dumping duty on certain hematite pig iron originating in Brazil,

conditions under which that price might be appropriate, is being fulfilled²⁹⁶. This case law has been incorporated in EC anti-dumping law, according to which the exporting country shall normally be the country of origin ; it may be an intermediate country in *inter alia* the three cases enumerated by GATT anti-dumping law (Article 1(3) basic EC Regulation). Thus, GATT and European anti-dumping law express opposite preferences.

2.2.2.2. Definition of the concept «origin»

The preference in European anti-dumping law for the country of origin may be said to be contrary to the spirit of GATT anti-dumping law. Because of the focus on the exporting country, the idea of «knowledge of dumping» is present in GATT anti-dumping law. For only the exporter established in the exporting country may know whether he is dumping because he, instead of the producer established in the country of origin, decides at what price he exports to the Community. In European anti-dumping law, however, the idea of «knowledge of dumping» will only be accepted, if such an interpretation is placed on the concept of «origin» that the exporting country is reduced to a country of transit where prices cannot be influenced.

The GATT Agreement on Rules of Origin, which was drafted on the occasion of the GATT Uruguay Round, limits the discretion of the European anti-dumping authorities, as it stipulates that it applies to anti-dumping proceedings (Article 1.2.). European anti-dumping law provides that the rules on the common definition of the concept of «origin» are applicable to anti-dumping proceedings. EC anti-dumping law allows the European anti-dumping authorities to adopt special provisions in pursuance with this common definition (Article 14(3) basic EC Regulation). ECSC anti-dumping law equally allows the European anti-dumping authorities to adopt special provisions, but seems that those special provisions may deviate from the common definition

O.J., 16 February 1979, No L 41/29 ; Commission Recommendation No 720/79/ECSC of 9 April 1979 providing for the termination of the application of the provisional anti-dumping duty established in relation to imports of certain hematite pig iron originating in Brazil, *O.J.*, 11 April 1979, No L 92/10 ; Commission Recommendation No 950/79/ECSC of 14 May 1979 imposing a definitive anti-dumping duty on certain hematite pig iron originating in Brazil but imported from some other non-member country, *O.J.*, 16 May 1979, No L 120/11), *steel plates and iron plates from Spain* (Commission Recommendation No 433/79/ECSC of 27 February 1979 imposing a provisional anti-dumping duty on certain sheets and plates of iron or steel originating in Spain and repealing certain suspended anti-dumping duties, *O.J.*, 3 March 1979, No L 53/21 ; Commission Recommendation No 787/79/ECSC of 20 April 1979 providing for the termination of the provisional anti-dumping duties established in relation to imports of certain steel products originating in Spain, *O.J.*, 21 April 1979, No L 99/31 ; Commission Recommendation No 1083/79/ECSC of 30 May 1979 imposing a definitive anti-dumping duty on certain plates of iron or steel originating in Spain but imported from some other non-member country, *O.J.*, 1 June 1979, No L 135/54) and *steel angles, shapes and sections from Spain* (Commission Recommendation No 267/79/ECSC of 9 February 1979 imposing a provisional anti-dumping duty on certain angles, shapes and U, I or H sections of iron or steel, not further worked than hot-rolled or extruded, originating in Spain, *O.J.*, 13 February 1979, No L 37/21 ; Commission Recommendation No 787/79/ECSC of 20 April 1979 providing for the termination of the provisional anti-dumping duties established in relation to imports of certain steel products originating in Spain, *O.J.*, 21 April 1979, No L 99/31 ; Commission Recommendation No 935/79/ECSC of 8 May 1979 imposing a definitive anti-dumping duty on certain angles, shapes and U, I or H sections of iron or steel, not further worked than hot-rolled or extruded, originating in Spain but imported from some other non-member country, *O.J.*, 12 May 1979, No L 117/16) anti-dumping duties were imposed only on indirect trade, but the scope of the duties was determined by reference to the origin of the dumped products.

²⁹⁶ Council Regulation (EEC) No 1391/91 of 27 May 1991 imposing a definitive anti-dumping duty on imports of of aspartame originating in Japan and the United States of America, *O.J.*, 29 May 1991, No L 134/1.

(Article 13(7) basic ECSC Decision). Clearly, in that case, ECSC anti-dumping law is, unlike EC anti-dumping law, at variance with the GATT Agreement on Rules of Origin and should be amended as soon as possible.

Though the GATT Agreement on Rules of Origin prohibits any deviation from the common definition of origin, it does not entirely deprive the European anti-dumping authorities of their discretionary powers, as the common rules on origin are open to many divergent implementations²⁹⁷. According to the European common definition of the concept «origin», a product must be «deemed to originate in the country where they underwent their last, substantial, economically justified processing or working in an undertaking equipped for that purpose and resulting in the manufacture of a new product or representing an important stage of manufacture»²⁹⁸. For the Court of Justice, the decisive criterion is that of the last substantial process or operation. The Court of Justice considers a process or operation to be substantial if, through that process or operation, the use to which the component parts are to be put becomes definite and the processed products are given their specific qualities. If the use of that criterion is not conclusive, the Court of Justice allows the use of the value-added test²⁹⁹. The European anti-dumping authorities seem to apply the common definition of the concept «origin» correctly. Sometimes, they explicitly refer to the common definition³⁰⁰ and, in general, they use the value-added test in order to determine the substantiality of the operation³⁰¹.

The European anti-dumping authorities place, however, a broad interpretation on the concept «origin». They regard trade via subsidiaries established in third countries as direct trade and

²⁹⁷ VERMULST, E., «Rules of Origin as Commercial Policy Instruments - Revisited», *Journal of World Trade*, 1992/6, (61), 95-96.

²⁹⁸ Article 24 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, *O.J.*, 19 October 1992, No L 302/1.

²⁹⁹ C.J.E.C., case 26/88, 13 December 1989, *Brother International GmbH v Hauptzollamt Gießen*, *E.C.R.*, 1989, (4253), 4278-4281.

³⁰⁰ Council Regulation (EEC) No 90/82 of 18 January 1982 imposing a definitive anti-dumping duty on phenol originating in the United States of America, *O.J.*, 18 January 1982, No L 12/1 ; Commission Decision 86/193/EEC of 23 May 1986 terminating the anti-dumping proceeding concerning imports of electronic typewriters originating in Taiwan, *O.J.*, 27 May 1986, No L 140/52. The Regulations taken by the Commission in execution of Council Regulation (EEC) No 802/68 (i.e., the former Regulation on the common definition of the concept of the origin of goods (*O.J.*, June 28, 1968, No. L 148/1)) are also taken into account, see : Commission Decision 85/158/EEC of 22 February 1985 terminating the anti-dumping proceeding concerning imports of certain ball bearings originating in Thailand, *O.J.*, 27 February 1985, No L 59/30 ; Commission Regulation (EEC) No 129/91 of 11 January 1991 imposing a provisional anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China, *O.J.*, 19 January 1991, No L 14/31 ; Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50.

³⁰¹ See : *phenol from the United States of America*, where the American exporter argued that on the basis of the value added test the products were of European origin instead of American origin. The European anti-dumping authorities were of the opinion that the products were of American origin because the last process took place in the United States of America and created a new product (Council Regulation (EEC) No 90/82 of 18 January 1982 imposing a definitive anti-dumping duty on phenol originating in the United States of America, *O.J.*, 18 January 1982, No L 12/1).

consider countries in which the product underwent a delay or a judicial act that does not have a direct relationship with transport, to be exporting countries³⁰². Moreover, they seem to accept low value added operations may confer origin³⁰³. That broad interpretation may go against the common definition of the concept «origin». Moreover, it may be contrary to the spirit of GATT anti-dumping law, which, in view of its preference for the exporting country, incorporates the idea of «knowledge of dumping». Because, in their eyes, price manipulation in third countries does not affect the origin of the product, the European anti-dumping authorities have not adopted an interpretation of the concept «origin» by means of which the idea of «knowledge of dumping», may be incorporated in European anti-dumping law. Moreover, that broad interpretation results in the highest degree of protection as possible. Indeed, such an interpretation enlarges the scope of anti-dumping protection³⁰⁴ and reduces the possibilities of circumvention, *e.g.*, by establishing packaging, labelling, sorting, mixing, labelling and simple assembly operations in another country that does not come within the scope of application of anti-dumping protection³⁰⁵.

2.2.3. Whose normal value ?

Producer and exporter do not always coincide. GATT anti-dumping law does not define whose prices and costs must be used for determining normal value. European anti-dumping law seems to prefer the exporting side, as it allows the use of the prices and, under ECSC anti-dumping law, the costs of other sellers and producers if «the exporter» in the country of origin neither produces nor sells the like product in the country of origin» (Article 2(1)(a) basic EC Regulation ; Article 2(3)(c) basic ECSC Decision). Thus, normal value must apparently be based on the prices or costs of the exporter insofar as he sells or produces the like product on his domestic market.

³⁰² In the anti-dumping cases concerning *hematite graphite spheroidal pig iron from Brazil, steel plates and iron plates from Spain and steel angles, shapes and sections from Spain* the Commission defined the exporting country as the last intermediate country in which the product concerned underwent a delay or a judicial act that does not have a direct relationship with transport (Commission Recommendation No 1218/79/ECSC of 19 June 1979 supplementing recommendations No 935/79/ECSC, No 950/79/ECSC and No 1083/79/ECSC concerning anti-dumping duties on certain steel products, *O.J.*, 21 June 1979, No L 153/17).

³⁰³ An increase in value between 45 and 50 % would be considered as a significant factor in the determination of origin in recent European anti-dumping case law (VAN BAELE, I., and BELLIS, J.-F., *Anti-Dumping and other Trade Protection Laws of the EEC*, Bicester, CCH Editions, 1990, 224-225). The European anti-dumping authorities, though, have stated that «no threshold has been specified in either Community legislation or in previous (anti-dumping) cases for the minimum value added that must be respected in order for a producer to qualify as part of Community industry» and accepted a value added of but 20 to 35 % sufficient for conferring Community origin to products assembled in the Community (Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12). As the discretionary powers of the European anti-dumping authorities regarding the definition of origin apply to all aspects of European anti-dumping law, such a broad interpretation may also be applied to the products imported into the Community.

³⁰⁴ See : McQUEEN, M., «Lomé and the Protective Effect of Rules of Origin», *Journal of World Trade Law*, 1982, (119), 124-126.

³⁰⁵ See : McQUEEN, M., «Lomé and the Protective Effect of Rules of Origin », *Journal of World Trade Law*, 1982, (119), 124-127 ; NUSBAUMER, J., «Origin Systems and the Trade of Developing Countries», *Journal of World Trade Law*, 1979, (34), 35. The conclusion of M. McQUEEN and J. NUSBAUMER is the opposite to the conclusion made here, but anti-dumping measures have the opposite effect with regard to tariff preferences.

However, European anti-dumping law also treats of «the exporter or producer» when explaining how the constructed value must be determined (Article 2(6) basic EC Regulation). It, thus seems that the terminology of European anti-dumping is quite inaccurate and, therefore, does not allow to draw conclusions as to whose normal value should be determined.

According to the European anti-dumping authorities, «their usual method (consists in) calculating normal value on the basis of transactions by the producers»³⁰⁶, because an exporter who does not manufacture the product «is normally free to purchase from any source, and may change its source of supply whenever convenient»³⁰⁷. In practice, though, there usually is not any problem since producer and exporter are practically always identical. Moreover, in one case, the European anti-dumping authorities have calculated the normal value on the basis of the transactions of the exporter³⁰⁸.

The exporter is the one who sells the product for export to the Community³⁰⁹. He does not have to actually export it. This definition of the exporter coincides with the definition of the export price. As, under European anti-dumping law, the export price is defined as the price «for the product when sold from the exporting country to the Community» (Article 2(8) basic EC Regulation) or as the price «for the product sold for export to the Community» (Article 2(8)(a)

306 Commission Decision 91/142/EEC of 15 March 1991 terminating the anti-dumping proceeding concerning imports of Atlantic salmon originating in Norway, *O.J.*, 16 March 1991, No L 69/32 (corrigendum, *O.J.*, 21 March 1991, No L 75/64).

307 Commission Regulation (EC) No 371/94 of 17 February 1994 imposing a provisional anti-dumping duty on imports into the Community of large aluminium electrolytic capacitors originating in the Republic of Korea and Taiwan, *O.J.*, 19 February 1994, No L 48/10.

308 See : *Atlantic salmon from Norway*, where the normal value was based on the transactions of the exporter. Because his transactions on the Norwegian market were made at a loss, the constructed value was used. It was calculated on the basis of the production costs of the producers, including their profits, the general expenses of the exporters and a reasonable profit margin on their resale activities (Commission Decision 91/142/EEC of 15 March 1991 terminating the anti-dumping proceeding concerning imports of Atlantic salmon originating in Norway, *O.J.*, 16 March 1991, No L 69/32 (corrigendum, *O.J.*, 21 March 1991, No L 75/64)). If it was the usual method of calculating normal value on the basis of the transactions of the producers, the European anti-dumping authorities could have calculated the constructed value for them, i.e., without adding the general expenses and a profit margin of the exporters. However, they chose not to do so.

309 Commission Regulation (EEC) No 1411/81 of 25 May 1981 imposing a provisional anti-dumping duty on orthoxylene (o-Xylene) originating in Puerto Rico and the United States of America, *O.J.*, 27 May 1981, No L 141/29 ; Commission Regulation (EEC) No 1591/81 of 10 June 1981 imposing a provisional anti-dumping duty on paraxylene (p-xylene) originating in Puerto Rico, the United States of America and the US Virgin Islands, *O.J.*, 16 June 1981, No L 158/7 ; Commission Regulation (EEC) No 2017/81 of 15 July 1981 imposing a provisional anti-dumping duty on phenol originating in the United States of America, *O.J.*, 18 July 1981, No L 195/22 ; Council Regulation (EEC) No 551/83 of 8 March 1983 imposing a definitive anti-dumping duty on kraftliner paper and board originating in the United States of America and accepting undertakings given in connection with the review of the anti-dumping proceeding on kraftliner paper and board originating in Austria, Canada, Finland, Portugal, the Soviet Union and Sweden, *O.J.*, 10 March 1983, No L 64/25 ; Commission Regulation (EEC) No 744/84 of 19 March 1984 imposing a provisional anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 23 March 1984, No L 79/8 (corrigendum, *O.J.*, 29 March 1984, No L 86/31) ; Council Regulation (EEC) No 1739/85 of 24 June 1985 imposing a definitive anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan, *O.J.*, 27 June 1985, No L 167/3 ; Commission Regulation (EEC) No 3421/90 of 26 November 1990 imposing a provisional anti-dumping duty on imports of aspartame originating in Japan and the United States of America, *O.J.*, 29 November 1990, No L 330/16 ; C.J.E.C., joined cases 133/87 and 150/87, 14 March 1990, *Nashua Corporation v Commission and Council*, *E.C.R.*, 1990, I, (719), 754 and 774.

basic ECSC Decision³¹⁰), the export price is the price paid to the exporter. Through that coincidence, the idea of «knowledge of dumping» would be present in European anti-dumping case law if normal value was determined in respect of the exporter. For the exporter should then have the opportunity of knowing in advance whether or not he is dumping, when normal value and export price are both based on data which the exporter may influence or at least should be aware of. However, as it usually assesses normal value in respect of the producer, European anti-dumping case law is not characterised by the idea of «knowledge of dumping», unless, by mere coincidence, namely when the producer is also the exporter.

2.2.4. *Comparable sales in the ordinary course of trade*

The determination of dumping depends on the interpretation placed on the concept «comparable sales in the ordinary course of trade». The domestic market price may be used as normal value standard only if there are comparable sales in the ordinary course of trade (Article VI(1) GATT ; Articles 2.1. and 2.2. GATT Anti-dumping Code ; Articles 1(2) and 2(3) basic EC Regulation ; Article 2(3) basic ECSC Decision). The more restrictive the interpretation of the concept «comparable sales in the ordinary course of trade», the more the alternative normal value standards, especially the constructed value, will be used. The use of the alternative normal value standards may alter the outcome of the dumping examination. Indeed, the domestic market price should merely be established on the basis of invoices. The constructed value, the most frequently used alternative normal value standard, is based on production costs, general expenses and profits. It is susceptible to calculation errors and even arbitrariness. Indeed, the production costs, general expenses and profits must be determined on the basis of accounting records, not aimed at specifying product prices. The allocation of production costs, general expenses and profits between the different products produced by the exporter on the basis of accounting records is difficult and may result in miscalculations. Moreover, the amount for general expenses and profits must be reasonable (Article 2.2. GATT Anti-dumping Code ; Article 2(3) basic EC Regulation ; Article 2(3)(b)(ii) basic ECSC Decision). A concept as vague as «reasonable» opens the door to arbitrariness.

The concept «comparable sales in the ordinary course of trade» comprises two elements : the concept of «ordinary course of trade» (section 2.2.4.1.) and the concept of «comparable sales» (section 2.2.4.2.)³¹¹.

³¹⁰ *Infra*, 240-243.

³¹¹ C.J.E.C., case C-105/90, 13 February 1992, *Goldstar Co. Ltd v Council, E.C.R.*, 1992, I, (677), 701 (Opinion of Advocate General VAN GERVEN) and 720.

2.2.4.1. Ordinary course of trade

GATT anti-dumping law does not define the concept «ordinary course of trade». European anti-dumping law mentions sales between associated parties and sales at a loss as examples of situations which may be considered as not representing the ordinary course of trade (Article 2.2.1. GATT Anti-dumping Code ; Article 2(1)(b) and (4) basic EC Regulation ; Article 2(4) and (7) basic ECSC Decision)³¹². According to European anti-dumping authorities, ordinary course of trade requires that the domestic market prices are generally available to all existing and potential buyers and that they include all production costs regardless of whether competition is influenced by the existence of a cartel, a monopoly or a minimum-price arrangement³¹³. The general availability of prices does not seem to be an additional example of a situation not representing the ordinary course of trade. It would seem to refer to sales between associated parties, *i.e.*, sales at prices only available to associated parties, are made not in the ordinary course of trade³¹⁴.

In view of European anti-dumping case law, ordinary course of trade requires also a certain degree of competition³¹⁵. That requirement is not illegal. European anti-dumping law does not provide an exhaustive definition of the concept «ordinary course of trade» where it mentions

³¹² C.J.E.C., case C-105/90, 13 February 1992, *Goldstar Co. Ltd v Council*, E.C.R., 1992, I, (677), 701 (Opinion of Advocate General VAN GERVEN) and 720.

³¹³ Commission Decision 83/360/EEC of 18 July 1983 terminating the anti-dumping proceeding in respect of imports of certain pears in syrup, originating in Australia, the People's Republic of China and the Republic of South Africa, *O.J.*, 20 July 1983, No L 196/22. See also : Commission Regulation (EEC) No 2936/82 of 28 October 1982 imposing a provisional anti-dumping duty on copper sulphate originating in Yugoslavia, *O.J.*, 4 November 1982, No L 308/7 ; Commission Regulation (EEC) No 2800/86 of 9 September 1986 imposing a provisional anti-dumping duty on imports of certain deep freezers originating in the USSR, accepting the undertakings in connection with the investigation of imports of certain deep freezers originating in Yugoslavia or in the German Democratic Republic and terminating the investigation, and terminating the proceeding concerning imports of certain deep freezers, *O.J.*, 11 September 1986, No L 259/14.

³¹⁴ In *titanium mill products from Japan and welded tubes from Yugoslavia* two conditions are applied in order to investigate the existence of an ordinary course of trade. One condition concerns the coverage of all production costs whereas the other condition is the requirement that sales are made to non-associated buyers (Commission Decision 85/252/EEC of 23 April 1985 terminating the anti-dumping proceeding concerning imports of certain titanium mill products originating in Japan and the United States of America, *O.J.*, 26 April 1985, No L 113/30 ; Commission Regulation (EEC) No 3074/89 of 11 October 1989 imposing a provisional anti-dumping duty on imports of welded tubes originating in Yugoslavia and Romania, *O.J.*, 13 October 1989, No L 294/10). Therefore, it can be argued that the condition of general availability of prices implies that the domestic market prices must be prices charged to all non-associated buyers.

Though both conditions have to be fulfilled, the condition that all production costs must be covered seems to be the most fundamental. In *sensitized paper for colour photographs from Japan* the existence of a reasonable relationship between prices and production costs falsifies the presumption concerning the impact of associations between parties on selling prices (Commission Decision 84/259/EEC of 10 May 1984 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain sensitized paper for colour photographs originating in Japan and terminating that proceeding, *O.J.*, 11 May 1984, No L 124/45).

³¹⁵ Commission Decision 83/360/EEC of 18 July 1983 terminating the anti-dumping proceeding in respect of imports of certain pears in syrup, originating in Australia, the People's Republic of China and the Republic of South Africa, *O.J.*, 20 July 1983, No L 196/22 ; Commission Regulation (EEC) No 2800/86 of 9 September 1986 imposing a provisional anti-dumping duty on imports of certain deep freezers originating in the USSR, accepting the undertakings in connection with the investigation of imports of certain deep freezers originating in Yugoslavia or in the German Democratic Republic and terminating the investigation, and terminating the proceeding concerning imports of certain deep freezers, *O.J.*, 11 September 1986, No L 259/14.

sales between associated parties and sales at a loss as examples of sales not taking place in the ordinary course of trade.

GATT anti-dumping law recognizes that special regard must be given by developed countries to the special situation of developing countries when considering the application of anti-dumping measures (Article 15 GATT Anti-dumping Code). Accordingly, sales on the domestic market of developing countries might be considered as not having been made in the ordinary course of trade. European anti-dumping law does not contain such a provision nor has European anti-dumping case law yet applied this provision of GATT anti-dumping law in connection with the normal value determination. However, as European anti-dumping law does not provide an exhaustive definition of the concept «ordinary course of trade», it does not prohibit to consider sales on the domestic market of developing countries as not having been made in the ordinary course of trade.

This section investigates sales between associated parties (section 2.2.4.1.1.), sales at a loss (section 2.2.4.1.2.), sales on a competitive domestic market (section 2.2.4.1.3.) and sales on the domestic market of developing countries (section 2.2.4.1.4.).

2.2.4.1.1. Sales between associated parties

A manufacturing company may circumvent anti-dumping law by creating a legally distinct, but fully owned sales company. This sales company would buy the products of the manufacturing company at a price equal to or below the export price, and resell them on the domestic market of the exporting country at a price above the export price. The fact that the profits made on the domestic market are located within the sales company, makes no difference to the manufacturer, because he owns the sales company.

In order to prevent such a circumvention, sales between associated parties may be considered as not having been made in the ordinary course of trade (Article 2(1)(b) basic EC Regulation ; Article 2(7) basic ECSC Decision). European anti-dumping law does not provide a definition of the notion «associated»³¹⁶. Moreover, it requires only that the parties «appear» to be associated³¹⁷. Thus, it grants the European anti-dumping authorities a large discretion in interpreting the concept «association».

³¹⁶ BESELER, J.-F., *Die Abwehr von Dumping und Subventionen durch die Europäische Gemeinschaften*, Baden-Baden, Nomos, 1980, 58 ; BOUDANT, J., *L'anti-dumping communautaire*, Paris, Economica, 1991, 88 ; BRIET, L.A.E., «Antidumping in de EEG - De kinderschoenen ontgroeid ?», *S.E.W.*, 1982, (145), 162, note (30) ; LESGUILLONS, H., *Le régime communautaire de protection contre le dumping et les subventions*, Paris, F.E.D.U.C.I., 1983, 68 ; VAN BAEL, I., and BELLIS, J.-F., *Anti-Dumping and other Trade Protection Laws of the EEC*, Bicester, CCH Editions, 1990, 46.

³¹⁷ VAN BAEL, I., and BELLIS, J.-F., *Anti-Dumping and other Trade Protection Laws of the EEC*, Bicester, CCH Editions Ltd, 1990, 46.

Thus far, the European anti-dumping authorities have not paid much attention to the concept «association». When being confronted with presumably associated parties, they always investigate whether those parties do not constitute an economic unit. Indeed, as they do not accept the formal distinction between sales departments incorporated within the manufacturing company and sales companies associated with the manufacturing company³¹⁸, they apply the economic unit theory.

Originally, the European anti-dumping authorities placed a broad interpretation on the notion of economic unit. Thus, they held a sales company³¹⁹ to constitute an economic unit with the manufacturing company if :

- (i) the principal function of the sales company is to sell or to facilitate the sale of the corporate product³²⁰ ; or
- (ii) (a) the fact that the sales company is wholly owned by the corporate entity ; or
(b) the fact that the sales company is wholly controlled by the corporate entity ; or
- (iii) the existence of strong links with respect to management personnel and staff³²¹.

According to the European anti-dumping authorities, these three conditions need not be fulfilled cumulatively³²².

³¹⁸ Council Regulation (EEC) No 1739/85 of 24 June 1985 imposing a definitive anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan, *O.J.*, 27 June 1985, No L 167/3 ; Commission Regulation (EEC) No 2865/85 of 14 October 1985 imposing a provisional anti-dumping duty on imports of certain electronic scales originating in Japan and accepting undertakings and terminating the proceeding in respect of certain imports of such products originating in Japan, *O.J.*, 16 October 1985, No L 275/5.

³¹⁹ Economic unit theory is not applied to sales departments. It can only be applied to legally distinct parties. Parties not having separate legal personality are an economic as well as a legal unity. Indeed, in *photocopiers from Japan*, the Commission held that «when a sales organisation (...) is only a part of a concern contemplating the production and the sale of specific products, article 2, paragraph 7, is not applicable on the transfer of these products from one part of the concern to another, e.g., from the manufacturing to the selling» (Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5). Thus, Article 2(1)(b) basic EC Regulation and Article 2(7) basic ECSC Decision are not applicable to a sales organisation. On the other hand, it follows from European anti-dumping case law that those Articles are applicable to sales companies. A sales organisation differs from a sales company in that it is a legally distinct entity.

³²⁰ This condition is still fulfilled when the manufacturing company carries out a limited number of sales functions (C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, E.C.R., 1992, I, (1409), 1456 (Opinion of Advocate General MISCHO) and 1472).

³²¹ Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1 ; Commission Regulation (EEC) No 2865/85 of 14 October 1985 imposing a provisional anti-dumping duty on imports of certain electronic scales originating in Japan and accepting undertakings and terminating the proceeding in respect of certain imports of such products originating in Japan, *O.J.*, 16 October 1985, No L 275/5 ; Commission Decision 87/236/EEC of 10 April 1987 terminating the anti-dumping proceeding on imports of synthetic fibres of polyesters originating in the German Democratic Republic, Romania, Turkey and Yugoslavia, *O.J.*, 15 April 1987, No L 103/38.

³²² In *electronic typewriters from Japan and synthetic polyester fibres from Turkey*, the Council and the Commission respectively determined the existence of an economic unity because «one or more of these three conditions» were fulfilled (Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1 ; Commission Decision 87/236/EEC of 10 April 1987 terminating the anti-dumping proceeding on imports of synthetic fibres of polyesters originating in the German Democratic Republic, Romania, Turkey and Yugoslavia, *O.J.*, 15 April 1987, No L 103/38).

The Court of Justice, though approving the application of the economic unit theory to anti-dumping law³²³, did not accept this broad interpretation placed upon the notion of «economic unit». Instead, it required the following two conditions to be met cumulatively :

- (i) the sales company carries out tasks which are normally the responsibility of an internal sales department of the manufacturing organization ; and
- (ii) the manufacturing company has control over the sales company³²⁴.

Since the Court's first judgements on this matter, the European anti-dumping authorities seem to have adopted this less broad interpretation³²⁵.

The same seems to hold with regard to the implementation of those two conditions. As to condition (i), European anti-dumping authorities originally considered sole representation agreements to constitute an association³²⁶. However, since Advocate-General J.P.

³²³ C.J.E.C., joined cases 260/85 and 106/86, 5 October 1988, *Tokyo Electric Company Ltd (TEC) a.o. v Council*, E.C.R., 1988, (5855), 5919 ; C.J.E.C., joined cases 273/85 and 107/86, 5 October 1988, *Silver Seiko Limited a.o. v Council*, E.C.R., 1988, (5927), 5975 ; C.J.E.C., case C-171/87, 10 March 1992, *Canon Inc. v Council*, E.C.R., 1992, I, (1237), 1287 ; C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, E.C.R., 1992, I, (1335), 1391 ; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, E.C.R., 1992, I, (1409), 1471-1472 ; C.J.E.C., case C-178/87, 10 March 1992, *Minolta Camera Co. Ltd v Council*, E.C.R., 1992, I, (1577), 1624-1625 ; C.J.E.C., case C-179/87, 10 March 1992, *Sharp Corporation v Council*, E.C.R., 1992, I, (1635), 1673.

³²⁴ C.J.E.C., joined cases 260/85 and 106/86, 5 October 1988, *Tokyo Electric Company Ltd (TEC) a.o. v Council*, E.C.R., 1988, (5855), 5919 ; C.J.E.C., joined cases 273/85 and 107/86, 5 October 1988, *Silver Seiko Limited a.o. v Council*, E.C.R., 1988, (5927), 5975 ; C.J.E.C., case C-171/87, 10 March 1992, *Canon Inc. v Council*, E.C.R., 1992, I, (1237), 1287 ; C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, E.C.R., 1992, I, (1335), 1391 ; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, E.C.R., 1992, I, (1409), 1471-1472 ; C.J.E.C., case C-178/87, 10 March 1992, *Minolta Camera Co. Ltd v Council*, E.C.R., 1992, I, (1577), 1624-1625 ; C.J.E.C., case C-179/87, 10 March 1992, *Sharp Corporation v Council*, E.C.R., 1992, I, (1635), 1673 ; C.J.E.C., case C-104/90, 13 October 1993, *Matsushita Electric Industrial Co. Ltd v Council*, recital 18 (Opinion of Advocate General VAN GERVEN) and considerations 8-10 (not yet reported).

The Court of Justice, thus, applies the same economic unit theory to anti-dumping law as the one it applies to antitrust law (compare with : C.J.E.C., case 48/69, July 14, 1972, *Imperial Chemical Industries Ltd v Commission*, E.C.R., 1972, 619 ; C.J.E.C. joined cases 6-7/73, March 6, 1974, *Istituto Chimioterapico Italiano SpA and Commercial Solvents Corporation v Commission*, E.C.R., 1974, 223 ; C.J.E.C., case 15/74, October 31, 1974, *Centrafarm BV a.o. v Steeling Drug*, E.C.R., 1974, 1147 ; Decision No. 70/332/EEC, June 30, 1970, *Kodak, O.J.*, July 7, 1970, No. L 147/24. See also : Decision No. 69/195/EEC, June 18, 1969, *Christiani & Nielsen, O.J.*, July 5, 1969, No. L 165/12 ; Decision No. 72/457/EEC, December 14, 1972, *Zoja C.S.C.-I.C.I., O.J.*, December 31, 1972, No. L 299/51 ; BARACK, B., *The application of the Competition rules (antitrust law) of the European Economic Community*, Deventer, Kluwer, 1981, 55 ; MANN, F.A., «The Doctrine of International Jurisdiction Revisited After Twenty Years», *Recueil des Cours de l'Académie de Droit International*, 1984/III, (11), 65).

³²⁵ See e.g. : *electronic weighing scales from Japan*, where an economic unit was found between a producer and a sales company because the producer had financial control over the sales company and had divided tasks of marketing his production among the manufacturing company, selling directly to distributors or dealers, the sales department of the manufacturing company and two related sales companies which sold to end-users (Council Regulation (EEC) No 993/93 of 26 April 1993 imposing a definitive anti-dumping duty on imports of certain electronic weighing scales originating in Japan, *O.J.*, 29 April 1993, No L 104/4).

³²⁶ Commission Regulation (EEC) No 261/77 of 4 February 1977 imposing a provisional anti-dumping duty on ball bearings, tapered roller bearings and parts thereof originating in Japan, *O.J.*, 5 February 1977, No L 34/60 ; Council Regulation (EEC) No 1778/77 of 26 July 1977 concerning the application of the anti-dumping duty on ball bearings and tapered roller bearings, originating in Japan, *O.J.*, 3 August 1977, No L 196/1. It concerned a sole representation agreement between an exporter and an importer (see : C.J.E.C., joined cases 113 and 118-121/77, March 29, 1979, *NTN Toyo Bearing Company Ltd a.o. v Council*, E.C.R., 1979, (1185), 1254-1255 (opinion of Advocate-General J.P. WARNER)). In investigating and establishing the existence of an association, European anti-dumping law has adopted the same approach for sales within the domestic market as for exports, see : BESELER, J.-F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 56.

WARNER³²⁷, followed later by the Court of Justice³²⁸, has stated that a sole representation agreement cannot be considered to constitute an association, European anti-dumping case law does not provide any evidence as to sole representation agreements³²⁹.

With regard to condition (ii), European anti-dumping case law seems to be in line with the Court of Justice's case law. The control of the manufacturing company over the sales company is usually founded on stock ownership³³⁰. Whole stock ownership is deemed to create the

³²⁷ C.J.E.C., joined cases 113 and 118-121/77, March 29, 1979, *NTN Toyo Bearing Company Ltd a.o. v Council*, E.C.R., 1979, (1185), 1254-1255 (opinion of Advocate-General J.P. WARNER), where Advocate-General J.P. WARNER held that a contractual link, such as a sole representation agreement, does not constitute an association. Though the Court of Justice did not pass a judgement on this point, the European anti-dumping authorities, contrary to their prior decisions (Commission Regulation (EEC) No 261/77 of 4 February 1977 imposing a provisional anti-dumping duty on ball bearings, tapered roller bearings and parts thereof originating in Japan, O.J., 5 February 1977, No L 34/60; Council Regulation (EEC) No 1778/77 of 26 July 1977 concerning the application of the anti-dumping duty on ball bearings and tapered roller bearings, originating in Japan, O.J., 3 August 1977, No L 196/1), did no longer consider this agreement to be an association in the following of the anti-dumping proceeding in respect of ball bearings from Japan (Commission Decision 81/406/EEC of 4 June 1981 accepting undertakings in connection with the anti-dumping proceeding concerning imports of ball and tapered roller bearings, originating in Japan, Poland, Romania and the Soviet Union and terminating that proceeding, O.J., 11 June 1981, No L 152/44; Commission Regulation (EEC) No 3669/84 of 21 December 1984 imposing a provisional anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan, O.J., 28 December 1984, No L 340/37; Council Regulation (EEC) No 1739/85 of 24 June 1985 imposing a definitive anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan, O.J., 27 June 1985, No L 167/3).

³²⁸ C.J.E.C., case 205/87, 11 November 1987, *Nuova Ceam Srl v Commission*, E.C.R., 1987, (4427), 4430; C.J.E.C., case 279/86, 8 July 1987, *SA Sermes v Commission*, E.C.R., 1987, (3109), 3112 and 3114; C.J.E.C., case 301/86, 8 July 1987, *R. Frimodt Pedersen A/S v Commission*, E.C.R., 1987, (3123), 3126.

³²⁹ Thus, in European anti-dumping law, the same attitude is adopted in respect of sole representation agreements as in antitrust law. Indeed, in European antitrust case law, the question whether an exclusive selling agreement constitutes a sufficient ground to concede to the existence of an economic unit between the grantor of the concession and the concessionary has been answered in the negative. In the *Sugar Union Case* (C.J.E.C., joined cases 40-48, 50, 54-56, 111, 113-114/73, December 16, 1975, *Sugar Union UA a.o. v Commission*, E.C.R., 1975, 1663) the Court of Justice held that a representative will constitute an economic unit with the principal, if he sells the principal's products on behalf of and for account of the principal, if he has to follow the instructions of the principal and to look after the principal's interests; if, however, the representative acts at his own risk and on his account, there will be no economic unit between him and his principal. A non-negligible circumstance was the fact that the representative was carrying out other activities than selling the principal's products. In the *Pittsburgh Corning Europe Case* (Commission Decision No 72/403/EEC of 23 November 1972, *Pittsburgh Corning Europe*, O.J., 5 December 1972, No L 272/35) the Commission adopted the same attitude towards exclusive selling agreements. The fact that the representative had other activities than selling the principal's products, was also decisive. But in the *B.M.W. Case* (Commission Decision No 78/155/EEC, 23 December 1978, *B.M.W. Belgium N.V. and Belgian B.M.W.-dealers*, O.J., 17 February 1978, No L 46/33) this circumstance was not present. Nevertheless the Commission held that an exclusive concession agreement did not create such a degree of economic dependence that the concessionaries had no alternative but to subscribe the instructions of the grantor of the concession. It was recognized that this agreement caused some degree of economic dependence liable to condition the concessionaries' room for initiative and decision. This was not a sufficient degree to concede to an economic unit. The Commission's B.M.W.-decision was brought before the Court of Justice which reaffirmed it (C.J.E.C., joined cases 32 and 36-82/78, July 12, 1979, *B.M.W. Belgium N.V. a.o. v Commission*, E.C.R., 1979, 2435).

³³⁰ Exceptionally, the control is found because of other «mutual links» (Commission Regulation (EEC) No 2865/85 of 14 October 1985 imposing a provisional anti-dumping duty on imports of certain electronic scales originating in Japan and accepting undertakings and terminating the proceeding in respect of certain imports of such products originating in Japan, O.J., 16 October 1985, No L 275/5). The notion «mutual links» has not yet been clarified.

unrebuttable presumption that the entirely owned company is wholly controlled by its owner³³¹. However, a majority stock ownership may also imply the control of the majority stock holder over the sales company. The European anti-dumping authorities have considered a 50 % share holding³³², as well as a 5 % share holding³³³, to represent a majority stock ownership. The Court of Justice too has considered a 20 % share holding to be sufficient for a majority stock ownership³³⁴. A 5 or 20 % share holding, though, will not always be sufficient. A majority stock ownership normally depends upon the degree of dispersion of stock ownership³³⁵. Thus, if there is only a majority stock ownership, it should be investigated whether it is the majority stock owner who controls the sales company.

It seems that the notion of economic unit is less broad than the notion of association. For an association to exist, only condition (ii) must be fulfilled³³⁶. For example, there will be an association, but not an economic unit, when a manufacturing company controls another manufacturing company which buys and processes the first company's product. In this case, condition (ii) is not met and, thus, there will be no economic unit, though there is an association.

This interpretation placed on the concept «association» is accompanied by the rebuttable presumption that the sales prices between associated parties are influenced by the association.

331 See : Commission Recommendation No 259/83/ECSC of 27 January 1983 imposing a definitive anti-dumping duty on broad-flanged beams originating in Spain, *O.J.*, 1 February 1983, No L 30/61 (corrigendum, *O.J.*, 8 February 1983, No L 36/10 ; Commission Decision No 2247/87/ECSC of 28 July 1987 imposing a provisional anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Mexico, *O.J.*, 29 July 1987, No L 207/21 ; Commission Regulation (EEC) No 2684/88 of 26 August 1988 imposing a provisional anti-dumping duty on certain imports of video cassette recorders originating in Japan and the Republic of Korea, *O.J.*, 31 August 1988, No L 240/5 ; Commission Decision 89/56/EEC of 20 January 1989 terminating the anti-dumping proceeding concerning imports of certain seamless tubes of iron or non-alloy steel originating in Austria, *O.J.*, 28 January 1989, No L 25/87.

332 Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5.

333 Council Regulation (EEC) No 1058/86 of 8 April 1986 imposing a definitive anti-dumping duty on imports of certain electronic scales originating in Japan, *O.J.*, 12 April 1986, No L 97/1.

334 C.J.E.C., case C-104/90, 13 October 1993, *Matsushita Electric Industrial Co. Ltd v Council*, recital 3 (Opinion Advocate General VAN GERVEN) and consideration 8 (not yet reported).

335 In *electronic typewriters from Japan* the Commission stated that the manufacturing company possessed a majority stock ownership because the other owners had each individually only a very small share-holding (Commission Regulation (EEC) No 3643/84 of 20 December 1984 imposing a provisional anti-dumping duty on imports of electronic typewriters originating in Japan and terminating the anti-dumping proceeding with regard to Nakajima All Co. Ltd, *O.J.*, 22 December 1984, No L 335/43).

336 See : *polyester yarns from the People's Republic of China*, where an association was found between companies of which it was only noted that they were financially linked to each other (Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7, where it concerned an association between an exporter and importers. Nevertheless, it is relevant because European anti-dumping law has adopted the same approach for sales between associated parties on the domestic market of the exporting country as for exports to the Community (BESELER, J.-F., and WILLIAMS, A.N, *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 56)).

Under European anti-dumping case law, the rebuttal is successful when the sales prices between associated parties are comparable³³⁷ to price actually charged between non-associated parties³³⁸. The sales price between non-associated parties is a rather rough standard. It is quite possible that transactions between non-associated parties do not take place in the ordinary course of trade, or that non-associated parties are less efficient and, therefore, must charge higher prices than the associated parties.

In only one European anti-dumping case, the transactions between associated parties were considered to be made in the ordinary course of trade not only because the prices were comparable to those between non-associated parties, but also because there was a reasonable relationship between the prices and production costs and because sales took place under conditions which for a reasonable time had been normal in the trade under consideration³³⁹. In this respect, the condition that the sales between associated parties must correspond to sales made in the ordinary course of trade, is combined with the condition that prices between associated parties must be comparable to prices between non-associated parties. As a result, the rebuttal is made more difficult. Because of the difficulties in rejecting the presumption that prices are influenced by the association, together with the broad interpretation placed on the concept «association», the

337 Both prices must be comparable to each other. If there is a difference between both prices and if there are circumstances, other than the association, which can explain this difference, e.g., the quantities sold, the presumption will be rebutted, see : Commission Regulation (EEC) No 1500/83 of 9 June 1983 imposing a provisional anti-dumping duty on imports of outboard motors originating in Japan, *O.J.*, 10 June 1983, No L 152/18.

338 Commission Regulation (EEC) No 1500/83 of 9 June 1983 imposing a provisional anti-dumping duty on imports of outboard motors originating in Japan, *O.J.*, 10 June 1983, No L 152/18 ; Commission Decision 84/259/EEC of 10 May 1984 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain sensitized paper for colour photographs originating in Japan and terminating that proceeding, *O.J.*, 11 May 1984, No L 124/45 ; Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1 ; Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5 ; Commission Decision 87/236/EEC of 10 April 1987 terminating the anti-dumping proceeding on imports of synthetic fibres of polyesters originating in the German Democratic Republic, Romania, Turkey and Yugoslavia, *O.J.*, 15 April 1987, No L 103/38 ; Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia, *O.J.*, 9 May 1987, No L 121/11.

The rebuttal has been rejected merely because there were no transactions between the producer/exporter and an independent party. See : Commission Decision 87/236/EEC of 10 April 1987 terminating the anti-dumping proceeding on imports of synthetic fibres of polyesters originating in the German Democratic Republic, Romania, Turkey and Yugoslavia, *O.J.*, 15 April 1987, No L 103/38 ; Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27).

Sometimes, it is not even investigated whether the assumption actually holds and the transactions between associated parties are disregarded (Commission Regulation (EC) No 3119/94 of 19 December 1994 imposing a provisional anti-dumping duty on imports of ferro-silico-manganese originating in Russia, Ukraine, Brazil and South Africa, *O.J.*, 21 December 1994, No L 330/15).

339 Commission Decision 84/259/EEC of 10 May 1984 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain sensitized paper for colour photographs originating in Japan and terminating that proceeding, *O.J.*, 11 May 1984, No L 124/45.

actually charged prices on the domestic market will seldom be used, whenever some kind of association may be detected.

2.2.4.1.2. Sales at a loss

Under GATT and EC anti-dumping law, sales may be considered as not being in the ordinary course of trade if it is determined that :

- (i) when they are made at prices below per unit (fixed and variable) production costs ;
- (ii) if it is determined that those sales are made within an extended period of time in substantial quantities ; and
- (iii) are at prices which do not provide for the recovery of all costs within a reasonable period of time (Article 2.2.1. GATT Anti-dumping Code ; Article 2(4) basic EC Regulation).

Under ECSC anti-dumping law, sales may considered as not having been made in the ordinary course of trade :

- (i) whenever there are reasonable grounds for believing or suspecting that the price at which a product is actually sold for consumption in the country of origin is less than the cost of production ;
- (ii) if such sales have been made in substantial quantities during the investigation period ; and
- (iii) are not at prices which permit recovery of all costs, reasonably allocated, within the investigation period in the normal course of trade (Article 2(4) basic ECSC Decision).

Condition (i) concerns the (suspected) existence of sales at a loss. Conditions (ii) and (iii) define the circumstances in which sales at a loss are not made in the ordinary course of trade. These three conditions have to be fulfilled cumulatively³⁴⁰.

The major difference between GATT and EC anti-dumping and ECSC anti-dumping law concerns the onus of proof. Under ECSC anti-dumping law, it is sufficient that «there are *reasonable grounds for believing or suspecting* that the price (...) is less than the cost of production» (Article 2(4) basic ECSC Decision) (emphasis added). An allegation made by the complainant Community producers about sales at a loss may be such a reasonable ground. For it has created the rebuttable presumption that sales are made at a loss and, consequently, shift the onus of proof onto the

³⁴⁰ BESELER, J.-F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 63 ; KRETSCHMER, H., *Das Antidumping- und Antisubventionsrecht der Europäischen Gemeinschaften*, Frankfurt/Main, VVW-Verlag, 1980, 29 ; LANDSITTEL, R., *Dumping in Außerhandels- und Wettbewerbsrecht*, Baden-Baden, Nomos, 1987, 26 ; STANBROOK, C., *Dumping. A Manual of the EEC Anti-Dumping Law and Procedure*, Chequers, European Business Publications, 1980, 21. If not all three conditions are fulfilled, the domestic market price of all sales on the exporter's domestic market must be used, including the sales made at prices below the production costs. Indeed, in *saccharine from the United States of America*, the Commission determined that the prices of certain sales did not permit recovery of all production costs. Nevertheless, the Commission used the weighted average price of *all* sales - thus including the sales below the production costs - on the domestic market as normal value (Commission Decision 80/1116/EEC of 4 December 1980 accepting undertakings offered by the exporters of saccharin and its salts originating in China and the United States of America and terminating the proceedings concerning imports of saccharin and its salts from China, Japan and the United States of America, *O.J.*, 9 December 1980, No L 331/41). Probably conditions (ii) and (iii), unlike condition (i), were not fulfilled.

exporters³⁴¹. In ECSC anti-dumping law, however, no straightforward rule about the onus of proof exists³⁴². Indeed, the onus of proof may lie with the exporters in cases not providing any evidence of an allegation by the complainant Community producers about sales at a loss³⁴³. The absence of a straightforward rule as to the onus of proof most certainly does not enhance legal certainty. GATT and EC anti-dumping law, on the other hand, require that prices *are* below

³⁴¹ See e.g.: *polyester yarns from the United States of America* (Notice of initiation of an anti-dumping proceeding concerning imports of certain polyester yarn originating in the United States, *O.J.*, 30 May 1980, No C 129/2 (corrigendum, *O.J.*, June 18, 1980, No. C 149/19); Council Regulation (EEC) No 3439/80 of 22 December 1980 imposing a definitive anti-dumping duty on imports of certain polyester yarn originating in the United States of America, *O.J.*, 31 December 1980, No L 358/91); *titanium mill products from Japan and the United States* (Notice of initiation of an anti-dumping proceeding concerning imports of titanium mill products originating in Japan and the United States of America, *O.J.*, 7 September 1984, No C 237/2; Commission Decision 85/252/EEC of 23 April 1985 terminating the anti-dumping proceeding concerning imports of certain titanium mill products originating in Japan and the United States of America, *O.J.*, 26 April 1985, No L 113/30); *clogs from Sweden* (Notice of initiation of an anti-dumping proceeding concerning imports of clogs originating in Sweden, *O.J.*, 19 February 1985, No C 47/2; Commission Regulation (EEC) No 2823/85 of 7 October 1985 imposing a provisional anti-dumping duty on imports of certain clogs originating in Sweden, *O.J.*, 10 October 1985, No L 268/11; Commission Decision 86/21/EEC of 4 February 1986 accepting undertakings given in connection with the anti-dumping investigation concerning imports of certain clogs originating in Sweden, *O.J.*, 7 February 1986, No L 32/28); *synthetic fibres of polyester from the Republic of Korea* (Notice of initiation of an anti-dumping proceeding concerning imports of synthetic fibres of polyester originating in India and the Republic of Korea, *O.J.*, 21 November 1990, No C 291/20; Commission Regulation (EEC) No 1956/92 of 7 July 1992 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in India and the Republic of Korea, *O.J.*, 16 July 1992, No L 197/25; Council Regulation (EEC) No 54/93 of 8 January 1993 imposing a definitive duty on imports of synthetic fibres of polyesters originating in India and the Republic of Korea, *O.J.*, 15 January 1993, No L 9/2).

It would seem that the allegation of the complainants must be grounded sufficiently. See: *propan-1-ol from the United States of America*, where the exporter was not able to provide evidence that his prices were not below his production costs. Nevertheless, the Commission seems not to have had any reasonable grounds for believing or suspecting that sales were made at a loss (Commission Decision 84/229/EEC of 13 April 1984 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of propan-1-ol (propyl alcohol) originating in the United States of America, and terminating that proceeding, *O.J.*, 19 April 1984, No L 106/55). Probably the allegation of the complainants was not grounded sufficiently. Indeed, in the notice initiating the proceeding no mention was made about any sales at a loss (Notice of initiation of an anti-dumping proceeding concerning imports of propyl alcohol originating in the United States of America, *O.J.*, 14 October 1983, No C 275/3).

³⁴² European anti-dumping law is not identical to the anti-dumping practice of the United States of America. In the United States of America the complainants must substantiate that sales have been made at a loss. If they succeed, the onus of proof usually lies with the allegedly dumping exporters (DICKEY, W.L., «A Guide for Pricing Commodities to Enter the Commerce of the United States», *Law and Policy in International Business*, 1979, (491), 500).

³⁴³ See: *acrylic fibres from the United States of America* (Notice concerning an anti-dumping/anti-subsidy proceeding in respect of certain acrylic fibres originating in Greece, Japan, Spain, Turkey and the United States of America, *O.J.*, 12 June 1979, No C 146/2; Council Regulation (EEC) No 1100/80 of 30 April 1980 imposing a definitive anti-dumping duty on certain acrylic fibres originating in the United States of America, *O.J.*, 3 May 1980, No L 114/37); *ortho-xylene from Puerto Rico and the United States* (Notice in connection with the review of the definitive anti-dumping duty on imports of o-xylene (ortho-xylene) originating in Puerto Rico and the United States of America, *O.J.*, 15 May 1982, No C 124/2; Council Regulation (EEC) No 906/83 of 18 April 1983 amending Regulation (EEC) No 2761/81 imposing a definitive anti-dumping duty on o-xylene (ortho-xylene) originating in Puerto Rico and the United States of America, *O.J.*, 20 April 1983, No L 101/4); *p-xylene from Puerto Rico, the United States of America and the American Virgin Islands* (Notice in connection with the review of the definitive anti-dumping duty on imports of p-xylene (paraxylene) originating in Puerto Rico, the United States of America and the American Virgin Islands, *O.J.*, 15 May 1985, No C 124/2; Council Regulation (EEC) No 905/83 of 18 April 1983 amending Regulation (EEC) No 2940/81 imposing a definitive anti-dumping duty on p-xylene (paraxylene) originating in Puerto Rico, the United States of America and the United States Virgin Islands, *O.J.*, 20 April 1983, No L 101/1); *kraftliner from the United States of America* (Notice in connection with the review of the definitive anti-dumping duty on kraftliner originating in the United States of America and accepting the undertakings for kraftliner originating in Canada, Finland, Austria, Portugal, the Soviet Union and Sweden, *O.J.*, 21 August 1982, No C 217/2; Council Regulation (EEC) No 551/83 of 8 March 1983 imposing a definitive anti-dumping duty on kraftliner paper and board originating in the United States of America and accepting undertakings given in connection with the review of the anti-dumping proceeding on kraftliner paper and board originating in Austria, Canada, Finland, Portugal, the Soviet Union and Sweden, *O.J.*, 10 March 1983, No L 64/25); *wire rod from Brazil and Portugal* (Notice in connection with the introduction of an anti-dumping proceeding in respect of imports of wire rod originating in Brazil, Portugal, Trinidad and Tobago and Venezuela, *O.J.*, 20 February 1985, No C 48/2; Commission Decision 85/501/ECSC of 11 November 1985 terminating the anti-dumping proceeding concerning imports of wire rod originating in Brazil, Portugal, Trinidad and Tobago and Venezuela, *O.J.*, 13 November 1985, No L 299/18).

production costs. Thus, reasonable grounds for believing or suspecting, such as an allegation, that sales are made at a loss will not suffice. Moreover, even if prices are below production costs, the onus of proof cannot be shifted onto the exporters. Indeed, under GATT and EC anti-dumping law, it must be «determined» that those sales are made within an extended period of time in substantial quantities and are at prices which do not permit the recovery of all costs (Article 2.2.1. GATT Anti-dumping Code : Article 2(4) basic EC Regulation). Such a determination is clearly different from a determination that exporters are unable to provide the proof to the contrary. Moreover, GATT anti-dumping law explicitly stipulates that «the authorities» must determine whether all conditions for sales at a loss are fulfilled (Article 2.2.1. GATT Anti-dumping Code), and, thus, indicates how EC anti-dumping law must be interpreted. As they provide a straightforward rule as to the onus of proof, GATT and EC anti-dumping law should be preferred and, in order to stop it from violating GATT anti-dumping law, ECSC anti-dumping law should be amended or, at least, its interpretation should be altered.

The major problem with GATT and European anti-dumping law is that they do not guarantee that only sales at a loss will be identified which, from an economic point of view, are not made in the ordinary course of trade. From an economic point of view, only sales at a loss which do not result from short-run profit maximization should be considered as not having been made in the ordinary course of trade. Short-run profit maximization may result in sales at prices which cover variable and possibly a part of the fixed production costs. For it is more profitable to sell at such prices than to stop production and incur a loss equal to total fixed production costs³⁴⁴. In condition (i), however, the concept of «cost of production» refers to all variable and fixed production costs.

The concept «all costs» used in condition (iii) also refers to variable and fixed production costs. Its definition may, however, be economically justified. Condition (iii) differs from condition (i), for under condition (iii) it is investigated whether all sales - sales at a loss and profitable sales -

³⁴⁴ *Supra*, 38-39.

cover all production costs³⁴⁵. Indeed, GATT and EC anti-dumping law stipulate that prices, which are above weighted average costs for the investigation period, must be considered to provide for the recovery of costs within a reasonable period of time (Article 2.2.1. GATT Anti-dumping Code ; Article 2(4)(a) basic EC Regulation). This seems to meet the economic requirement that in the long run total production costs must be covered.

Condition (ii) also seems to render the same economic requirement. For, if substantial quantities³⁴⁶ are sold at a loss, total production costs will probably not be covered by the revenue of all sales. This is explicitly affirmed by GATT and EC anti-dumping law, which consider sales at a loss to have been made in substantial quantities when it is established that the weighted average selling price is below the weighted average unit cost (Note 5 *ad* Article 2.2.1. GATT Anti-dumping Code ; Article 2(4)(b) basic EC Regulation). However, condition (ii) does not meet condition (iii) entirely, as GATT and EC anti-dumping law consider condition (ii) to be equally fulfilled if the volume of sales below unit cost is not less than 20 % of sales being used to

³⁴⁵ For condition (iii) to be fulfilled the weighted average price of all sales must be below total production costs (Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79 ; corrigendum, *O.J.*, 10 February 1990, No L 38/44) ; Commission Regulation (EEC) No 313/92 of 4 February 1992 imposing a provisional anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in South Korea, *O.J.*, 11 February 1992, No L 34/8 ; Commission Regulation (EEC) No 1994/92 of 14 July 1992 imposing a provisional anti-dumping duty on imports into the Community of outer rings of tapered roller bearings originating in Japan, *O.J.*, 18 July 1992, No L 199/8 ; BESELER, J.F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 63 ; see also : KRETSCHMER, H. *Das Antidumping- und Antisubventionsrecht der Europäischen Gemeinschaften*, Frankfurt/Main, VVW-Verlag, 1980, 30), or the weighted average price must cover the average unit cost of production (Commission Regulation (EC) No 3119/94 of 19 December 1994 imposing a provisional anti-dumping duty on imports of ferro-silico-manganese originating in Russia, Ukraine, Brazil and South Africa, *O.J.*, 21 December 1994, No L 330/15). Thus, in *plain paper photocopiers from Japan* (C.J.E.C., case C-178/87, 10 march 1992, *Minolta Camera Co. Ltd v Council, E.C.R.*, 1992, I, (1577), 1626 ; Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12) and *small screen colour television receivers from the Republic of Korea* (Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1) sales which were considered as profitable, covered all sales at an average price above the production costs, including the sales at a loss. In those cases, condition (i) was fulfilled - there were sales at a loss -, but condition (iii) was not.

³⁴⁶ No further attention will be paid to the interpretation placed on the concept of "substantial quantities". For European anti-dumping case law provides too little information :

- in *wire rod from Trinidad and Tobago and Venezuela* condition (ii) was obviously fulfilled because all the domestic transactions were made at a loss (Commission Decision 85/501/EEC of 11 November 1985 terminating the anti-dumping proceeding concerning imports of wire rod originating in Brazil, Portugal, Trinidad and Tobago and Venezuela, *O.J.*, 13 November 1985, No L 299/18) ;
- in *potato granules from Canada* the European anti-dumping authorities considered two thirds of the domestic sales as substantial quantity ; the other sales were considered to be comparable sales having been made in the ordinary course of trade (Council Regulation (EEC) No 2467/81 of 24 August 1981 imposing a definitive anti-dumping duty on potato granules originating in Canada, *O.J.*, 26 August 1981, No L 243/1 ; Commission Decision 81/663/EEC of 24 August 1981 accepting undertakings in connection with the anti-dumping proceedings concerning potato granules originating in Canada, *O.J.*, 26 August 1981, No L 243/16) ;
- *sodium carbonate from the United States of America* the sales at a loss represented on average 70 % of total domestic sales (Commission Decision 90/507/EEC of 7 September 1990 terminating the review of the anti-dumping measures concerning dense sodium carbonate originating in the United States of America, *O.J.*, 16 October 1990, No L 283/38) ;
- in *hematite pig iron from Brazil*, more than 90 % of the sales on the domestic market of the exporting country were made at a loss (Commission Decision No 67/94/EEC of 12 January 1994 imposing a provisional anti-dumping duty on imports into the Community of hematite pig iron, originating in Brazil, Poland, Russia and Ukraine, *O.J.*, 15 January 1994, No L 12/5).

determine normal value (Note 5 *ad* Article 2.2.1. GATT Anti-dumping Code ; Article 2(4)(b) basic EC Regulation). Here, GATT and EC anti-dumping law grant a broad room for manoeuvre to the anti-dumping authorities : the latter can influence the fulfilment of condition (ii) by selecting the sales taken into account for the determination of normal value so that 20 % or more of those sales are made at a loss. In general, GATT and EC anti-dumping law expose the weakness of the system : the outcome of an investigation into sales at a loss, depends to a great extent on the sales taken into account.

A similar weakness concerns the period taken into account. Under ECSC anti-dumping law, only the sales made during the investigation period are taken into account (Article 2(4)(1)(a) and (b) basic ECSC Decision)³⁴⁷. GATT and EC anti-dumping law require that an extended period of time, as well as a reasonable period of time be taken into account ; the extended period of time should normally be one year but shall in no case be less than six months, whereas the reasonable period of time may coincide with the investigation period (Article 2.2.1. GATT Anti-dumping Code ; Article 2(4) basic EC Regulation). That investigation period must normally cover a period of not less than six months (Article 6(1) basic EC Regulation ; Article 7(1)(c) basic ECSC legislation). The choice of those periods may determine whether or not sales at a loss will be considered as having been made in the ordinary course of trade. Indeed, the shorter/longer the period, the lower/higher the probability that production costs will be covered, unless a short period is taken into account in which practically no sales at a loss are made. It may be argued that, from an economic point of view, the period taken into account should be equivalent to a business cycle³⁴⁸. GATT and European anti-dumping law seem to guarantee a minimum period of six months. However, with the approval of the Court of Justice³⁴⁹, that guarantee has been misused upon a pretext that a period of six months is amply sufficient, even if it does

³⁴⁷ Thus, future sales must not be taken into account. See, however : DIDIER, P., «EEC Antidumping Rules and Practices», *Common Market Law Review*, 1980, (349), 355-356.

³⁴⁸ VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 430.

³⁴⁹ C.J.E.C., case C-178/87, 10 march 1992, *Minolta Camera Co. Ltd v Council*, E.C.R., 1992, I, (1577), 1613-1614 (Opinion of Advocate General MISCHO) and 1627.

not coincide with a business cycle³⁵⁰. Accordingly, by guaranteeing a minimum period, GATT and European anti-dumping law may entail too short periods which do not cover a business cycle. As a consequence, under European anti-dumping law, sales at a loss resulting from short-run profit maximization may be considered as not having been made in the ordinary course of trade.

2.2.4.1.3. Sales on a competitive domestic market

Under European anti-dumping law, ordinary course of trade implies that there is competition in the market, but does not require the competition to be perfect. It encompasses also imperfect competition, such as situations in which competition is restricted by a cartel or a monopoly³⁵¹. From an economic point of view, this is a necessary interpretation for dumping to include all cases of price discrimination. For the most important cause of price discrimination is the existence of imperfect competition on the domestic market of the exporting country. As a

³⁵⁰ In *plain paper photocopiers from Japan*, the Council considered that an investigation period covering seven months met the criterion of «an extended period of time». It also refused to accept the variation of profitability of a product over its lifetime as a general principle (C.J.E.C., case C-178/87, 10 march 1992, *Minolta Camera Co. Ltd v Council*, E.C.R., 1992, I, (1577), 1593 (Report for the Hearing : conclusions of the Council)).

In *urea from Malaysia*, the exporter contended that the production cycle was equivalent to eighteen months. The Commission replied that «an investigation period is determined on a neutral manner for all parties concerned at the anti-dumping investigation and (that) a deviation from such a period in favour of one party is not possible. Moreover, the investigation period amounted to twice the minimum indicated by Article 7(1)(c), of Regulation (EEC) No 2423/88 (i.e., the former basic EC legislation). The investigation period used in this proceeding is, therefore, thought not unreasonable» (Commission Regulation (EEC) No 2623/88 of 24 August 1988 imposing a provisional anti-dumping duty on imports of urea originating in Austria, Hungary, Malaysia, Romania, the USA and Venezuela, O.J., 25 August 1988, No L 235/5).

In *DRAMs from Japan* and *EPROMs from Japan*, the Commission could not accept the dumping exporters' argument that all costs would have been recovered, albeit over a longer period than the investigation period. It rejected the dumping exporters' argument because the investigation period covered a whole year. It considered that within such a period prices which do not permit the recovery of all costs cannot be regarded as having been made in the ordinary course of trade (Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, O.J., 25 January 1990, No L 20/5 (corrigendum, O.J., 27 January 1990, No L 22/79 ; corrigendum, O.J., 10 February 1990, No L 38/44 ; Council Regulation (EEC) No 577/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as EPROMs (erasable programmable read only memories) originating in Japan, O.J., 12 March 1991, No L 65/1).

³⁵¹ Commission Decision 83/360/EEC of 18 July 1983 terminating the anti-dumping proceeding in respect of imports of certain pears in syrup, originating in Australia, the People's Republic of China and the Republic of South Africa, O.J., 20 July 1983, No L 196/22 ; Commission Regulation (EEC) No 2800/86 of 9 September 1986 imposing a provisional anti-dumping duty on imports of certain deep freezers originating in the USSR, accepting the undertakings in connection with the investigation of imports of certain deep freezers originating in Yugoslavia or in the German Democratic Republic and terminating the investigation, and terminating the proceeding concerning imports of certain deep freezers, O.J., 11 September 1986, No L 259/14.

consequence, high domestic market prices, caused by a cartel or a monopoly, may be used as normal value³⁵².

As it refers to competition, ordinary course of trade also implies prices to be determined by the market, *i.e.*, the interaction between demand and supply. Hence, according to European anti-dumping case law, prices determined by the government are not in the ordinary course of trade³⁵³, unless, at least, they cover all production costs³⁵⁴, like market prices should do in order to fit in with the concept «ordinary course of trade». If they also take into account competition from other products, they certainly will fit in with the concept «ordinary course of trade»³⁵⁵. This aspect of European case law smells of «one-way flexibility»: it has an increasing effect on normal value determination as prices determined by the government may be used as normal value if they cover all production costs, *i.e.*, if they are high enough.

352 In *aspartame from the United States of America*, the American exporter claimed that his domestic market prices could not be used because of the differences in the price-elasticity of aspartame between the American and the Community markets. The Commission rejected his claim because a difference in price-elasticity is a prerequisite for price differentiation and dumping could never be sanctioned if adjustments for differences in price-elasticity had to be made (Commission Regulation (EEC) No 3421/90 of 26 November 1990 imposing a provisional anti-dumping duty on imports of aspartame originating in Japan and the United States of America, *O.J.*, 29 November 1990, No L 330/16). For dumping to be determined the price-elasticity on the market of the exporting country has to be less than that on the Community market. The highest possible price-elasticity equals infinity. Thus, the price-elasticity on the market of the exporting country must always be lower than infinity and such a price-elasticity always corresponds to imperfect competition. *Supra*, 25-33.

See also: *dihydrostreptomycin from the People's Republic of China*, where the Commission refused to make any adjustment for the monopoly the Japanese producer (who was taken as reference for the determination of the normal value of China being a non-market economy (NME) country (Article 2(7) basic EC Regulation; Article 2(5) basic ECSC Decision)) had on his domestic market. According to the Commission, harmful price differentiation is contrary to European and international law, irrespective of the reasons (Commission Regulation (EEC) No 2054/91 of 11 July 1991 imposing a provisional anti-dumping duty on imports of dihydrostreptomycin originating in the People's Republic of China, *O.J.*, 13 July 1991, No L 187/23).

See, however, the *Chinese brushes case*, in which the Court of Justice rejected the choice of Sri Lanka as reference country (for the determination of the normal value of China being a NME country (Article 2(7) basic EC Regulation; Article 2(5) basic EC legislation)) because the Sri Lankan domestic market prices were too high (C.J.E.C., case C-16/90, 22 October 1991, *Eugen Nölle v Hauptzollamt Bremen-Freihafen*, *E.C.R.*, 1991, I, (5163), 5207). These high prices may have been the result of the duopoly on the Sri Lankan market. The Court, though, stated in general that a duopoly does not, in itself, prevent prices being the result of real competition, but did not investigate the Sri Lankan duopoly in particular (C.J.E.C., case C-16/90, 22 October 1991, *Eugen Nölle v Hauptzollamt Bremen-Freihafen*, *E.C.R.*, 1991, I, (5163), 5207).

353 In *cotton yarn from Egypt*, the cotton yarn spinning companies were state-owned and the domestic market prices of cotton yarn were fixed by the government. The Commission considered these prices to be influenced by non-market forces to such an extent that their artificiality prevented them from being considered as having been made in the ordinary course of trade (Commission Regulation (EEC) No 2818/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports of cotton yarn originating in Brazil, Egypt and Turkey and terminating the anti-dumping proceeding in respect of cotton yarn originating in India and Thailand, *O.J.*, 27 September 1991, No L 271/17).

354 Commission Regulation (EEC) No 2936/82 of 28 October 1982 imposing a provisional anti-dumping duty on copper sulphate originating in Yugoslavia, *O.J.*, 4 November 1982, No L 308/7; Commission Decision 83/360/EEC of 18 July 1983 terminating the anti-dumping proceeding in respect of imports of certain pears in syrup, originating in Australia, the People's Republic of China and the Republic of South Africa, *O.J.*, 20 July 1983, No L 196/22.

355 Commission Decision 83/360/EEC of 18 July 1983 terminating the anti-dumping proceeding in respect of imports of certain pears in syrup, originating in Australia, the People's Republic of China and the Republic of South Africa, *O.J.*, 20 July 1983, No L 196/22.

Economically, this interpretation is not justified. Indeed, economic theory shows that, under short-run profit maximization, prices do not always cover all production costs.

2.2.4.1.4. Sales on the domestic market of developing countries

Whereas European anti-dumping law does not pay attention to dumping from developing countries, GATT anti-dumping law recognizes «that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under (the GATT Anti-dumping Code). Possibilities of constructive remedies provided for by (the GATT Anti-dumping Code) shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members» (Article 15 GATT Anti-dumping Code). Under a strict and literal interpretation, GATT anti-dumping law allows to adopt constructive remedies, but does not affect the rules on the determination of dumping. Such an interpretation does not seem to be intended by GATT. For on 5 May 1981 the GATT Committee on Anti-dumping Practices, cognizant of the commitment in Article 13 of the 1980 GATT Anti-dumping Code (which has become Article 15 GATT Anti-dumping Code), decided that :

«(d)ue consideration should be given to all cases where, because special economic conditions affect prices in the home market, these prices do not provide a commercially realistic basis for dumping calculations. In such cases the normal value for the purposes of ascertaining whether the goods are being dumped shall be determined by methods such as a comparison of the export price with the comparable price of the like product when exported to any third country or the cost of production of the exported goods in the country of origin plus a reasonable amount for administrative, selling and any other costs and for profits»³⁵⁶.

By suggesting the use of the export price to third countries or the production costs (*i.e.*, the constructed value), the GATT Committee implicitly admits that sales on the domestic market of developing countries are not being made in the ordinary course of trade. For, according to GATT anti-dumping law, the export price to third countries or the constructed value may only be used as normal value standard if the sales on the domestic market of the exporting country are not made in the ordinary course of trade (Article 2.2. GATT Anti-dumping Code). This interpretation of Article 15 is probably meant to benefit the developing countries. For domestic market prices in developing countries are usually higher because of the high protection their domestic markets enjoy. By using other normal value standards instead of domestic market prices, the probability of finding dumping will be reduced.

European anti-dumping authorities reject such a favourable treatment of imports from developing countries. Contrary to the GATT Committee, they uphold a strict and literal interpretation, which

³⁵⁶ B.I.S.D., Twenty-seventh Supplement, Geneva, GATT, 1981, 17.

limits the scope of the GATT provision about developing countries to the choice of anti-dumping measures³⁵⁷.

2.2.4.2. Comparable sales

2.2.4.2.1. The concept of «sale»³⁵⁸

GATT and European anti-dumping law do not define the concept «sale». Of course, as the Court of Justice has pointed out, there is a difference between sales and production : sales are the vital element, regardless of whether there is production at the same time³⁵⁹.

European anti-dumping case law places a casuistic interpretation on it. Indeed, transactions of small quantities for testing purposes³⁶⁰ as well as transactions sent by sample post³⁶¹ do not meet the definition of the concept «sale», but development samples do³⁶². Moreover, barter

³⁵⁷ See : Council Decision 87/66/EEC of 19 January 1987 accepting undertakings given in connection with imports of binder and baler twine originating in Brazil and Mexico, and terminating the investigations, *O.J.*, 5 February 1987, No L 34/55 ; Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia, *O.J.*, 9 May 1987, No L 121/11 ; Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1.

³⁵⁸ All cases mentioned in connection with the interpretation of the concept of «sale» are export transactions towards the Community. Those transactions may be relevant only for the the export price determination. As GATT and European anti-dumping law use the concept of «sale» in connection with both normal value and export price, the same interpretation in respect of normal value may be expected.

³⁵⁹ C.J.E.C., case C-105/90, 13 February 1992, *Goldstar Co. Ltd v Council*, E.C.R., 1992, I, (677), 720-721.

³⁶⁰ The anti-dumping proceeding concerning *fluid cracking catalysts from the United States of America* has been terminated against two exporters because they exported small quantities for testing purposes only and did not intend to export in commercial quantities (Commission Decision 82/31/EEC of 14 January 1982 accepting undertakings in connection with the anti-dumping proceeding concerning imports of fluid cracking catalysts originating in the United States of America and terminating that proceeding, *O.J.*, 16 January 1982, No L 11/25).

³⁶¹ Without providing any explanation, the Council did not take into account the export transaction sent by sample post in *polyester yarns from the United States of America* (Council Regulation (EEC) No 2585/85 of 12 September 1985 amending Regulation (EEC) No 3439/80 imposing a definitive anti-dumping duty on imports of certain polyester yarn originating in the United States of America, *O.J.*, 13 September 1985, No L 246/57).

³⁶² In *acrylic fibres from the United States of America*, development samples which constituted a high proportion of total sales and for which a (low) price had been charged, were taken into account (Commission Regulation (EEC) No 2712/79 of 30 November 1979 imposing a provisional anti-dumping duty on certain acrylic fibres originating in the United States of America, *O.J.*, 4 December 1979, No L 308/11 ; Council Regulation (EEC) No 1100/80 of 30 April 1980 imposing a definitive anti-dumping duty on certain acrylic fibres originating in the United States of America, *O.J.*, 3 May 1980, No L 114/37).

trade seems not to fit in with the concept «sale»³⁶³. Renting and leasing transactions, furthermore, have not been taken into account merely because of the practical difficulties involved in obtaining a net return per product³⁶⁴. Thus, if there were no such practical difficulties, renting and leasing transactions would come within the concept «sale».

The casuistic interpretation placed on the concept «sale» cannot be accepted for it increases arbitrariness. Because of the absence of a definition in GATT and European anti-dumping law, the concept «sale» should be interpreted in its usual legal meaning, *i.e.*, the transfer of property in change of the payment of a price expressed in a monetary unit. Such an interpretation may create an opportunity for circumvention : if the products are not sold, but are instead rented or leased, anti-dumping law would be circumvented. In order to prevent such circumvention, the concept «sale» could be extended, but it should be prohibited that legally different types of transactions be compared (*e.g.*, a comparison between leasing transactions on the domestic market of the exporting country and export sales transactions towards the Community). Comparing two legally different transactions implies too many and too large adjustments and, thus, increases the probability of errors and arbitrariness to a far too high degree.

2.2.4.2.2. Insufficient quantities

Sales which permit a proper comparison are sales which are sufficiently representative, *i.e.*, which reflect normal behaviour on the part of purchasers and result from normal patterns of price

³⁶³ From *tubes of iron or steel from Romania* it may be deduced that barter trade does not fit the concept of «sale». Indeed, the Council did not meet the objection of the importers that the import of Romanian tubes into the Community was partly made in return of export transactions to Romania. The Council only referred to the provisional findings of the Commission. There, the Commission determined the export price on the basis of the Romanian export prices reported by the Romanian exporter. The Commission, thus, seems to have made no use of barter trade transactions (Commission Regulation (EEC) No 250/82 of 29 January 1982 imposing a provisional anti-dumping duty on certain welded iron or steel tubes originating in Romania, *O.J.*, 3 February 1982, No L 26/5 ; Council Regulation (EEC) No 1304/82 of 25 May 1982 establishing the definitive collection of the provisional anti-dumping duty on certain welded steel tubes originating in Romania, *O.J.*, 29 May 1982, No L 150/1 ; Commission Regulation (EEC) No 1334/82 of 28 May 1982 accepting an undertaking offered in connection with the anti-dumping procedure concerning certain welded steel tubes originating in Romania, terminating that procedure and cancelling the provisional anti-dumping duty, *O.J.*, 29 May 1982, No L 150/79).

³⁶⁴ In the provisional assessment on *plain paper photocopiers from Japan*, the Commission, moreover, did not think it necessary to take into account the renting and leasing transactions because the investigation covered more than 70 % of all transactions and the transactions taken into account were considered to be representative (Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5). However, the definitive finding concerning *plain paper photocopiers from Japan* took account of renting transactions to determine injury, namely to determine the evolution of the marketed products (Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12), which the Court of Justice (implicitly) approved (C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, *E.C.R.*, 1992, I, (1335), 1399 and 1402 ; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, *E.C.R.*, 1992, I, (1409), 1483 and 1485 ; C.J.E.C., case C-176/87, 10 March 1992, *Konishiroku Photo Industry Co. Ltd v Council*, *E.C.R.*, 1992, I, (1493), 1527 and 1529 ; C.J.E.C., case C-177/87, 10 March 1992, *Sanyo Electric Co. Ltd v Council*, *E.C.R.*, 1992, I, (1535), 1568 and 1570 ; C.J.E.C., case C-179/87, 10 March 1992, *Sharp Corporation v Council*, *E.C.R.*, 1992, I, (1635), 1680 and 1682).

formation³⁶⁵. As to the European anti-dumping authorities, sales representing a quantity of less than 5 % of the volume of total exports of the exporting country to the Community, in principle³⁶⁶, are not representative because such sales may be influenced by other than normal commercial considerations and because their quantities may be residual or so negligible that they cannot be considered as reliably reflecting pricing in the ordinary course of trade³⁶⁷. GATT and EC anti-dumping law have recently codified this aspect of European case law (note 2 *ad* Article 2.2. GATT Anti-dumping Code ; Article 2(2) basic EC Regulation).

³⁶⁵ C.J.E.C., case C-105/90, 13 February 1992, *Goldstar Co. Ltd v Council, E.C.R.*, 1992, I, (677), 701-702 (Opinion of Advocate General VAN GERVEN) and 720.

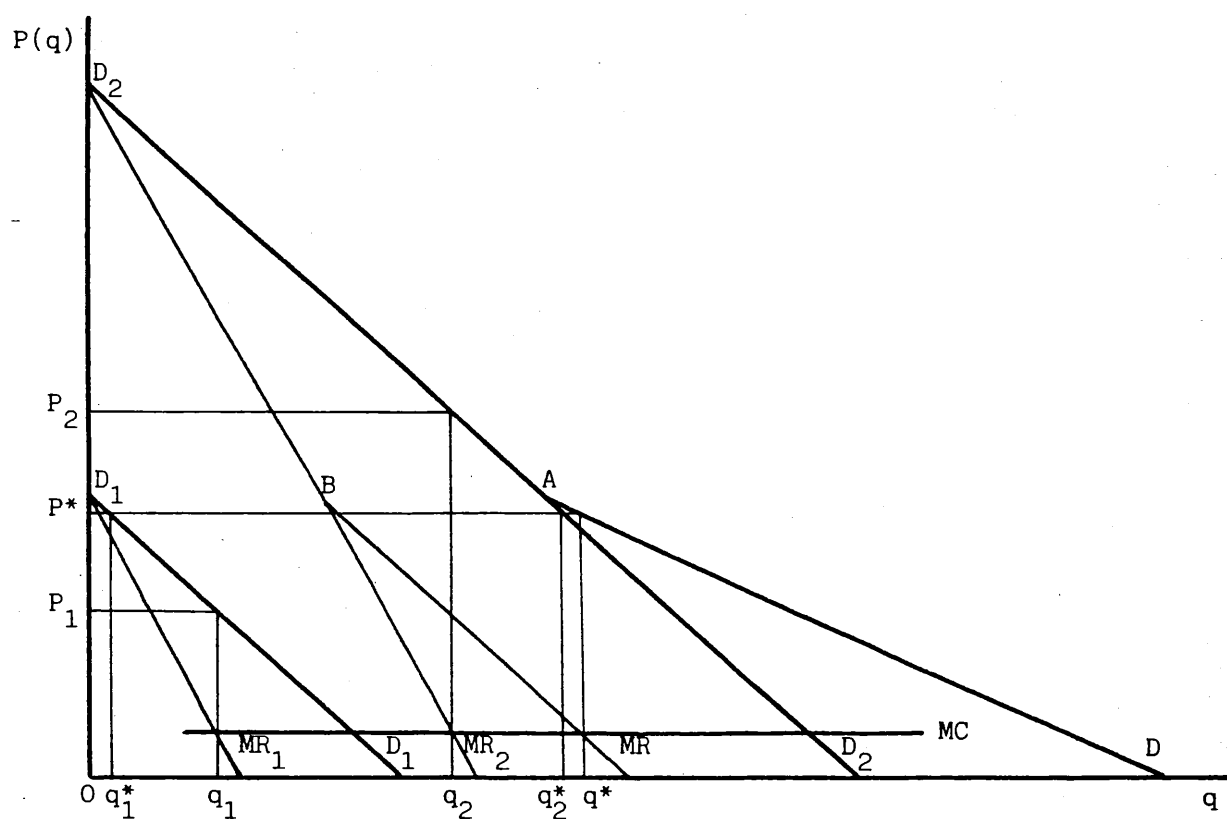
³⁶⁶ The threshold of 5 % is but a guideline which offers traders a degree of legal certainty as regard the interpretation of the notion «comparable sales». In exceptional circumstances, the threshold may be deviated from. Such circumstances may arise where the total volume on the domestic market is not sufficiently large for prices to be determined by supply and demand (C.J.E.C., case C-105/90, 13 February 1992, *Goldstar Co. Ltd v Council, E.C.R.*, 1992, I, (677), 702-703 (Opinion of Advocate General VAN GERVEN) and 720-722 ; Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1 ; VERMULST, E.A., and HOOIJER, J.J., «Annotation on Case C-170/89, *Bureau Européen des Unions de Consommateurs v. Commission*, Judgment of 28 November 1991 ; Case C-105/90, *Goldstar Co. Ltd v. Council*, Judgment of 13 February 1992 ; Case C-188/88, *NMB (Deutschland) GmbH, NMB Italia Srl, NMB (UK) Ltd. v. Commission of the European Communities*, Judgment of 10 March 1992 ; Case 171/87, *Canon Inc. v. Council* ; Case 172/87, *Mita Industrial Co. Ltd. v. Council* ; Case 174/87, *Ricoh Company Ltd. v. Council* ; Case 175/87, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd. v. Council* ; Case 176/87, *Konishiroky Photo Industry Co. Ltd. v. Council* ; Case 177/87, *Sanyo Electric Co. Ltd. v. Council* ; Case 178/87, *Minolta Camera Co. Ltd. v. Council* ; Case 179/87, *Sharp Corporation v. Council*, Judgments of 10 March 1992 ; Case C-358/89, *Extramet Industrie SA v. Council*, Judgment of 11 June 1992», *Common Market Law Review*, 1993, (115), 164-165).

The threshold only applies to sales made in the ordinary course of trade. If substantial quantities are sold at a loss and the remaining profitable sales on the domestic market do not reach the threshold of 5 %, the domestic market price of the profitable sales will not be used as normal value standard. It is of irrelevant whether total sales constitute a quantity of more than 5 % (Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 24 November 1988, No L 317/33 ; Council Regulation (EEC) No 1768/89 of 19 June 1989 imposing a definitive anti-dumping duty on imports of video cassettes originating in the Republic of Korea and Hong Kong, collecting definitively the provisional duty and terminating the anti-dumping proceeding with regard to the imports of video tape reels originating in the Republic of Korea, *O.J.*, 22 June 1989, No L 174/1 ; Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79 ; corrigendum, *O.J.*, 10 February 1990, No L 38/44) ; Commission Decision 90/507/EEC of 7 September 1990 terminating the review of the anti-dumping measures concerning dense sodium carbonate originating in the United States of America, *O.J.*, 16 October 1990, No L 283/38).

³⁶⁷ C.J.E.C., case 250/85, 5 October 1988, *Brother Industries Ltd v Council, E.C.R.*, 1988, (5683), 5721-5722 ; C.J.E.C., joined cases 277 and 300/85, 5 October 1988, *Canon Inc. a.o. v Council, E.C.R.*, 1988, (5731), 5799-5800 ; C.J.E.C., joined cases 273/85 and 107/86, 5 October 1988, *Silver Seiko Limited a.o. v Council, E.C.R.*, 1988, (5927), 5959 (Opinion of Advocate General Sir Gordon SLYNN) ; C.J.E.C., case C-105/90, 13 February 1992, *Goldstar Co. Ltd v Council, E.C.R.*, 1992, I, (677), 720-721 ; Commission Regulation (EEC) No 3643/84 of 20 December 1984 imposing a provisional anti-dumping duty on imports of electronic typewriters originating in Japan and terminating the anti-dumping proceeding with regard to Nakajima All Co. Ltd, *O.J.*, 22 December 1984, No L 335/43.

Contra : J. BOUDANT (*L'anti-dumping communautaire*, Paris, Economica, 1991, 81) argues that the European anti-dumping authorities have never indicated the percentage of overall production or exports below which domestic sales do not permit a proper comparison.

Figure 5



It appears that sales of small quantities are presumed to have been made at very low prices in order to circumvent anti-dumping law³⁶⁸. That presumption is probably borne out by the fact that the smaller the quantity sold on the domestic market of the exporting country, the smaller the loss will be for the producer/exporter to charge low prices on his domestic market. However, sales of small quantities may be also the result of short-run profit maximization. Moreover, the prices of such sales may even be lower than the export prices (*i.e.*, reverse dumping) when merely the domestic market of the exporting country is smaller than the Community.

In figure 5, market demand, D_1D_1 , with corresponding marginal revenue curve, D_1MR_1 , represents the domestic market of the exporter. The latter is assumed to be a monopolist and, therefore, is a price-maker. He is also assumed to export to the Community. The demand curve D_2D_2 , with corresponding marginal revenue curve D_2MR_2 , represents demand on the Community market. The Community market only differs from the exporter's domestic market because of its larger size. The exporter's total demand curve is the sum of D_1D_1 and D_2D_2 , which is represented by the curve D_2AD , the corresponding total marginal revenue curve being D_2BMR . His marginal cost curve, MC , which is assumed to be constant, cuts the total marginal revenue curve at a total quantity Oq^* . The exporter, thus, produces a quantity Oq^* . If he chooses to charge a uniform price in both markets, he will charge a price OP^* . At that price he will sell a quantity Oq^*_1 in his domestic market and export a quantity Oq^*_2 to the Community. If the exporter wants to maximize his profits, he will choose a price discriminating strategy. Profit maximization implies that in each market marginal revenue equals marginal cost. At the uniform price OP^* , marginal cost is lower than marginal revenue in the domestic market, but higher than marginal revenue in the Community market. If he equates in each market marginal revenue to marginal cost at a total quantity of Oq^* , the exporter will sell a quantity Oq_1 at a price of OP_1 on his domestic market, whereas a quantity of Oq_2 will be exported at a price of OP_2 to the Community. As a result, the exporter does not dump: his products are not sold at a loss and the price charged in the Community is higher than in the domestic market of the exporter³⁶⁹. The exporter practices reverse dumping.

Low prices of sales of small quantities, thus, may result from short-run profit maximization. Moreover, a profit-maximizing exporter may practise reverse dumping if his domestic market is smaller than the Community market. By considering sales of small quantities to be, in principle, no comparable sales, the European anti-dumping authorities place a «one-way flexible» interpretation on European anti-dumping law. They disregard that the exporter may practice reverse dumping in order to maximize his profits. Moreover, as they allow the use of alternative normal value standards which result in a higher normal value, they increase the probability of finding dumping in cases in which reverse dumping is practised. Sales of small quantities at low prices may, of course, also result from circumventing European anti-dumping law. In order to

³⁶⁸ If, on the other hand, prices are relatively high, sales of small quantities probably will be qualified as being comparable. The Court of Justice has, for instance, referred to the product life cycle where there is a gradual increase in the volume of sales with a parallel downward trend in prices, in order to qualify the sales of small quantities of a newly developed product at high prices as being comparable (C.J.E.C., case C-105/90, 13 February 1992, *Goldstar Co. Ltd v Council, E.C.R.*, 1992, I, (677), 721). It is, however, the question whether the Court would adopt the same attitude towards sales of small quantities at low prices which can be explained by a low demand for the product on the domestic market (*i.e.*, the case as depicted in figure 5 below).

³⁶⁹ In figure 5 the domestic market sales represent more than 5 % of total exports to the Community. The illustration of a domestic market less than 5 % of total exports would require a scale too small for illustrative clarity. It should, however, be clear from figure 5 that the smaller the domestic market, the lower the price on the domestic market will be.

prevent both «one-way flexibility» and circumvention, sales of small quantities should be considered to be comparable sales unless it is demonstrated that the prices on the exporter's domestic market are lower than their short-run profit-maximizing level.

2.2.4.2.3. Sales transactions intended for consumption

Comparable sales are sales intended for consumption on the domestic market of the exporter (Article VI(1) GATT ; Article 2.1. GATT Anti-dumping Code ; Article 2(1) basic EC Regulation ; Article 2(3)(a) basic ECSC Decision).

European anti-dumping case law has disregarded sales intended for export in determining the normal value without offering any explanation³⁷⁰. Probably, those sales were excluded because they were clearly not intended for consumption (on the domestic market).

European anti-dumping case law is even more obscure on the qualification of texturing, processing and conversion operations. In some cases, those operations are considered as not having been intended for consumption³⁷¹, but in other cases they are considered as not having been made in the ordinary course of trade³⁷². The doctrine pays only attention to the last cases : it qualifies these operations as compensatory arrangements, which, by definition, are not made in the ordinary course of trade (see : Article 2(1)(b) basic EC Regulation ; Article 2(7) basic ECSC

³⁷⁰ Council Regulation (EEC) No 407/83 of 21 February 1983 amending Regulation (EEC) No 3439/80 imposing a definitive anti-dumping duty on imports of certain polyester yarn originating in the United States of America, *O.J.*, 23 February 1983, No L 50/1 ; Council Regulation (EEC) No 2585/85 of 12 September 1985 amending Regulation (EEC) No 3439/80 imposing a definitive anti-dumping duty on imports of certain polyester yarn originating in the United States of America, *O.J.*, 13 September 1985, No L 246/57.

³⁷¹ Council Regulation (EEC) No 407/83 of 21 February 1983 amending Regulation (EEC) No 3439/80 imposing a definitive anti-dumping duty on imports of certain polyester yarn originating in the United States of America, *O.J.*, 23 February 1983, No L 50/1 ; Commission Regulation (EEC) No 2221/85 of 29 July 1985 imposing a provisional anti-dumping duty on imports of basic chromium sulphate originating in Yugoslavia, *O.J.*, 3 August 1985, No L 205/12 ; Commission Decision 87/236/EEC of 10 April 1987 terminating the anti-dumping proceeding on imports of synthetic fibres of polyesters originating in the German Democratic Republic, Romania, Turkey and Yugoslavia, *O.J.*, 15 April 1987, No L 103/38.

³⁷² Council Regulation (EEC) No 1282/81 of 12 May 1981 imposing a definitive anti-dumping duty on vinyl acetate monomer originating in the United States of America, *O.J.*, 15 May 1981, No L 129/1 ; Commission Regulation (EEC) No 2017/81 of 15 July 1981 imposing a provisional anti-dumping duty on phenol originating in the United States of America, *O.J.*, 18 July 1981, No L 195/22 ; Council Regulation (EEC) No 90/82 of 18 January 1982 imposing a definitive anti-dumping duty on phenol originating in the United States of America, *O.J.*, 18 January 1982, No L 12/1 ; Commission Decision 82/397/EEC of 14 June 1982 accepting undertakings in connection with the anti-dumping procedure concerning imports of certain polypropylene film for capacitors originating in Japan and terminating that procedure, *O.J.*, 18 June 1982, No L 172/44 ; Commission Regulation (EEC) No 2172/93 of 30 July 1993 imposing provisional anti-dumping duties on imports of ethanolamine originating in the United States of America, *O.J.*, 4 August 1993, No L 195/5.

Decision)³⁷³. European anti-dumping case law though has never qualified them as compensatory arrangements.

Only when texturing, processing and conversion operations are made on the captive market (*i.e.*, the use of the product by the producer who has produced it, in the manufacture of other products), they may be qualified as not being made in the ordinary course of trade. Indeed, as stated by the European anti-dumping authorities, the buyers in such a case are not free in their choice of suppliers³⁷⁴.

Nevertheless, texturing, processing and conversion operations on the captive market, just like those made on the open market, are also operations not intended for consumption. A comparison with the regime for inward processing operations, *i.e.*, processing operations in another country than the country of origin of the products to be processed, shows that processing operations are not compensatory arrangements. In European anti-dumping case law, the export price has been determined on the basis of inward processing operations³⁷⁵. As compensatory arrangements are considered not to constitute a reliable basis for the determination of the export price (Article 2.3. GATT Anti-dumping Code ; Article 2(9) basic EC Regulation ; Article 2(8)(b) basic ECSC Decision), inward processing operations seem not to come within the concept of «compensatory arrangement». As European anti-dumping law does not require export transactions to be intended for consumption, this probably explains why inward processing operations may be taken into

³⁷³ BESELER, J.-F., *Die Abwehr von Dumping und Subventionen durch die Europäische Gemeinschaften*, Baden-Baden, Nomos, 1980, 60 ; BOUDANT, J., *L'anti-dumping communautaire*, Paris, Economica, 1991, 89 ; BRIET, L.A.E., «Antidumping in de EEG - De kinderschoenen ontgroeid ?», *S.E.W.*, 1982, (145), 150 ; VAN BAEL, I., and BELLIS, J.-F., *Anti-Dumping and other Trade Protection Laws of the EEC*, Bicester, CCH Editions Ltd, 1990, 48 ; VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 429.

³⁷⁴ Commission Regulation (EEC) No 2172/93 of 30 July 1993 imposing provisional anti-dumping duties on imports of ethanolamine originating in the United States of America, *O.J.*, 4 August 1993, No L 195/5.

³⁷⁵ Council Decision 83/162/EEC of 18 April 1983 terminating the anti-dumping proceeding in respect of imports of acrylonitrile originating in the United States of America, *O.J.*, 20 April 1983, No L 101/29 ; Commission Decision 84/229/EEC of 13 April 1984 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of propan-1-ol (propyl alcohol) originating in the United States of America, and terminating that proceeding, *O.J.*, 19 April 1984, No L 106/55 ; Council Regulation (EEC) No 1306/89 of 11 May 1989 imposing a definitive anti-dumping duty on imports of light sodium carbonate originating in Bulgaria, the German Democratic Republic, Poland and Romania, *O.J.*, 13 May 1989, No L 131/4 ; Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79 ; corrigendum, *O.J.*, 10 February 1990, No L 38/44). In one case the inward processing arrangements were taken into account merely for practical reasons. Indeed, in this case European anti-dumping authorities were confronted with the practical difficulty that the products were sold to subsidiaries in the European Community who processed the imported product and did not resell it to independent customers in the European Community. See : Council Regulation (EEC) No 2702/87 of 4 September 1987 repealing a definitive anti-dumping duty on styrene monomer originating in the United States of America and terminating the investigation, *O.J.*, 8 September 1987, No L 258/20.

account for determining the export price³⁷⁶. Since there is basically no difference between domestic processing operations and inward processing operations, but for their location, it may be concluded that domestic processing operations are not compensatory arrangements and should be disregarded only for not being intended for consumption..

In view of European anti-dumping case law regarding the determination of the export price, a compensatory arrangement seems to be a kind of financial arrangement. Indeed, an agreement on the reimbursement of certain advertising expenses was held not to be a compensatory arrangement merely because of the circumstances of the agreement³⁷⁷. Regarding the determination of the normal value, explicit reference has been made in but one case to the existence of compensatory arrangements, without any further information being provided though³⁷⁸.

2.2.5. Domestic market price

2.2.5.1. Net price actually paid or payable

The domestic market price is the comparable price paid or payable in the ordinary course of trade for the like product intended for consumption in the exporting country or country of origin (Articles 1(2) and 2(1) basic EC Regulation ; Article 2(3)(a) basic ECSC Decision). ECSC anti-dumping law further requires that those prices are *actually* paid or payable. It is not yet clear whether the recent disappearance of the word «actually» in EC anti-dumping law will have any effect.

The words «actually paid or payable» imply that the domestic market price must be the price charged in connection with actual transactions. These transactions include all transactions made

³⁷⁶ Though it is legally not required, European antidumping case law possibly takes account only of export prices intended for consumption. For, in *video cassette recorders from Japan*, it was noted that the exports were intended for consumption in the Community and were, therefore, taken into account (Commission Regulation (EEC) No 2684/88 of 26 August 1988 imposing a provisional anti-dumping duty on certain imports of video cassette recorders originating in Japan and the Republic of Korea, *O.J.*, 31 August 1988, No L 240/5). It is, however, unclear whether the terms «destined for consumption» were added with a specific meaning.

³⁷⁷ Council Regulation (EEC) No 1048/90 of 25 April 1990 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 27 April 1990, No L 107/56 (corrigendum, *O.J.*, 24 May 1990, No L 133/92). See also : Council Regulation (EEC) No 1115/91 of 29 April 1991 imposing definitive anti-dumping duties in connection with the review of anti-dumping measures concerning imports of ferro-silicon originating in Brazil, *O.J.*, 3 May 1991, No L 111/1 ; Commission Decision 91/240/EEC of 29 April 1991 accepting undertakings offered by certain exporters in connection with the review of anti-dumping measures concerning imports of ferro-silicon originating in Brazil and terminating the investigation as regards those exporters, *O.J.*, 3 May 1991, No L 111/47, where a compensatory arrangement was found. No explanation was given about its content.

³⁷⁸ Commission Regulation (EC) No 3119/94 of 19 December 1994 imposing a provisional anti-dumping duty on imports of ferro-silicomanganese originating in Russia, Ukraine, Brazil and South Africa, *O.J.*, 21 December 1994, No L 330/15.

unconditionally, regardless of whether they are afterwards cancelled or postponed for reasons of error or bad quality³⁷⁹. The prices of these transactions are the prices shown in the invoices and other accounting documents of the supplier involved³⁸⁰. However, invoices and accounting documents are not necessarily decisive³⁸¹. In principle, price lists must not be used, if they do not reflect actual prices³⁸². In European anti-dumping case law, however, price lists are

379 Commission Regulation (EEC) No 2064/90 of 17 July 1990 imposing a provisional anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 20 July 1990, No L 188/10 (corrigendum, *O.J.*, 21 November 1990, No L 321/19); Council Regulation (EEC) No 117/91 of 16 January 1991 imposing a definitive anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 19 January 1991, No L 14/1.

380 Commission Regulation (EEC) No 2936/82 of 28 October 1982 imposing a provisional anti-dumping duty on copper sulphate originating in Yugoslavia, *O.J.*, 4 November 1982, No L 308/7; Commission Decision No 163/88/ECSC of 20 January 1988 imposing a provisional anti-dumping duty on imports of certain iron or steel coils, originating in Algeria, Mexico and Yugoslavia, *O.J.*, 22 January 1988, No L 18/31; Commission Regulation (EEC) No 1696/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 June 1988, No L 151/47; BESELER, J.-F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 54; BUHART, J., «Le régime communautaire de l'antidumping : vingt ans d'expérience», *Revue Trimestrielle de Droit Européen*, 1988, (253), 261.

381 Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12.

382 Commission Decision 80/1175/EEC of 15 December 1980 terminating the anti-dumping proceeding concerning imports of pressure sensitive paper masking tape originating in the United States of America, *O.J.*, 19 December 1980, No L 344/57; Commission Decision 87/236/EEC of 10 April 1987 terminating the anti-dumping proceeding on imports of synthetic fibres of polyesters originating in the German Democratic Republic, Romania, Turkey and Yugoslavia, *O.J.*, 15 April 1987, No L 103/38; Commission Decision No 163/88/ECSC of 20 January 1988 imposing a provisional anti-dumping duty on imports of certain iron or steel coils, originating in Algeria, Mexico and Yugoslavia, *O.J.*, 22 January 1988, No L 18/31; Commission Regulation (EEC) No 1696/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 June 1988, No L 151/47; Council Regulation (EEC) No 3946/88 of 16 December 1988 imposing a definitive anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 December 1988, No L 348/49; Commission Regulation (EEC) No 3296/92 of 12 November 1992 imposing a provisional anti-dumping duty on imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in Czechoslovakia, Hungary, Poland and the Republic of Croatia and terminating the anti-dumping proceeding with regard to the Republics of Serbia and of Montenegro, the former Yugoslav Republic of Macedonia, the Republic of Bosnia-Herzegovina and the Republic of Slovenia, *O.J.*, 14 November 1992, No L 328/15; BESELER, J.-F., *Die Abwehr von Dumping und Subventionen durch die Europäische Gemeinschaften*, Baden-Baden, Nomos, 1980, 47; BESELER, J.-F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 54; DIDIER, P., «EEC Antidumping Rules and Practices», *Common Market Law Review*, 1980, (349), 353; DIDIER, P., «Deux années d'application du nouveau règlement antidumping de la CEE», *Cahiers de Droit Européen*, 1982, (21), 26; GJLSTRA, D.J., «Anti-Dumping Policy of the EEC in Practice», in *Protectionism and the European Community. Import Relief Measures taken by the European Economic Community and the Member States, and the Legal Remedies Available to Private Parties*, VÖLKER, E.L.M. (ed.), Deventer, Kluwer, 1983, (147), 163.

sometimes used without there taking place any inquiry whether they reflect actual prices or not³⁸³. The use of price lists, however, increases the dumping margin as price lists often are only a basis for discounting rather than actual prices that customers in general are expected to pay³⁸⁴. Therefore, the use of price lists is only in accordance with European anti-dumping law, if allowance is made for discounts.

2.2.5.2. Associated parties

2.2.5.2.1. Legal approach

Under European anti-dumping law, sales between associated parties may be considered as not being made in the ordinary course of trade (Article 2(1)(b) basic EC Regulation ; Article 2(7) basic ECSC Decision). According to GATT and European anti-dumping law, the domestic market price must not be used as normal value standard when there are no sales in the ordinary course of trade. Instead, either the export price to third countries or the constructed value must be used (Article VI(1) GATT ; Article 2.2. GATT Anti-dumping Code ; Article 2(3) basic EC legislation)³⁸⁵.

However, if the producer and his sales company are associated, European anti-dumping authorities do not use the export price to third countries nor the constructed value. They use the resale price

383 Commission Regulation (EEC) No 1633/82 of 23 June 1982 imposing a provisional anti-dumping duty on imports of fibre building board (hardboard) originating in Romania, repealing Commission Decision No 80/564/EEC of 4 June 1980 and accepting undertakings in connection with the proceeding in respect of imports of fibre building board from Czechoslovakia, Finland, Hungary, Norway, Poland, Spain, Sweden and the Soviet Union and terminating the proceeding with regard to those countries and Bulgaria, *O.J.*, 25 June 1982, No L 181/19 ; Commission Recommendation No 2975/82/ECSC of 8 November 1982 imposing a definitive anti-dumping duty on certain sheets and plates, of iron or steel, originating in Brazil, *O.J.*, 9 November 1982, No L 312/10.

Only once price lists have been used as best information available. Their use was motivated by the lack of cooperation of several producers/exporters (Council Regulation (EEC) No 117/91 of 16 January 1991 imposing a definitive anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 19 January 1991, No L 14/1). Only then their use is legal.

Price lists of other producers established in the exporting country but who did not export to the Community, have been used as touchstone for determining whether the domestic market prices of the allegedly dumping exporters were representative and could, therefore, be used as normal value standard (Commission Regulation (EEC) No 2064/90 of 17 July 1990 imposing a provisional anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 20 July 1990, No L 188/10 (corrigendum, *O.J.*, 21 November 1990, No L 321/19) ; Council Regulation (EEC) No 117/91 of 16 January 1991 imposing a definitive anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 19 January 1991, No L 14/1).

384 GOVINDARAJAN, V., and ANTHONY, R.N., «How firms use cost data in price decisions», *Management Accounting*, July 1983, 1983, (30), 30-36 ; STIGLER, G.J., and KINDAHL, J., *The Behaviour of Industrial Prices*, New York, University Press Columbia New York (N.Y.), 1970, 202 p.

385 BUHART, J., «Le régime communautaire de l'antidumping : vingt ans d'expérience», *Revue Trimestrielle de Droit Européen*, 1988, (253), 263 ; LESGUILLONS, H., *Le régime communautaire de protection contre le dumping et les subventions*, Paris, F.E.D.U.C.I., 1983, 67 ; VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 420.

charged by the associated sales company to third independent parties on its domestic market³⁸⁶. That resale price is considered to be the domestic market price (in the sense of Article 2(1) basic EC Regulation and of Article 2(3)(a) basic ECSC Decision)³⁸⁷. It includes all the administrative, selling and other general expenses as well as a profit margin, irrespective of whether they are borne by either the exporter or his associated sales company³⁸⁸.

The interpretation placed by the European anti-dumping authorities on European anti-dumping law might seem illegal and in violation of GATT anti-dumping law. However, their interpretation is

³⁸⁶ Council Regulation (EEC) No 2089/84 of 19 July 1984 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 21 July 1984, No L 193/1; Commission Regulation (EEC) No 3643/84 of 20 December 1984 imposing a provisional anti-dumping duty on imports of electronic typewriters originating in Japan and terminating the anti-dumping proceeding with regard to Nakajima All Co. Ltd, *O.J.*, 22 December 1984, No L 335/43; Commission Regulation (EEC) No 3669/84 of 21 December 1984 imposing a provisional anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan, *O.J.*, 28 December 1984, No L 340/37; Commission Decision 85/252/EEC of 23 April 1985 terminating the anti-dumping proceeding concerning imports of certain titanium mill products originating in Japan and the United States of America, *O.J.*, 26 April 1985, No L 113/30; Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1; Council Regulation (EEC) No 1739/85 of 24 June 1985 imposing a definitive anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan, *O.J.*, 27 June 1985, No L 167/3; Commission Regulation (EEC) No 2865/85 of 14 October 1985 imposing a provisional anti-dumping duty on imports of certain electronic scales originating in Japan and accepting undertakings and terminating the proceeding in respect of certain imports of such products originating in Japan, *O.J.*, 16 October 1985, No L 275/5; Council Regulation (EEC) No 1058/86 of 8 April 1986 imposing a definitive anti-dumping duty on imports of certain electronic scales originating in Japan, *O.J.*, 12 April 1986, No L 97/1; Commission Regulation (EEC) No 2516/86 of 4 August 1986 imposing a provisional anti-dumping duty on imports of housed bearing units originating in Japan, *O.J.*, 7 August 1986, No L 221/16; Council Regulation (EEC) No 374/87 of 5 February 1987 definitively collecting the provisional anti-dumping duty and imposing a definitive anti-dumping duty on imports of housed bearing units originating in Japan, *O.J.*, 6 February 1987, No L 35/32; Commission Decision 87/236/EEC of 10 April 1987 terminating the anti-dumping proceeding on imports of synthetic fibres of polyesters originating in the German Democratic Republic, Romania, Turkey and Yugoslavia, *O.J.*, 15 April 1987, No L 103/38; Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia, *O.J.*, 9 May 1987, No L 121/11; Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1.

³⁸⁷ C.J.E.C., joined cases 277 and 300/85, 5 October 1988, *Canon Inc. a.o. v Council*, *E.C.R.*, 1988, (5731), 5799; C.J.E.C., case C-171/87, 10 March 1992, *Canon Inc. v Council*, *E.C.R.*, 1992, I, (1237), 1287; C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, *E.C.R.*, 1992, I, (1335), 1371 (Opinion of Advocate General MISCHO) and 1391; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, *E.C.R.*, 1992, I, (1409), 1454 (Opinion of Advocate General MISCHO) and 1472; C.J.E.C., case C-179/87, 10 March 1992, *Sharp Corporation v Council*, *E.C.R.*, 1992, I, (1635), 1673-1674; C.J.E.C., case C-104/90, 13 October 1993, *Matsushita Electric Industrial Co. Ltd v Council*, consideration 16 (not yet reported); Commission Regulation (EEC) No 3643/84 of 20 December 1984 imposing a provisional anti-dumping duty on imports of electronic typewriters originating in Japan and terminating the anti-dumping proceeding with regard to Nakajima All Co. Ltd, *O.J.*, 22 December 1984, No L 335/43; BELLIS, J.-F., «The EEC Antidumping System», in *Antidumping Law and Practice. A Comparative Study*, JACKSON, J.H., and VERMULST, E.A. (eds.), New York, Harvester Wheatsheaf, 1990, (41) 71.

³⁸⁸ C.J.E.C., joined cases 273/85 and 107/86, 5 October 1988, *Silver Seiko Limited a.o. v Council*, *E.C.R.*, 1988, (5927), 5975; C.J.E.C., case C-171/87, 10 March 1992, *Canon Inc. v Council*, *E.C.R.*, 1992, I, (1237), 1288; C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, *E.C.R.*, 1992, I, (1335), 1391; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, *E.C.R.*, 1992, I, (1409), 1456-1458 (Opinion of Advocate General MISCHO) and 1472; C.J.E.C., case C-179/87, 10 March 1992, *Sharp Corporation v Council*, *E.C.R.*, 1992, I, (1635), 1673-1674.

Expenses and profits of the associated sales company due to other activities than the resale of the product in question are not included (Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5; Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12; Commission Regulation (EEC) No 2005/88 of 5 July 1988 imposing a provisional anti-dumping duty on imports of serial impact fully formed character printers originating in Japan, *O.J.*, 8 July 1988, No L 177/1).

the logical consequence of the economic unit theory they apply³⁸⁹. Under the economic unit theory, the producer and his associated sales company are assumed to be one and the same person, although they are legally distinct companies. As a consequence, the resales made by the associated sales company are imputed to the one person constituted by the producer and his sales company³⁹⁰. Therefore, resale prices may be subsumed under the concept «domestic market price» (Article VI(1)(a) GATT ; Article 2.1. GATT Anti-dumping Code ; Article 2(1) basic EC Regulation ; Article 2(3)(a) basic ECSC Decision³⁹¹).

2.2.5.2.2. Economic approach

In economics it is investigated what price would prevail between associated parties if they do not determine their internal transfer prices in order to evade the application of the law, such as national tax laws and tariffs. That price is usually indeterminate or practically impossible to determine. This is also the case when associated parties try to evade the application of European anti-dumping law.

The basic Copithorne model of transfer pricing may be used for dumping analysis. It demonstrates that internal transfer prices are indeterminate or difficult to determine. This model is a partial equilibrium model of a vertically integrated enterprise³⁹². It assumes there are no corporate taxes nor tariffs. It, thus, applies to sales between a manufacturing company and a sales company, both established in the same country and part of one enterprise. Because they are established in the same country, both companies are subjected to the same corporate taxes. If these taxes are proportionate taxes, they may be ignored, because only the difference in tax rates plays a role in determining transfer prices³⁹³. Moreover, their internal sales take place within one country and, thus, one customs area. Therefore, they are not subjected to any tariff.

³⁸⁹ *Supra*, 124-128.

³⁹⁰ Conversely, if the exporter and his associated company do not constitute an economic unit, their resale prices will not constitute the «domestic market price». The prices actually paid or payable to the exporter by his associated company will be used as normal value, or, if the transactions between the exporter and his associated company are not comparable sales in the ordinary course of trade, normal value will have to be constructed or the export price to third countries will have to be used (as provided in Article 2.2. GATT Anti-dumping Code and Article 2(3) basic EC legislation)

³⁹¹ C.J.E.C., joined cases 277 and 300/85, 5 October 1988, *Canon Inc. a.o. v Council*, E.C.R., 1988, (5731), 5774 (Opinion of Advocate General Sir Gordon SLYNN); C.J.E.C., joined cases 260/85 and 106/86, 5 October 1988, *Tokyo Electric Company Ltd (TEC) a.o. v Council*, E.C.R., 1988, (5855), 5896-5897 (Opinion of Advocate-General Sir GORDON SLYNN); C.J.E.C., joined cases 273/85 and 107/86, 5 October 1988, *Silver Seiko Limited a.o. v Council*, E.C.R., 1988, (5927), 5959 (Opinion of Advocate-General Sir GORDON SLYNN); C.J.E.C., case C-171/87, 10 March 1992, *Canon Inc. v Council*, E.C.R., 1992, I, (1237), 1267 (Opinion of Advocate General MISCHO) and 1287; C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, E.C.R., 1992, I, (1335), 1371 (Opinion of Advocate General MISCHO) and 1391; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, E.C.R., 1992, I, (1409), 1454 (Opinion of Advocate General MISCHO) and 1472; C.J.E.C., case C-179/87, 10 March 1992, *Sharp Corporation v Council*, E.C.R., 1992, I, (1635), 1673-1674.

³⁹² See : COPITHORNE, L.W., «International Corporate Transfer Prices and Government Policy», *Canadian Journal of Economics*, 1971, (324), 324-341; COPITHORNE, L.W., «La théorie des prix de transfert internes des grandes sociétés», *L'actualité économique*, 1976, (324), 324-352; EDEN, L., «The Microeconomics of Transfer Pricing», in *Multinationals and Transfer Pricing*, RUGMAN, A.M., and EDEN, L. (eds.), London, Croom Helm, 1985, (13), 20-22.

³⁹³ *Infra*, 252-262.

The manufacturing company (company 1) owns the sales company (company 2). Company 1 produces an output Y of which it exports Y_1 to the Community at a price P_1 , and sells Y_2 at a transfer price R to company 2. Company 2 is a typical sales company : it does not manufacture any product. It only resells the products bought from company 1 on its domestic market at a price P_2 . Company 1 incurs costs of producing and selling its products. Company 2 has to bear the costs of reselling the products it bought from company 1. Their cost functions are given by $C_i(Y_i)$ where $i = 1, 2$. The profit functions of companies 1 and 2 are :

$$\pi_1 = P_1 Y_1 + R Y_2 - C_1(Y) \quad (1)$$

$$\pi_2 = P_2 Y_2 - R Y_2 - C_2(Y_2) \quad (2)$$

The total profit function of the entire enterprise, consisting of companies 1 and 2, is :

$$\pi = \pi_1 + \pi_2 = P_1 Y_1 + P_2 Y_2 - C_1(Y) - C_2(Y_2) \quad (3)$$

Because total output Y of company 1 is sold either to company 2 or for export to the Community :

$$Y = Y_1 + Y_2 \quad (4)$$

Maximizing profits yields the following first order conditions :

$$\frac{\delta \pi}{\delta Y_1} = MR_1 - MC_1 = 0 \quad (5)$$

$$\frac{\delta \pi}{\delta Y_2} = MR_2 - MC_1 - MC_2 = 0 \quad (6)$$

The first order conditions (5) and (6) may be rewritten as :

$$MR_1 = MR_2 - MC_2 = MC_1 \quad (7)$$

It follows from the general first order condition (7) that the transfer price R is indeterminate. Indeed, the term $R Y_2$ in the profit functions (1) and (2) is cancelled out in the total profit function (3).

The basic Copithorne model assumes that the enterprise has only one objective, *i.e.*, total profit maximization. However, within one jurisdiction, an enterprise may have different objectives, such as supporting a newly established subsidiary, helping a subsidiary in penetrating a new market or locating profits in divisions where the leadership of the

enterprise has the greatest block of shares³⁹⁴. Those different objectives may be grasped in one basic objective, i.e., the maximization of total profits of the enterprise on the condition of obtaining a certain nominal profit in each of the divisions of the enterprise³⁹⁵. It may be proven that, through the introduction of that condition in the objective function of the enterprise, the transfer price becomes determinate³⁹⁶.

Moreover, even when operating within only one jurisdiction, the enterprise may have tax and tariff incentives which influence transfer prices. It can be proven that, when corporate tax rates are a non-linear function of profits, the enterprise will allocate its profits so that marginal tax rates are identical. In that case, transfer prices are also determinate³⁹⁷. In practice, however, corporate taxes, in most countries, are a linear function of profits³⁹⁸. As a consequence, transfer prices are generally indeterminate³⁹⁹.

Tariffs too, especially anti-dumping duties, may influence transfer prices in the domestic market of the exporting enterprise. That effect of anti-dumping duties is illustrated in figure 6. Figure 6 corresponds to the mathematical model of transfer pricing described above. Figure 6(a) depicts the situation of the sales corporation (company 2). The NMR_2 curve is the vertical difference between the marginal revenue curve (MR_2) and the marginal cost curve (MC_2) of company 2. This company is faced with the domestic demand curve D_2 . The manufacturing company (company 1) is faced with the demand of the importer who imports the products sold by company 1 into the Community. This demand is represented by the curve D_1 in figure 6(b), the corresponding marginal revenue curve being MR_1 . The introduction of an importer, when evaluating the effects of an anti-dumping duty, is essential in view of European anti-dumping law. According to European anti-dumping law, the burden of an imposed anti-dumping duty has to lie with the consumers in the Community as it stipulates that the burden must not be carried by the exporter (Article 12 basic EC Regulation ; Article 13(11)(a) basic ECSC Decision). In other words, the anti-dumping duty must be paid by the importer who will shift this burden onto the consumers. Finally, the marginal cost curve of company 1 (MC_1) and the sum of NMR_2 and MR_1 ($NMR_2 + MR_1$) are provided in figure 6(c).

³⁹⁴ COPITHORNE, L.W., «International Corporate Transfer Prices and Government Policy», *Canadian Journal of Economics*, 1971, (324), 332 ; JANS, P., *Les transferts indirects de bénéfices entre sociétés interdépendantes. Droit fiscal belge et comparé. Perspectives internationales et communautaires européennes*, Bruxelles, Bruylant, 1976, 29-30 ; KANT, C., «Foreign Subsidiary, Transfer Pricing and Tariffs», *Southern Economic Journal*, 1988-1989, (162), 162-170 ; PLASSCHAERT, S., *Transfer pricing and multinational corporations: an overview of concepts, mechanisms and regulations*, Hampshire, Saxon House, 1979, 67-69 ; PLASSCHAERT, S., *Les prix de transferts et les entreprises multinationales. Une vue globale*, Paris, P.U.F., 1979, 88-89.

³⁹⁵ See e.g. : KANT, C., «Foreign Subsidiary, Transfer Pricing and Tariffs», *Southern Economic Journal*, 1988-1989, (162), 164-165. In the model of C. KANT, the objective of the enterprise is the maximization of its global profits. However, the parent company does not wholly own the subsidiary. Therefore, it is more profitable for the enterprise to shift all profits to the parent company. This is translated in the condition that the profit of the partially owned subsidiary has to be zero.

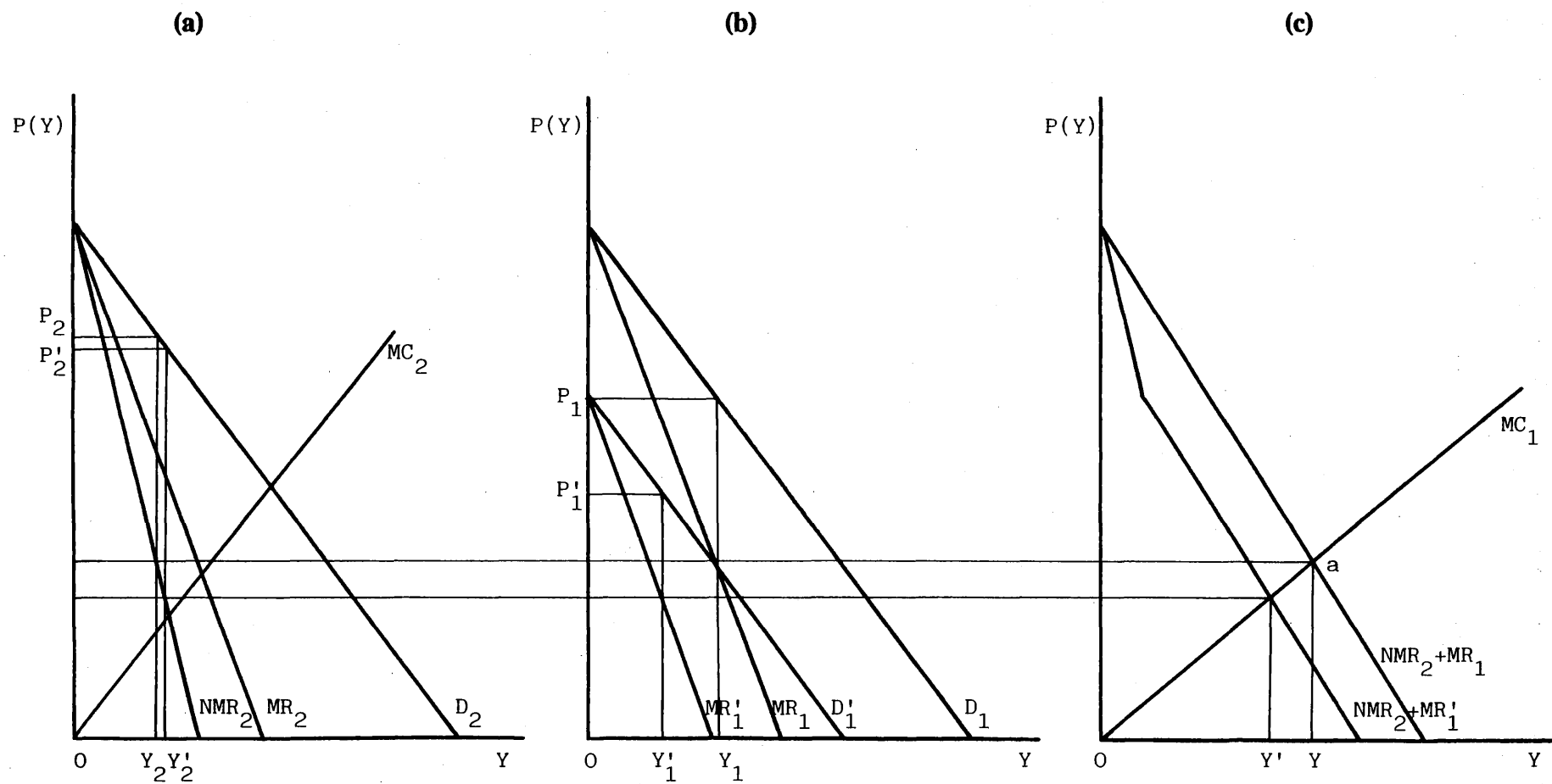
³⁹⁶ See : BOOTH, E.J.R., and JENSEN, O.W., «Transfer prices in the global corporation under internal and external constraints», *Canadian Journal of Economics*, 1977, (434), 434-446 ; COPITHORNE, L. W., «International Corporate Transfer Prices and Government Policy», *Canadian Journal of Economics*, 1971, (324), 327-328 and 339 ; KANT, C., «Foreign Subsidiary, Transfer Pricing and Tariffs», *Southern Economic Journal*, 1988-1989, (162), 164-167.

³⁹⁷ See : COPITHORNE, L. W., «International Corporate Transfer Prices and Government Policy», *Canadian Journal of Economics*, 1971, (324), 329-330 and 339-340.

³⁹⁸ COPITHORNE, L.W., «La théorie des prix de transfert internes des grandes sociétés», *L'actualité économique*, 1976, (324), 351.

³⁹⁹ COPITHORNE, L.W., «International Corporate Transfer Prices and Government Policy», *Canadian Journal of Economics*, 1971, (324), 329 and 340.

Figure 6



In the absence of any anti-dumping law in the importing country, MR_1 and $NMR_2 (= MR_2 - MC_2)$ must equal MC_1 (see : equation (7)). This equality is reached at point a in figure 6(c), i.e., the intersection of MC_1 and $NMR_2 + MR_1$. Company 1, thus, manufactures the output OY . It exports a quantity OY_1 at a price OP_1 and sells a quantity OY_2 at company 2. The latter resells quantity OY_2 at a price OP_2 on the domestic market. The transfer price is not determinate.

However, the Community has a far adequate anti-dumping law. According to European anti-dumping law, an anti-dumping duty will be levied when the export price to the Community is lower than the normal value. At the most, the anti-dumping duty may amount to the difference between normal value and export price (Articles 7(2) and 9(4) basic EC Regulation ; Article 13(3) basic ECSC Decision). In principle, normal value is equal to the price charged by the producer of the exported good on his domestic market. In the model illustrated in figure 6, the producer charges only one price on his domestic market, i.e., the transfer price to his sales corporation. If this transfer price is used as domestic market price and, thus, as normal value standard, the producer has an incentive to equate his transfer price to his export price.

If, however, the producer (company 1) charges a higher transfer price, an anti-dumping duty will be levied. The burden of this duty will lie with the consumers in the importing country. They, thus, will have to pay a higher price and the quantity bought by them will decline. As a consequence, the demand of the importer will also decrease. As a result, the curve D_1 shifts to D_1' . Correspondingly, the MR_1 curve shifts to MR_1' and the curve $NMR_2 + MR_1$ decreases to $NMR_2 + MR_1'$. Total output of company 1 drops to OY' , $OY_1' (< OY_1)$ of which is exported at a price $OP_1' (< OP_1)$ and $OY_2' (> OY_2)$ is sold by company 2 on the domestic market at a price $OP_2' (< OP_2)$. The fact that a smaller output is sold at lower prices results in a lower total profit of the whole enterprise. The enterprise, however, may avoid the decline in profits by charging a transfer price equal to or higher than the export price. In this case, no anti-dumping duty can be levied according to European anti-dumping law and the demand curve D_1 will, *ceteris paribus*, not fall. Besides the effect of evading the levy of an anti-dumping duty, equating the transfer price to the export price has not any effect on the profits of the whole enterprise. For, even when the possibility of the levy of an anti-dumping duty is introduced in the model, transfer prices remain indeterminate.

Thus, associated parties determine their internal transfer prices at a level at least as high as their export prices in order to evade the application of European anti-dumping law. By doing this, they will maintain their total output and profit level at the same level as if market forces were not distorted by a trade barrier like anti-dumping law. From an economic point of view, their attempt to evade the application of European anti-dumping law is an efficient response to the market distortion created by European anti-dumping law. Moreover, by nullifying the market distorting effects of European anti-dumping law, they increase global welfare⁴⁰⁰.

The Community, however, will not accept the evasion of its anti-dumping law, even if such evasion might be efficient from an economic point of view. For, should the arguments concerning market distortion and global welfare have been convincing, the Community would not have enacted anti-dumping law⁴⁰¹. In order to prevent the evasion of anti-dumping law, the transfer price which would prevail between associated parties if they do not try to evade the application of anti-dumping law, should be determined. However, that transfer price is indeterminate or hard to

⁴⁰⁰ RUGMAN, A.M., and EDEN, L., «Introduction», in *Multinationals and Transfer Pricing*, RUGMAN, A.M., and EDEN, L. (eds.), London, Croom Helm, 1985, (1), 6.

⁴⁰¹ *Infra*, 343-358.

determine⁴⁰². On the other hand, under conditions of technological⁴⁰³ and demand⁴⁰⁴ independence between the operations of the different divisions of the enterprise, the efficient transfer price⁴⁰⁵ would equal the marginal cost of the manufacturing company, irrespective of whether perfect competition prevails in the external market⁴⁰⁶. Marginal costs are also hard to determine, especially for authorities, as they cannot have all inside information on the cost structure of the enterprise⁴⁰⁷. Moreover, the conditions of technological independence and demand independence are rather seldom fulfilled⁴⁰⁸.

Because of the difficulties to determine marginal cost, the «dealing at arm's length» price, *i.e.*, the actual price charged for comparable transactions of comparable products between independent parties⁴⁰⁹, is usually proposed as the least inefficient standard for evaluating transactions between associated parties⁴¹⁰. Such comparable transactions frequently do not exist⁴¹¹. In

402 Transfer prices are determinate if there are some non-linear corporate profit taxes or if the enterprise's objective to maximize its profits is subjected to some other motive. However, in most countries there are no non-linear corporate taxes. Moreover, it will be rather difficult to determine the effective tax rate, which incorporates all the rules and peculiarities (special discounts, exemptions) of a corporate tax system. The motives of an enterprise such as supporting a newly established subsidiary or helping a subsidiary to penetrate a new market, which makes transfer prices determinate, will also be hard to quantify into a certain level of nominal profits a subsidiary should attain. Moreover, it is quite possible that an enterprise sets this nominal profit to such a level that the transfer price equals the export price, not because its objective is to obtain this level of nominal profit in its subsidiary which is perfectly lawful, but because its real objective is nothing else than avoiding the application of the anti-dumping law.

403 Technological independence means that the level of operations being carried on by one division does not have any effect on the costs of the other division.

404 Demand independence means that an additional external sale made by one division does not decrease the external demand for the products of the other division.

405 The efficient transfer price may be considered to be a shadow price. It is not the profit maximizing price when taxes and tariffs exist, but serves only as a means for allocating resources in a divisionalized enterprise (see : DIEWERT, W.E., «Transfer Pricing and Economic Efficiency», in *Multinationals and Transfer Pricing*, RUGMAN, A.M., and EDEN, L. (eds.), London, Croom Helm, 1985, (47), 47-81).

406 HIRSHLEIFER, J., «On the economics of transfer pricing», *Journal of Business*, 1956, (172), 172-184. See also : HIRSHLEIFER, J., «Economics of the divisionalized firm», *Journal of Business*, 1957, (96), 96-108 ; GOULD, J.R., «Internal pricing in firms when there are costs of using an outside market», *Journal of Business*, 1957, (61), 61-67.

407 See : AREEDA, P., and TURNER, D.F., «Predatory Pricing and Related Practices under Section 2 of the Sherman Act», *Harvard Law Review*, 1974-1975, (697), 716, who point out this problem in connection with searching a standard for distinguishing predatory pricing from normal short run profit maximization.

408 HIRSHLEIFER, J., «On the economics of transfer pricing», *Business Journal*, 1956, (172), 173 and 180-183 ; PLASSCHAERT, S., *Transfer pricing and multinational corporations : an overview of concepts, mechanisms and regulations*, Hampshire, Saxon House, 1979, 31 ; VERLAGE, H.C., *Transfer pricing for multinational enterprises*, Rotterdam, Rotterdam University Press, 1975, 177.

409 O.E.C.D., *Transfer Pricing and Multinational Enterprises. Report of the OECD Committee on Fiscal Affairs*, Paris, O.E.C.D., 1979, 13 and 33.

410 RUGMAN, A.M., and EDEN, L., «Introduction», in *Multinationals and Transfer Pricing*, RUGMAN, A.M., and EDEN, L. (eds.), London, Croom Helm, 1985, (1), 9.

such a case, either the actual transfer price has to be adjusted or the resale price, *i.e.*, the price charged to the first independent seller after deduction of the expenses and the profits of the reseller, must be used as alternative «dealing at arm's length» price. For both the adjusted actual transfer price and the resale price, price adjustments are necessary in order to obtain the «dealing at arm's length» price⁴¹². As price adjustments hold the danger of calculation errors and arbitrariness, they should be restricted as far as possible and adjusted, hypothetical «dealing at arm's length» prices should only be used when really necessary⁴¹³.

Under European anti-dumping law the «dealing at arm's length» price is not consistently used for determining normal value. Instead a peculiar mix of the «dealing at arm's length» price and the economic unit theory is applied. If actual transfer prices between associated parties are comparable to prices between independent parties, the «dealing at arm's length» price is used as normal value standard and normal value does not include the expenses and profit of the associated sales company. If, however, actual transfer prices between associated parties are not comparable to prices between independent parties, resale prices charged to independent buyers are used as normal value standard. In that case, the normal value includes the expenses and the profits of the associated sales company. Consequently, the resale price, as applied in European anti-dumping law, is higher and, thus, results in a higher dumping margin than the «dealing at arm's length» price. However, the resale price should be a substitute for the «dealing at arm's length» price and, therefore, should result in the same dumping margin.

2.2.6. Export price to third countries

In choosing an export price to third countries as normal value standard, the European anti-dumping authorities have the broadest margin of discretion⁴¹⁴. They do not have to take into consideration all export prices to every third country. Merely one export price to only one third

⁴¹¹ ALWORTH, J.S., *The Finance, Investment and Taxation Decisions of Multinationals*, Oxford, Basil Blackwell, 1988, 220; PLASSCHAERT, S., *Transfer Pricing and Multinational Corporations: an overview of concepts, mechanisms and regulations*, Hampshire, Saxon House, 1979, 32; VERLAGE, H.C., *Transfer pricing for multinational enterprises*, Rotterdam, Rotterdam university Press, 1975, 179.

⁴¹² ALWORTH, J., *The Finance, Investment and Taxation Decisions of Multinationals*, Oxford, Basil Blackwell, 1988, 222.

⁴¹³ O.E.C.D., *Transfer Pricing and Multinational Enterprises. Report of the OECD Committee on Fiscal Affairs*, Paris, O.E.C.D., 1979, 16.

⁴¹⁴ BRIET, L.A.E., «Antidumping in de EEG - De kinderschoenen ontgroeid?», *S.E.W.*, 1982, (145), 149; KRETSCHMER, H., *Das Antidumping- und Antisubventionsrecht der Europäischen Gemeinschaften*, Frankfurt/Main, VWV-Verlag, 1980, 27.

country is sufficient⁴¹⁵. Different rules apply to the choice of that export price. Under GATT, it should be the «highest comparable price for the like product for export to any third country in the ordinary course of trade» (Article VI(1)(b)(i) GATT). In pursuance of the 1980 GATT Anti-dumping Code (Article 2(4)), ECSC anti-dumping law has translated that provision into the provision that it should be «the comparable price of the like product when exported to any third country, which may be the highest such export price but should be a representative price» (Article 2(3)(b)(i) basic ECSC Decision). But, pursuant to the 1994 GATT Anti-dumping Code (Article 2.2.), EC anti-dumping legislation stipulates that normal value may be based on «the export prices, in the ordinary course of trade, to an appropriate third country, provided that these prices are representative» (Article 2(3) basic EC Regulation) ; it, moreover, requires that those prices are comparable (Article 2.2. GATT Anti-dumping Code ; Article 1(2) basic EC Regulation) and that those export sales are not made at a loss (Article 2.2.1. GATT Anti-dumping Code ; Article 2(4) basic EC Regulation). It, thus, seems that the strict rule of GATT that the highest export price should be used, has been watered down to the requirement of a representative price covering production costs. This is a welcome development since a representative price should be preferred to an exceptionally high price.

It is, however, difficult to predict how this development will affect anti-dumping case law. European anti-dumping case law, applying the ECSC rule on export prices, only sporadically provides information : export prices are not comparable when no or insufficient quantities are

⁴¹⁵ The European anti-dumping authorities have never tried to take into consideration the export price to more than one third country, see : Commission Regulation (EEC) No 2182/80 of 14 August 1980 imposing a provisional anti-dumping duty on certain chemical fertilizer originating in the United States of America, *O.J.*, 15 August 1980, No L 212/43 ; Commission Regulation (EEC) No 3171/80 of 4 December 1980 repealing a national anti-dumping duty on saccharin and its salts originating in the Republic of Korea imposed under the transitional provisions of the Act of Accession, *O.J.*, 9 December 1980, No L 331/25 ; Council Decision 87/66/EEC of 19 January 1987 accepting undertakings given in connection with imports of binder and baler twine originating in Brazil and Mexico, and terminating the investigations, *O.J.*, 5 February 1987, No L 34/55 ; Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1.

Not all export prices to all third countries should be taken into account. Their determination or, at least, the determination of their comparability or representativity is usually impossible (BESELER, J.F., *Die Abwehr von Dumping und Subventionen durch die Europäische Gemeinschaften*, Baden-Baden, Nomos, 1980, 48).

exported⁴¹⁶; they are not representative when large exchange rate fluctuations of certain important currencies are a too important factor of uncertainty in the choice of an appropriate export market⁴¹⁷. Though it is not required under GATT or European anti-dumping law, only export prices actually paid or payable are used in European anti-dumping case law. According to the European anti-dumping authorities, it is not necessary to adjust the price charged between associated parties⁴¹⁸. Notwithstanding their broad discretionary powers, the European anti-dumping authorities are rather reluctant to use export prices to third countries. Probably they think such prices will deflate the normal value. According to the GATT Group of Experts, the export price to third countries should not be used as normal value standard when dumping occurs in exports to third countries⁴¹⁹. The European anti-dumping authorities are equally reluctant to use the export price to third countries because they suspect the producer/exporter to dump on third

⁴¹⁶ No exports, see : Commission Decision 82/397/EEC of 14 June 1982 accepting undertakings in connection with the anti-dumping procedure concerning imports of certain polypropylene film for capacitors originating in Japan and terminating that procedure, *O.J.*, 18 June 1982, No L 172/44 ; Commission Decision 83/428/EEC of 26 August 1983 accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of caravans for camping and parts thereof originating in Yugoslavia and terminating that proceeding, *O.J.*, 30 August 1983, No L 240/12 ; Commission Decision No 163/88/ECSC of 20 January 1988 imposing a provisional anti-dumping duty on imports of certain iron or steel coils, originating in Algeria, Mexico and Yugoslavia, *O.J.*, 22 January 1988, No L 18/31.

Insufficient quantities, see : Commission Regulation (EEC) No 2182/80 of 14 August 1980 imposing a provisional anti-dumping duty on certain chemical fertilizer originating in the United States of America, *O.J.*, 15 August 1980, No L 212/43 ; Council Regulation (EEC) No 349/81 of 9 February 1981 imposing a definitive anti-dumping duty on certain chemical fertilizer originating in the United States of America, *O.J.*, 12 February 1981, No L 39/4 ; Commission Decision 81/35/EEC of 9 February 1981 accepting undertakings in connection with the anti-dumping proceedings concerning certain chemical fertilizer originating in the United States of America, *O.J.*, 12 February 1981, No L 39/35 ; Commission Decision 81/493/EEC of 6 July 1981 terminating the anti-dumping procedure concerning imports of furfural originating in the Dominican Republic, Spain and the People's Republic of China, *O.J.*, 11 July 1981, No L 189/57.

⁴¹⁷ Commission Decision 86/497/EEC of 7 October 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of silicon carbide originating in the People's Republic of China, Norway, Poland and the USSR, and terminating the investigation regarding imports of that product originating in the People's Republic of China, Norway, Poland, Czechoslovakia, the USSR and Yugoslavia, *O.J.*, 10 October 1986, No L 287/25 ; Council Regulation (EEC) No 341/90 of 5 February 1990 accepting undertakings and imposing a definitive anti-dumping duty on imports of ferro-silicon originating in Iceland, Norway, Sweden, Venezuela or Yugoslavia, except those sold for export to the Community by companies whose undertakings have been accepted, *O.J.*, 10 February 1990, No L 38/1.

⁴¹⁸ Commission Regulation (EEC) No 744/84 of 19 March 1984 imposing a provisional anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 23 March 1984, No L 79/8 (corrigendum, *O.J.*, 29 March 1984, No L 86/31) ; Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1.

⁴¹⁹ *B.I.S.D.*, Eight Supplement, Geneva, GATT, 1960, 148.

markets⁴²⁰. In fact, when anti-dumping investigations are initiated in the Community, similar investigations in third countries are likely to take place as to the same products⁴²¹.

The new GATT Anti-dumping Code and EC anti-dumping law seem to reverse this interpretation on the representativity of export prices to third countries. They have omitted the provision that the export price to third countries may be the highest export price. They further maintain the requirement that the export price be representative, but now specify, pursuant to GATT, that the representativity of the export prices involves exports having been made in the ordinary course of trade. This reference to the notion «ordinary course of trade» implies that the export prices may be taken into account insofar as the corresponding export transactions are not made within an extended period of time in substantial quantities at prices below costs (Article 2.2.1. GATT Anti-dumping Code ; Article 2(3) basic EC Regulation). As the GATT Anti-dumping Code and EC

420 Commission Regulation (EEC) No 163/83 of 21 January 1983 imposing a provisional anti-dumping duty on 4,4'-Isopropylidenediphenol originating in the United States of America, *O.J.*, 26 January 1983, No L 23/9 ; Commission Regulation (EEC) No 744/84 of 19 March 1984 imposing a provisional anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 23 March 1984, No L 79/8 (corrigendum, *O.J.*, 29 March 1984, No L 86/31) ; Commission Decision 86/497/EEC of 7 October 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of silicon carbide originating in the People's Republic of China, Norway, Poland and the USSR, and terminating the investigation regarding imports of that product originating in the People's Republic of China, Norway, Poland, Czechoslovakia, the USSR and Yugoslavia, *O.J.*, 10 October 1986, No L 287/25 ; Council Decision 87/66/EEC of 19 January 1987 accepting undertakings given in connection with imports of binder and baler twine originating in Brazil and Mexico, and terminating the investigations, *O.J.*, 5 February 1987, No L 34/55 ; Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1 ; Council Regulation (EEC) No 341/90 of 5 February 1990 accepting undertakings and imposing a definitive anti-dumping duty on imports of ferro-silicon originating in Iceland, Norway, Sweden, Venezuela or Yugoslavia, except those sold for export to the Community by companies whose undertakings have been accepted, *O.J.*, 10 February 1990, No L 38/1 ; Commission Decision No 3692/91/ECSC of 12 December 1991 repealing Decision No 2132/88/ECSC imposing definitive anti-dumping duties on imports of certain iron or steel coils, originating in Algeria, Mexico and Yugoslavia, *O.J.*, 19 December 1991, No L 350/11. See also : BELLIS, J.-F., «La réglementation anti-dumping de la Communauté Economique Européenne», *Cahiers de Droit Européen*, 1979, (495), 505 ; BESELER, J.-F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 57 ; KRETSCHMER, H., *Das Antidumping- und Antisubventionsrecht der Europäischen Gemeinschaften*, Frankfurt/Main, VWV-Verlag, 1980, 25 ; NORALL, C., «New trends in Anti-dumping Practice in Brussels», *World Economy*, 1986, (97), 103 ; STANBROOK, C., *Dumping. A Manual on the EEC Anti-Dumping Law and Procedure*, Chequers, European Business Publications, 1980, 21 ; VAN BAEL, I., and BELLIS, J.-F., *Anti-Dumping and other Trade Protection Laws of the EEC*, Bicester, CCH Editions, 1990, 63 ; VERMULST, E.A., «Dumping in the United States and the European Community : A Comparative Analysis», *Legal Issues of European Integration*, 1984/2, (103), 107 ; VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 422.

Though E.A. VERMULST (*Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 422) thinks that there are indications that the European anti-dumping authorities might pay more attention to the export prices to third countries, European anti-dumping case law does not show any change in the preference of the European anti-dumping authorities. Moreover, J. BUHART («Le régime communautaire de l'antidumping : vingt ans d'expérience», *Revue Trimestrielle de Droit Européen*, 1988, (253), 265) notes that the EC questionnaire intended for producers and exporters of products against which an anti-dumping complaint is lodged, does no longer contain any question for information about the export prices to third countries. P. WAER («Constructed Normal Values in EC Dumping Margin Calculations. Fiction, or a Realistic Approach», *Journal of World Trade*, 1993/3, (47), 48) too points out that routinely the anti-dumping authorities do not request submission of detailed data on such export prices and that respondents in anti-dumping proceedings have rarely claimed use of those prices.

421 BESELER, J.-F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 57.

anti-dumping law only allow a sales-at-a-loss test⁴²², it will no longer be possible to reject the use of export prices to third countries because they are made in insufficient quantities. Fluctuations in exchange rates and dumping in third countries will no longer be a reason either for not using export prices to third countries, unless they have resulted in sales at a loss. On the other hand, prices charged between associated parties, may still be used.

The GATT Anti-dumping Code and EC anti-dumping law, therefore, seem to open up possibilities for a more frequent use of export prices to third countries, which seems a welcome development⁴²³. Indeed, as the GATT Group of Experts has already stated in 1959, it might often prove easier to collect the necessary information on the export price to third countries than to determine the constructed value⁴²⁴. However, the determination of the export price to third countries requires the cooperation of the exporter and, usually, also of the importer in the third country. When information about the export price to third countries is not in the interest of the exporter, often no cooperation will be offered⁴²⁵.

2.2.7. *Constructed value*

2.2.7.1. Definition

The constructed value is determined by adding cost of production, including selling, administrative and other general expenses and a reasonable profit margin (Article 2.2. GATT Anti-dumping Code ; Article 2(3) basic EC Regulation ; Article 2(3)(b)(ii) basic ECSC Decision).

It is generally admitted that the constructed value is intended to be a surrogate for the domestic market price whenever the domestic market price cannot be used as normal value standard.

⁴²² WAER, P., and VERMULST, E., «EC Anti-Dumping Law and Practice after the Uruguay Round. A New Lease of Life ?», *Journal of World Trade*, 1994/2, (5), 10.

⁴²³ WAER, P., and VERMULST, E., «EC Anti-Dumping Law and Practice after the Uruguay Round. A New Lease of Life ?», *Journal of World Trade*, 1994/2, (5), 10.

Contra : J. BOUDANT (*L'anti-dumping communautaire*, Paris, Economica, 1991, 82), who welcomes the infrequent use of the export price to third countries because this normal value standard will lead to the alignment of the lower Community prices to the higher export prices to third countries. For this standard prohibits the exporter to charge lower prices to the Community than elsewhere. J. BOUDANT does not repeat the same criticism in respect of the other normal value standards, though it also applies to those standards.

⁴²⁴ *B.I.S.D.*, Eight Supplement, Geneva, GATT, 1960, 148.

⁴²⁵ KRETSCHMER, H., *Das Antidumping- und Antisubventionsrecht der Europäischen Gemeinschaften*, Frankfurt/Main, VWV-Verlag, 1980, 25. Hitherto, in only one case, it was explicitly mentioned that the export price to third countries could not be used because of the lack of cooperation by the exporter : Commission Regulation (EEC) No 2221/85 of 29 July 1985 imposing a provisional anti-dumping duty on imports of basic chromium sulphate originating in Yugoslavia, *O.J.*, 3 August 1985, No L 205/12.

Therefore, the production costs incurred and the profits realised on the exporter's domestic market are used (Article 2.2. GATT Anti-dumping Code ; Article 2(3) basic EC Regulation ; Article 2(3)(b)(ii) basic ECSC Decision)⁴²⁶.

It has been argued that such a constructed value goes against the «natural» interpretation of anti-dumping law. A «natural» interpretation of anti-dumping law would be that a reference or normal export price should be constructed⁴²⁷. It has, indeed, been argued that it is impossible to deduce from GATT anti-dumping law whether the constructed value should be a surrogate of the domestic market price or whether it should be the reasonable value of the exported products. The rule that the production costs to be taken into account are those of the exporter's domestic market is obvious and not conclusive : both the products sold on the domestic market as those exported originate and, thus, are produced in the exporter's home country. The requirement of GATT anti-dumping law that the amount to be added for profit must not exceed the profit normally realized on the exporter's domestic market, does not, as so is being argued, concern the determination of the profit to be taken into consideration, but simply lays down a maximum limit⁴²⁸. This reasoning is rather peculiar. First, it disregards the fact that dumping, in its traditional economic definition means price discrimination between national markets. Under that definition, the exporter's export price has to be compared to his domestic market price. GATT and European anti-dumping law apply that economic definition, since the first normal value standard to be used is the domestic market price. In a «natural» interpretation, the constructed value should then be a

⁴²⁶ C.J.E.C., case 250/85, 5 October 1988, *Brother Industries Ltd v Council*, E.C.R., 1988, (5683), 5723 ; C.J.E.C., case 301/85, 5 October 1988, *Sharp Corporation, v Council*, E.C.R., 1988, (5813), 5823 ; C.J.E.C., joined cases 260/85 and 106/86, 5 October 1988, *Tokyo Electric Company Ltd (TEC) a.o. v Council*, E.C.R., 1988, (5855), 5895-5896 and 5918-5919 ; C.J.E.C., joined cases 273/85 and 107/86, 5 October 1988, *Silver Seiko Limited a.o. v Council*, E.C.R., 1988, (5927), 5960 and 5975 ; C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, E.C.R., 1991, I, (2069), 2186-2187 ; C.J.E.C., case C-105/90, 13 February 1992, *Goldstar Co. Ltd v Council*, E.C.R., 1992, I, (677), 709 (Opinion of Advocate General VAN GERVEN) and 728 ; C.J.E.C., case C-171/87, 10 March 1992, *Canon Inc. v Council*, E.C.R., 1992, I, (1237), 1272 (Opinion of Advocate General MISCHO) ; C.J.E.C., case C-172/87, 10 March 1992, *Mita Industrial Co. Ltd v Council*, E.C.R., 1992, I, (1301), 1319-1320 (Opinion of Advocate General MISCHO) and 1330 ; C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, E.C.R., 1992, I, (1335), 1372-1373 (Opinion of Advocate General MISCHO) ; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, E.C.R., 1992, I, (1409), 1475-1476 ; C.J.E.C., case C-178/87, 10 March 1992, *Minolta Camera Co. Ltd v Council*, E.C.R., 1992, I, (1577), 1609-1610 (Opinion of Advocate General MISCHO) and 1626 ; Commission Regulation (EEC) No 3643/84 of 20 December 1984 imposing a provisional anti-dumping duty on imports of electronic typewriters originating in Japan and terminating the anti-dumping proceeding with regard to Nakajima All Co. Ltd, O.J., 22 December 1984, No L 335/43 ; Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, O.J., 22 June 1985, No L 163/1 ; Council Regulation (EC) No 2199/94 of 9 September 1994 imposing a definitive anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, and collecting definitively the provisional duty imposed, O.J., 10 September 1994, No L 236/2. See also : BELLIS, J.-F., VERMULST, E.A., and WAER, P., «Further Changes in the EEC Anti-Dumping Regulation : A Codification of Controversial Methodologies», *Journal of World Trade*, 1989, (21), 25 ; BESELER, J.F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 59 and 104 ; BOUDANT, J., *L'anti-dumping communautaire*, Paris, Economica, 1991, 83 ; LESGUILLONS, H., «Le régime anti-dumping de la Communauté européenne», *Droit et pratique du commerce international*, 1978, (459), 471 ; LESGUILLONS, H., *Le régime communautaire de protection contre le dumping et les subventions*, Paris, F.E.D.U.C.I., 1983, 48 and 47 ; WAER, P., «Constructed Normal Values in EC Dumping Margin Calculations. Fiction, or a Realistic Approach», *Journal of World Trade*, 1993/3, (47), 48.

⁴²⁷ HINDLEY, B., «Dumping and the Far East Trade of the European Community», *World Economy*, 1988, (445), 450.

⁴²⁸ C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, E.C.R., 1991, I, (2069), 2129 (Opinion of Advocate General LENZ) ; see also : *ibidem*, 2139-2145).

surrogate of the domestic market price and must be based on the production costs realised and the profits made on the exporter's domestic market⁴²⁹. Second, if the constructed value was intended as a reasonable value of the exported products, the amount to be added for profit should equal the profit (normally) realized on export sales, irrespective of whether it exceeded the profit normally realized on the exporter's domestic market.

It has also been argued that the use of the constructed value favours the finding of dumping because it comprises the general expenses and profits of domestic sales organisations solely engaged in domestic sales, whereas the export price does not⁴³⁰. This argument is right as it criticizes the fact that normal value and export price are not compared at the same level of trade⁴³¹. However, it is not specific to the constructed value. It is valid for both the domestic market price and the constructed value, for the very reason that the latter is a surrogate for the first and, thus, like the first, comprises the general expenses and profits of domestic sales organisations⁴³².

2.2.7.2. *Full cost pricing versus marginal pricing*

By defining the constructed value as the addition of all production costs and profits, GATT and European anti-dumping law seem to have opted for the method of full-cost pricing. Under full-cost pricing, attention is only being paid to the cost structure of the firm. Economic theory, however, usually upholds the method of marginal pricing. Marginal pricing implies that a producer maximizes his profits by producing a quantity in order for the additional cost of producing the last unit (the so-called marginal cost) to equal the additional revenue gained from the sale of the last unit (the so-called marginal revenue). Under marginal pricing, not only the cost structure of the firm, but also the revenue side (consumer demand and market structure) are taken into account.

⁴²⁹ Chapter II (*supra*, 37) defines dumping as selling at a loss when the constructed value is used as normal value standard. If the constructed value is a perfect surrogate for the domestic market price, dumping could never have that meaning, but would always be price discrimination. However, the constructed value is not a perfect surrogate for the domestic market price. Since it is defined as the addition of all production costs and a profit margin, it disregards the fact that sales at a loss may result from non-predatory short-run profit maximization and, consequently, its definition enlarges the meaning of dumping to sales at a loss.

⁴³⁰ VAN BAEL, I., and BELLIS, J.-F., *Anti-Dumping and other Trade Protection Laws of the EEC*, Bicester, CCH Editions Ltd, 1990, 59. See also : C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, E.C.R., 1991, I, (2069), 2180 (plea in law of the applicant).

⁴³¹ *Infra*, 279-283.

⁴³² C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, E.C.R., 1991, I, (2069), 2132-2133 (Opinion of Advocate General LENZ).

Pure forms of explicit marginal pricing and rigid full-cost pricing are very rare in actual business life. Firms apparently use either implicit marginal pricing⁴³³ or flexible full-cost pricing⁴³⁴. Empirical studies have demonstrated that only a small minority of firms explicitly stated that they adhered to a marginal pricing policy. Most companies declared that they practise full-cost pricing. As they took into consideration demand and competitive forces, it may be doubted, however, that they in fact adhered to rigid full-cost pricing⁴³⁵.

Because firms do not give evidence of a rigid full cost pricing policy, a rigid and purely mechanical link between production costs and constructed value cannot be accepted. Constructed value should be applied in a flexible way in GATT and European anti-dumping law. This flexibility, however, should not be unlimited. Besides the production side, only considerations concerning demand and competitive forces may be taken into consideration in order to determine the constructed value. Sections 2.2.7.3. up to 2.2.7.5. will examine whether the European anti-dumping authorities apply the required flexibility in determining the constructed value.

⁴³³ Implicit marginal pricing implies that firms determine their prices on the basis of the best available information they have about production costs, demand and competitive pressures. Their information is a conglomerate of «hard facts», such as historical production costs, and subjective estimates and expectations about future demand and competitive forces, as well as about future production costs. These elements do not have to coincide with mathematical calculated marginal cost, marginal revenue and numerical determined demand elasticity.

⁴³⁴ Flexible full-cost pricing implies that prices are determined not only on the basis of average total costs, but also on the basis of other information - be it a subjective estimate about demand and market structure and even about production costs and their allocation.

⁴³⁵ For a brief, but good overview of the empirical research on this field, see : DORWARD, N., *The Pricing Decision : Economic Theory and Business Practice*, London, Harper & Row, 1987, 109-123 ; NOOTEBOOM, B., KLEIJWEG, A., and THURIK, R., «Normal costs and demand effects in price setting», *European Economic Review*, 1988, (999), 999-1011.

2.2.7.3. Production costs actually incurred in the ordinary course of trade

2.2.7.3.1. Production costs actually incurred

ECSC anti-dumping law explicitly states that the production costs comprise all fixed⁴³⁶ and variable⁴³⁷ production costs⁴³⁸ actually incurred (Article 2(3)(b)(ii) basic ECSC Decision). This definition of the production costs is clearly based on full-cost pricing and, therefore goes against economic theory⁴³⁹. Moreover, it also disregards that, as economic theory shows, prices resulting from ordinary competition do not always cover all production costs⁴⁴⁰. By disregarding those findings of economic theory, ECSC anti-dumping law results in high normal values.

GATT and EC anti-dumping law do not define the notion «the cost of production» (Article 2.2. GATT Anti-dumping Code ; Article 2(3) basic EC Regulation). Probably, this notion also refers to all fixed and variable production costs since GATT and EC anti-dumping law allow to

⁴³⁶ Fixed costs are, for example, the non-operating costs of an entire factory (Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79 ; corrigendum, *O.J.*, 10 February 1990, No L 38/44)).

⁴³⁷ For a critical comment, see *supra*, 38-39.

⁴³⁸ Production costs comprise *e.g.* :

- royalties (Council Regulation (EEC) No 1768/89 of 19 June 1989 imposing a definitive anti-dumping duty on imports of video cassettes originating in the Republic of Korea and Hong Kong, collecting definitively the provisional duty and terminating the anti-dumping proceeding with regard to the imports of video tape reels originating in the Republic of Korea, *O.J.*, 22 June 1989, No L 174/1) ;
- financing costs (Commission Regulation (EC) No 1506/94 of 27 June 1994 imposing provisional duties on imports of urea ammonium nitrate solution originating in Bulgaria and Poland, *O.J.*, 30 June 1994, No L 162/16) ;
- the cost of (non-reconstituable) waste (Council Regulation (EEC) No 1768/89 of 19 June 1989 imposing a definitive anti-dumping duty on imports of video cassettes originating in the Republic of Korea and Hong Kong, collecting definitively the provisional duty and terminating the anti-dumping proceeding with regard to the imports of video tape reels originating in the Republic of Korea, *O.J.*, 22 June 1989, No L 174/1 ; Council Regulation (EEC) No 341/90 of 5 February 1990 accepting undertakings and imposing a definitive anti-dumping duty on imports of ferro-silicon originating in Iceland, Norway, Sweden, Venezuela or Yugoslavia, except those sold for export to the Community by companies whose undertakings have been accepted, *O.J.*, 10 February 1990, No L 38/1).

They do not comprise the production costs of a by-product (Council Regulation (EEC) No 341/90 of 5 February 1990 accepting undertakings and imposing a definitive anti-dumping duty on imports of ferro-silicon originating in Iceland, Norway, Sweden, Venezuela or Yugoslavia, except those sold for export to the Community by companies whose undertakings have been accepted, *O.J.*, 10 February 1990, No L 38/1).

They have neither to be adjusted for gains or losses from financial operations unconnected with the production process (*e.g.*, short-term bank investments, transferable securities, exchange operations) (Council Regulation (EEC) No 341/90 of 5 February 1990 accepting undertakings and imposing a definitive anti-dumping duty on imports of ferro-silicon originating in Iceland, Norway, Sweden, Venezuela or Yugoslavia, except those sold for export to the Community by companies whose undertakings have been accepted, *O.J.*, 10 February 1990, No L 38/1).

⁴³⁹ *Supra*, 161-162.

⁴⁴⁰ *Supra*, 38-49.

disregard sales at a loss and define those sales by referring to all fixed and variable production costs (Article 2.2.1. GATT Anti-dumping Code ; Article 2(4) basic EC Regulation). Therefore it may be concluded that the interpretation placed on ECSC anti-dumping law will also prevail for EC anti-dumping law, unless the latter contains special provisions which clearly deviate from ECSC anti-dumping law.

GATT and European anti-dumping law, thus, impose the application of full cost pricing, rather than the application of marginal pricing. However, not only GATT and European anti-dumping law result in high normal values which are economically not justified. Through a literal and restrictive interpretation of the concept «all production costs actually incurred», European anti-dumping authorities have created a mechanical link between constructed value and production costs. Hereinafter, it will be shown that this mechanical link usually inflates normal value, except in the case of input dumping and social dumping.

The requirement that *all* costs must be taken into account, is interpreted literally. The interpretation is literal because the constructed value includes costs which would have been incurred if there were no positive economies of scope (*i.e.*, the decreasing effect the production of another product may have on the production costs of the product involved). For example, when the waste resulting from another production process is used as input for the production of the allegedly dumped product, the value of that waste as input in the production process of the allegedly dumped product will be taken into account in calculating the production costs⁴⁴¹. By disregarding those positive economies of scope, the finding of (a higher degree of) dumping is favoured. On the other hand, if the production of the allegedly dumped product causes waste which is subsequently used to manufacture another product, the value that waste has as an input in the other production process, will be deducted from the production costs of the allegedly dumped product and a lower dumping margin will be obtained⁴⁴².

The requirement that *all* costs have to be taken into account is also interpreted in a strict sense. Indeed, under ECSC anti-dumping law, a special treatment of new investments is refused for three reasons :

- «i) neither Article VI of the GATT nor the (1980) GATT Antidumping Code nor yet (former basic EC Regulation (and present ECSC Decision)) provide for a different set of rules to be applied to exporters in a start-up or expansion phase ;

⁴⁴¹ In *furfural from the Dominican Republic* the allegedly dumping exporter used bagasse as fuel in his sugar mill for the production of furfural. By using bagasse as fuel he reduced his energy costs. Bagasse is a by-product of the exporter's sugar production. Due to disproportionately high transport costs, there is no demand for bagasse in the Dominican Republic or elsewhere and, therefore, no market price. For estimating the value of bagasse, the Commission used a method based on potential savings (Commission Decision 81/493/EEC of 6 July 1981 terminating the anti-dumping procedure concerning imports of furfural originating in the Dominican Republic, Spain and the People's Republic of China, *O.J.*, 11 July 1981, No L 189/57).

⁴⁴² Council Regulation (EEC) No 738/92 of 23 March 1992 imposing a definitive anti-dumping duty on imports of cotton yarn originating in Brazil and Turkey, *O.J.*, 27 March 1992, No L 82/1.

- ii) more favorable treatment to one exporter would constitute a discrimination against others which are not in a start-up or expansion phase ;
- iii) producers who have recently invested and who have not yet reached their expected economies of scale, should not engage in "pre-emptive pricing", i.e. selling below both their current normal value and the prices charged by the Community industry, on a scale large enough to cause material injury, whether to try to generate future economies of scale, or to break into and capture part of the Community market, or for any other purpose.⁴⁴³

Of these three reasons, at first sight, only the first seems convincing under ECSC anti-dumping law. Indeed, no specific rules with regard to new investments are provided by ECSC anti-dumping law. However, ECSC anti-dumping law requires that the production costs taken into account for determining the constructed value, should have been incurred in the ordinary course of trade. Insofar as production costs incurred in a start-up or expansion phase are not incurred in the ordinary course of trade, they should not be taken into account⁴⁴⁴. Moreover, as the new GATT Anti-dumping Code requires adjustments to be made for start-up operations, the European anti-dumping authorities will not be able to uphold their case law. In pursuance of the GATT Anti-dumping Code, they should take into account the costs at the end of the start-up period or, if that period extends beyond the investigation period, the most recent costs which may reasonably be taken into account (Article 2.2.1.1. GATT Anti-dumping Code). Clearly, ECSC anti-dumping law should be amended as soon as possible or, at least, should be interpreted in a way conform to GATT anti-dumping law. EC anti-dumping has already been amended in order to comply with the GATT Anti-dumping Code (Article 2(5)(b) basic EC Regulation). However, EC anti-dumping law provides a more elaborate description of the adjustments for start-up costs. That description may restrict the scope of those adjustments more than allowed by GATT anti-dumping law and may, thus, increase the amount of production costs. Indeed, whereas GATT anti-dumping law does not define for which kind of start-up costs the adjustments are necessary, EC anti-dumping law only allows adjustments when the costs are affected by the use of new production facilities requiring additional investment and by low capacity utilization rates, which are the result of start-up operations which take place within or during the investigation period. As a consequence, no adjustments will be allowed under EC anti-dumping law for low capacity utilization rates because of start-up operations if those start-up operations took place just before the investigation period.

⁴⁴³ Council Regulation (EEC) No 2089/84 of 19 July 1984 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 21 July 1984, No L 193/1. See also : Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1 ; Commission Decision 85/443/EEC of 23 September 1985 accepting an undertaking given in connection with the anti-dumping investigation concerning imports of container corner fittings of worked cast steel originating in Austria and terminating that investigation, *O.J.*, 27 September 1985, No L 256/44 ; C.J.E.C., case C-171/87, 10 March 1992, *Canon Inc. v Council, E.C.R.*, 1992, I, (1237), 1248-1249 (Report for the Hearing : conclusions of the Council).

See also : Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50, where the production costs were considered to be in the ordinary course of trade, as no sufficient evidence was provided that genuine start-up costs had been incurred.

⁴⁴⁴ *Infra*, 171-172.

GATT anti-dumping law, however, does not exclude adjustments for such start-up operations. Furthermore, whereas GATT anti-dumping law does not define the length of the start-up phase, EC anti-dumping law stipulates that the length of that phase must be determined in relation to the circumstances of the exporter, but must not exceed an appropriate initial portion of the period of cost recovery. Here, EC anti-dumping law provides the instruments to drive up unit costs. Indeed, the notion «appropriate» is open to many interpretations, including a restrictive one ; and the shorter the period of cost recovery, the higher unit costs will be. Another difference between GATT and EC anti-dumping law is the fact that, according to GATT anti-dumping law, the adjustment made for start-up costs must reflect the costs at the end of the start-up period or, if that period extends beyond the investigation period, the most recent costs which can reasonably be taken into account by the anti-dumping authorities during the investigation. EC anti-dumping law alters this provision as follows : instead of the costs at the end of the start-up period, the weighted average costs at the end of the start-up phase must be used ; and, information concerning the start-up phase which extends beyond the investigation period, must be taken into account insofar as it is submitted prior to verification visits and within three months from the initiation of the investigation. Clearly, whereas the first element is undoubtedly a correct explicitation of what is meant by GATT anti-dumping law, the latter definition severely limits the information on the most recent costs which can reasonably be taken into account. EC anti-dumping law promotes the finding of high production costs, since the costs will be lower the more the start-up period is coming.

The second reason, the principle of non-discrimination, is not convincing. Non-discrimination implies that equals are treated equally and unequals unequally. However, producers in a start-up or expansion phase differ profoundly from those who are not in such a phase, precisely because so-called pre-emptive pricing is not unusual for producers in a start-up or expansion phase⁴⁴⁵.

The third reason, the pre-emptive pricing, is also unconvincing. The European anti-dumping authorities do not allow pre-emptive pricing strategies probably because they consider them to be predatory. However, after a new investment, pre-emptive pricing resulting in sales below production costs is not necessarily predatory⁴⁴⁶. Indeed, during the first period after an investment has been made, total costs cannot be recovered because full capacity of the new

⁴⁴⁵ NORALL, C., «New Trends in Anti-dumping Practice in Brussels», *World Economy*, 1986, (97), 106.

⁴⁴⁶ For example, P. AREEDA and D.F. TURNER in their circumstantial search to identify every form of predatory pricing, admit that pricing below average variable cost - this is their criterion to identify predatory pricing - does not play in the face of new investment. To them, «the primary nonpredatory justification for prices below average variable cost is that the firm is actually only starting up and has not yet reached expected production levels. Firms in this situation, however, will not be in violation of a rule that prohibits prices below reasonably anticipated average variable cost» (AREEDA, P., and TURNER, «Predatory Pricing and Related Practices under Section 2 of the Sherman Act», *Harvard Law Review*, 1974-1975, (697), 717-718).

investment will usually not be reached during the warming-up period⁴⁴⁷. Moreover, a penetration strategy, which implies low prices in the beginning and a rising price path in the long run, is generally accepted as a normal pricing strategy⁴⁴⁸.

The requirement to take into account only the production costs *actually incurred*, is, furthermore, interpreted literally. The value of the production costs is determined on the basis of either the price actually paid for the production factors and inputs⁴⁴⁹ or the production costs incurred for producing the inputs⁴⁵⁰. Thus, anti-dumping law does not sanction input dumping nor social dumping⁴⁵¹. Input dumping occurs when the producer can buy an input at a very low price

⁴⁴⁷ NORALL, C., «New Trends in Anti-dumping Practice in Brussels», *World Economy*, 1986, (97), 105.

⁴⁴⁸ DEAN, J., «Pricing Policies for New Products», *Harvard Business Review*, 1950, (45), 50-52 ; DORWARD, N., *The Pricing Decision : Economic Theory and Business Practice*, London, Harper & Row, 1987, 126.

⁴⁴⁹ See e.g. : Commission Regulation (EEC) No 1696/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 June 1988, No L 151/47 ; Council Regulation (EEC) No 3946/88 of 16 December 1988 imposing a definitive anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 December 1988, No L 348/49.

⁴⁵⁰ Commission Decision 83/93/EEC of 1 March 1983 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ferro-silicon originating in Iceland, Norway, Sweden, Venezuela and Yugoslavia and terminating that proceeding, *O.J.*, 4 March 1983, No L 57/20 ; Commission Regulation (EEC) No 744/84 of 19 March 1984 imposing a provisional anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 23 March 1984, No L 79/8 (corrigendum, *O.J.*, 29 March 1984, No L 86/31) ; Commission Regulation (EEC) No 763/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten carbide and fused tungsten carbide originating in the People's Republic of China and terminating the anti-dumping proceeding concerning imports of those products from the Republic of Korea, *O.J.*, 30 March 1990, No L 83/36 ; Commission Decision 90/154/EEC of 26 March 1990 terminating the anti-dumping proceeding concerning imports of ammonium paratungstate originating in the People's Republic of China and the Republic of Korea, *O.J.*, 30 March 1990, No L 83/117.

⁴⁵¹ Answer of the Commission to written question No 1647/81, *O.J.*, 13 April 1982, No C 92/37 ; Answer of the Commission to written question No 1502/92, *O.J.*, 18 October 1993, No C 280/8 ; BESELER, J.-F., «EEC Protection against Dumping and Subsidies from Third Countries», *Common Market Law Review*, 1968-1969, (327), 332 ; VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 423. However, for R. BARENTS and J. STEENBERGEN (*Inleiding tot het mededingingsrecht*, Antwerpen, Kluwer, 1984, 187), it is not clear whether social dumping and input dumping are not sanctionable.

See also : *polyester yarns from the United States of America*, where the producer/exporter had to pay a lower price for his inputs when the finished product was destined for export than when it was sold on his domestic market. Only the lower input price was taken into account for the determination of the constructed value. As a consequence, the producer/exporter was not sanctioned for input dumping (Council Regulation (EEC) No 407/83 of 21 February 1983 amending Regulation (EEC) No 3439/80 imposing a definitive anti-dumping duty on imports of certain polyester yarn originating in the United States of America, *O.J.*, 23 February 1983, No L 50/1. Regulation (EEC) No. 407/83, which is the sole anti-dumping determination which may refer to input dumping. Contrary to the majority of the doctrine (BIERWAGEN, R.M., and HAILBRONNER, K., «Input, Downstream, Secondary, Diversionary and Components or Subassembly Dumping», *Journal of World Trade*, 1988, (27), 38 ; BESELER, J.-F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 79, note 65 ; BOURGEOIS, J.H.J., «EC Anti-dumping Enforcement - Selected Second Generation Issues», in *Antitrust and Trade Policy in the United States and the European Community*, HAWK, B.E. (ed.), New York, Bender, 1986, (563), 581 ; VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 461, note 35), it cannot be deduced from Regulation (EEC) No. 3439/80).

There may be one exception, namely when prices and wages of inputs and production factors are determined by the government of the exporting country (see : *infra*, 172-173).

which is usually below the production costs⁴⁵². Social dumping implies that a producer takes advantage of the fact that in his domestic market some production factors, such as labour, can be hired at a very low wage, though not necessarily below their marginal product in that country. As long as the wages are not below the marginal product, social dumping is in fact an application of the Heckscher-Ohlin theorem⁴⁵³. The low wages result from the comparative advantage the producer's country has because of its relative labour abundance. However, even when those wages are below the marginal product of labour and, accordingly, do not reflect exactly the country's comparative advantage, anti-dumping law should not sanction social dumping. Domestic market imperfections cause wages to fall below labour's marginal product. Anti-dumping measures cannot cure such imperfections. They cannot even remedy the symptoms. Indeed, the price increase caused by anti-dumping measures benefits either the Community institutions or the dumping exporters⁴⁵⁴. There is no guarantee that the dumping exporters will transfer the said benefits to their employees or not even an incentive for them to do so. When the producer buys the production factors and inputs he needs at the lowest possible price, he should not be sanctioned for such a sound economic behaviour⁴⁵⁵. Even more, he cannot be sanctioned, since the purchase of production factors and inputs takes place in the exporting country and, therefore, is not within the jurisdiction of the importing country⁴⁵⁶. It would also be difficult to administer input and social dumping. The anti-dumping authorities would have to inquire for each production factor and input whether they are not sold at a loss or hired at a wage below their marginal product. This would prove to be unworkable, especially as the cooperation

⁴⁵² BESELER, J.-F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 78-79 ; BOURGEOIS, J.H.J., «EC Anti-dumping Enforcement - Selected Second Generations Issues», in *Antitrust and Trade Policy in the United States and the European Community*, HAWK, B.E. (ed.), New York, Bender, 1986, (563), 580.

⁴⁵³ DAILLIER, P., «La pratique communautaire de lutte contre le dumping», *Revue du Marché Commun*, 1979, (557), 558 ; GREENAWAY, D., and MILNER, C., *Protectionism again ... ? Causes and Consequences of a Retreat from Freer Trade to Economic Nationalism*, London, Institute for Economic Affairs, 1979, 16-17; HINDLEY, B., and NICOLAIDES, E., *Taking the New Protectionism Seriously*, London, Trade Policy Research Centre, 1983, 60-62 ; KRAVIS, I.B., «The Current Case for Import Limitations», in *Changing Patterns in Foreign Trade and Payments*, BALLASA, B. (ed.), New York, Norton & Company, 1978, (1), 17-18 ; LANGJOUW, G.J., «Protectie ten opzichte van de ontwikkelingslanden», *Maandschrift voor Economie*, 1981, (1), 7 ; STANBROOK, C., *Dumping. A Manual on the EEC Anti-Dumping Law and Procedure*, Chequers, European Business Publications, 1980, 5 ; WARES, W.A., *The Theory of Dumping and American Commercial Policy*, Lexington, Lexington Books, 1977, 6.

For the Heckscher-Ohlin theorem, see e.g. : ETHIER, W., *Modern International Economics*, New York, Norton, 1983, 95-97.

⁴⁵⁴ *Infra*, 347-349.

⁴⁵⁵ BESELER, J.-F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 79 ; BIERWAGEN, R.M., and HAILBRONNER, K., «Input, Downstream, Secondary, Diversionary and Components or Subassembly Dumping», *Journal of World Trade Law*, 1988, (27), 40 ; BOURGEOIS, J.H.J., «EC Anti-dumping Enforcement - Selected Second Generations Issues», in *Antitrust and Trade Policy in the United States and the European Community*, HAWK, B.E. (ed.), New York, Bender, 1986, (563), 581.

Contra : BOUDANT, J., *L'anti-dumping communautaire*, Paris, Economica, 1991, 275-278.

⁴⁵⁶ BIERWAGEN, R.M., and HAILBRONNER, K., «Input, Downstream, Secondary, Diversionary and Components or Subassembly Dumping», *Journal of World Trade Law*, 1988, (27), 39.

of the supplier of the production factor or input would be required - who even may be established in a third country⁴⁵⁷.

2.2.7.3.2. Ordinary course of trade

Under European anti-dumping law, the production costs used for determining the constructed value must be incurred in the ordinary course of trade (Articles 1(2) and 2(3) basic EC Regulation ; Article 2(3)(b)(ii) basic ECSC Decision). European anti-dumping law may be in violation of GATT anti-dumping law. Indeed, GATT anti-dumping law does not require the production costs to have been incurred in the ordinary course of trade (see : Article VI(1) GATT ; Article 2.2. GATT Anti-dumping Code). Consequently, under GATT anti-dumping law, the constructed value may be determined on the basis of production costs which have not been incurred in the ordinary course of trade.

Though they might resort to it in order to disregard too high production costs, European anti-dumping authorities rely on the concept «ordinary course of trade» in order to submit higher production costs than those actually incurred. As actual production costs are the minimum to be taken into account, the requirement that production costs be incurred in the ordinary course of trade only increases normal value.

European anti-dumping case law offers three examples which show that production costs in the ordinary course of trade equal at least those actually incurred. First, the European anti-dumping authorities apply the concept «production costs in the ordinary course of trade» in respect of associations between the producer and the supplier of his inputs⁴⁵⁸. As is also the case for the domestic market price (see : Article 2(1)(b) basic EC Regulation ; Article 2(7) basic ECSC Decision), transactions concerning inputs between associated parties are assumed not to have been

⁴⁵⁷ BESELER, J.-F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 79 ; BIERWAGEN, R.M., and HAILBRONNER, K., «Input, Downstream, Secondary, Diversionary and Components or Subassembly Dumping», *Journal of World Trade Law*, 1988, (27), 39-40 ; KRETSCHMER, H., *Das Antidumping- und Antisubventionsrecht der Europäischen Gemeinschaften*, Frankfurt/Main, VVV-Verlag, 1980, 32.

⁴⁵⁸ See : BOURGEOIS, J.H.J., «EC Antidumping Enforcement - Selected Second Generation Issues», in *Antitrust and Trade Policy in the United States and the European Community*, HAWK, B.E. (ed.), New York, Bender, 1986, (563), 581-582, who points out in this respect that the «approach vis-à-vis input dumping (between associated parties) results from the Community's view that the 1979 GATT Antidumping Code, no provision of which specifically authorizes application of antidumping duties to input dumping (a term which does not even appear in the Code) should not be interpreted extensively and, where a need appears for an evolving interpretation, an understanding within the framework of GATT should be reached». No such agreement has been concluded.

made in the ordinary course of trade⁴⁵⁹. The assumption is rebutted when the prices charged between associated parties are comparable with the prices charged between independent parties⁴⁶⁰. If associated parties constitute an economic unity, the production costs in general and the selling, administrative and other general expenses in particular of the company associated with the allegedly dumping producer/exporter, are added to the production costs of the producer/exporter⁴⁶¹. This is especially so when the European anti-dumping authorities are

459 Commission Decision 80/783/EEC of 27 August 1980 accepting undertakings in connection with the anti-dumping proceedings concerning imports of studded welded-link chain, originating in Spain and Sweden and terminating those proceedings, *O.J.*, 2 September 1980, No L 231/10; Commission Decision 81/366/EEC of 18 May 1981 accepting an undertaking given in connection with the anti-dumping proceedings concerning louvre doors originating in Malaysia and Singapore and terminating the proceedings, *O.J.*, 22 May 1981, No L 135/33; Commission Decision 86/151/EEC of 29 April 1986 terminating the anti-dumping proceeding concerning imports of certain ball bearings originating in Thailand, *O.J.*, 30 April 1986, No L 113/61; Council Regulation (EEC) No 3522/90 of 4 December 1990 amending Regulation (EEC) No 1768/89 with regard to the imposition of a definitive anti-dumping duty on imports of video cassettes originating in the Republic of Korea and Hong Kong, *O.J.*, 7 December 1990, No L 343/1; Commission Regulation (EC) No 1076/94 of 6 May 1994 imposing a provisional anti-dumping duty on imports of certain watch movements originating in Malaysia and Thailand, *O.J.*, 11 May 1994, No L 120/3.

460 Commission Decision 80/783/EEC of 27 August 1980 accepting undertakings in connection with the anti-dumping proceedings concerning imports of studded welded-link chain, originating in Spain and Sweden and terminating those proceedings, *O.J.*, 2 September 1980, No L 231/10; Commission Decision 86/151/EEC of 29 April 1986 terminating the anti-dumping proceeding concerning imports of certain ball bearings originating in Thailand, *O.J.*, 30 April 1986, No L 113/61; BESELER, J.-F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 59; BUHART, J., «Le régime communautaire de l'antidumping : vingt ans d'expérience», *Revue Trimestrielle de Droit Européen*, 1988, (253), 266.

461 Commission Regulation (EEC) No 3453/81 of 2 December 1981 imposing a provisional anti-dumping duty on imports of certain cotton yarns originating in Turkey, *O.J.*, 3 December 1981, No L 347/19; Council Regulation (EEC) No 789/82 of 2 April 1982 imposing a definitive anti-dumping duty on imports of certain cotton yarns originating in Turkey, *O.J.*, 3 March 1982, No L 90/1; Commission Regulation (EEC) No 3643/84 of 20 December 1984 imposing a provisional anti-dumping duty on imports of electronic typewriters originating in Japan and terminating the anti-dumping proceeding with regard to Nakajima All Co. Ltd, *O.J.*, 22 December 1984, No L 335/43; Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1; Commission Regulation (EEC) No 2865/85 of 14 October 1985 imposing a provisional anti-dumping duty on imports of certain electronic scales originating in Japan and accepting undertakings and terminating the proceeding in respect of certain imports of such products originating in Japan, *O.J.*, 16 October 1985, No L 275/5; Council Regulation (EEC) No 1058/86 of 8 April 1986 imposing a definitive anti-dumping duty on imports of certain electronic scales originating in Japan, *O.J.*, 12 April 1986, No L 97/1; Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5; Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12; Council Regulation (EEC) No 3528/87 of 23 November 1987 amending Regulation (EEC) No 2089/84 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 26 November 1987, No L 336/1; Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12; Commission Regulation (EEC) No 2005/88 of 5 July 1988 imposing a provisional anti-dumping duty on imports of serial impact fully formed character printers originating in Japan, *O.J.*, 8 July 1988, No L 177/1; Commission Regulation (EEC) No 2623/88 of 24 August 1988 imposing a provisional anti-dumping duty on imports of urea originating in Austria, Hungary, Malaysia, Romania, the USA and Venezuela, *O.J.*, 25 August 1988, No L 235/5; Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 24 November 1988, No L 317/33; Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79; corrigendum, *O.J.*, 10 February 1990, No L 38/44); Council Regulation (EEC) No 577/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as EPROMs (erasable programmable read only memories) originating in Japan, *O.J.*, 12 March 1991, No L 65/1; BESELER, J.-F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 59.

The production costs not only of associated suppliers or sales companies, but also of the holding company of the producer/exporter are added (Commission Decision 86/151/EEC of 29 April 1986 terminating the anti-dumping proceeding concerning imports of certain ball bearings originating in Thailand, *O.J.*, 30 April 1986, No L 113/61). Moreover, the associated company must not be

convinced that the production costs borne by the associated company should normally have been borne by the producer/exporter⁴⁶².

Second, exceptionally high production costs caused by an economic recovery programme of the government of the exporting country are considered to be in the ordinary course of trade as they represent the general economic situation of the exporting country⁴⁶³

Third, European anti-dumping law offers the possibility to take account of the specific situation of producers in a start-up or expansion phase. Indeed, during a start-up or expansion phase, production costs are unusually high in respect of prices, so that it seems but normal that they are not fully covered by the prices charged. Therefore, it may be argued that in a start-up or expansion phase production costs are not incurred in the ordinary course of trade. In only one European anti-dumping case, the production costs of a new production plant during its start-up phase have not been considered as being incurred in the ordinary course of trade and were, therefore, not taken into account⁴⁶⁴. It is, however, an isolated case which probably has been

established in the country of origin (Commission Regulation (EEC) No 3262/90 of 5 November 1990 imposing a provisional anti-dumping duty on imports of audio tapes in cassettes originating in Japan, the Republic of Korea and Hong Kong, *O.J.*, 13 November 1990, No L 313/5 (corrigendum, *O.J.*, 12 January 1991, No L 9/36)).

⁴⁶² Commission Regulation (EEC) No 3262/90 of 5 November 1990 imposing a provisional anti-dumping duty on imports of audio tapes in cassettes originating in Japan, the Republic of Korea and Hong Kong, *O.J.*, 13 November 1990, No L 313/5 (corrigendum, *O.J.*, 12 January 1991, No L 9/36).

⁴⁶³ Council Regulation (EEC) No 2305/92 of 4 August 1992 imposing a definitive anti-dumping duty on imports of silicon metal originating in Brazil and definitively collecting the amounts secured by way of the provisional anti-dumping duty, *O.J.*, 7 August 1992, No L 222/1.

⁴⁶⁴ In *chemical fertilizer from the United States of America*, the investigation period covered the period from 1 January to 30 September 1980. As domestic sales had been made at a loss during that period, the constructed value was used as normal value standard. However, the constructed value «was established on the basis of the costs of production including a reasonable margin for overheads and profit for the third quarter of 1980, this being the period (...) when its new production plant was operating for the first time under normal conditions» (Council Regulation (EEC) No 349/81 of 9 February 1981 imposing a definitive anti-dumping duty on certain chemical fertilizer originating in the United States of America, *O.J.*, 12 February 1981, No L 39/4; Commission Decision 81/35/EEC of 9 February 1981 accepting undertakings in connection with the anti-dumping proceedings concerning certain chemical fertilizer originating in the United States of America, *O.J.*, 12 February 1981, No L 39/35). The wording «normal conditions» was probably used in order to indicate that the production costs incurred during the third quarter of 1980 were in the ordinary course of trade. *A contrario*, the production costs incurred during the first two quarters of 1980 were not in the ordinary course of trade.

There is still another case in which attention has been paid to temporary and exceptional costs incurred during the start-up phase of production. Indeed, in *potassium chloride from Belarus, Russia or Ukraine*, normal value has been established on the basis of the domestic market price, though it did not cover all production costs. Normally, such domestic market price is disregarded (*infra*, 226). It was nevertheless, applied as normal value standard because it covered all production costs, except for the temporary and exceptional costs specific to the start-up phase (Council Regulation (EEC) No 3068/92 of 23 October 1992 imposing a definitive anti-dumping duty on imports of potassium chloride originating in Belarus, Russia or Ukraine, *O.J.*, 24 October 1992, No L 308/41). This case, though, does not show that production costs incurred during the start-up phase are considered as not being incurred in the ordinary course of trade. Indeed, those production costs were disregarded because they were specific to the reference country (normal value for NME countries is determined on the basis of the prices or costs in a third ME country, the so-called reference country, see: Article 2(7) basic EC Regulation; Article 2(5) basic ECSC Decision) and not to the NME countries under investigation and it would have been unfair to take them into account.

overruled by later anti-dumping case law⁴⁶⁵ in which all production costs incurred during the start-up or expansion phase were taken into account. According to anti-dumping case law, former GATT and EC anti-dumping law and present ECSC anti-dumping law do not provide for a different set of rules to be applied to exporters in a start-up or expansion phase. Whereas European anti-dumping authorities are right in respect of former GATT anti-dumping law, they interpret the concept «production costs incurred in the ordinary course of trade» in a way that cannot be justified from an economic point of view. Moreover, as the new GATT Anti-dumping Code (Article 2.2.1.1.) and prevailing EC anti-dumping law (Article 2(5)(b) basic EC Regulation) require adjustments to be made for start-up operations, the European anti-dumping authorities will have to change their case law (including their case law in respect of ECSC anti-dumping law, the legislation of which should be best amended too)⁴⁶⁶.

As transactions of inputs at prices below their production costs are considered to have been made in the ordinary course of trade, the actual input prices are taken into account⁴⁶⁷. Hence, input

⁴⁶⁵ Council Regulation (EEC) No 2089/84 of 19 July 1984 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 21 July 1984, No L 193/1. See also : Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1 ; Commission Decision 85/443/EEC of 23 September 1985 accepting an undertaking given in connection with the anti-dumping investigation concerning imports of container corner fittings of worked cast steel originating in Austria and terminating that investigation, *O.J.*, 27 September 1985, No L 256/44 ; Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia, *O.J.*, 9 May 1987, No L 121/11 ; Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1.

See also : *cotton yarn from Egypt*, where the exporter claimed that his production costs were exceptionally high during the period of investigation and decreased in following years. The Commission answered that factors relating to a period outside the period of investigation cannot be taken into consideration (Council Regulation (EEC) No 738/92 of 23 March 1992 imposing a definitive anti-dumping duty on imports of cotton yarn originating in Brazil and Turkey, *O.J.*, 27 March 1992, No L 82/1).

⁴⁶⁶ *Supra*, 164-166.

⁴⁶⁷ In *electronic typewriters from Japan*, the production costs of the Japanese producer of electronic typewriters were adjusted because he had purchased components of one of his production units at a price below the cost of production (Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1). It is not made clear whether the too low price or the association was decisive. According to the doctrine, it was the association which made the adjustment necessary. Thus, the price at which inputs and production factors are bought, have to be taken as such in establishing the constructed value, unless the producer could have had some influence on this price, e.g., through a certain relationship with his supplier (BESELER, J.-F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 78-80).

In *cotton yarn from Egypt*, the price for raw cotton (i.e., the main input for cotton yarn) was not considered to be in the ordinary course of trade. It was pointed out that raw cotton was sold on the domestic market at a considerably lower price than the price of raw cotton exported from Egypt and that this had a direct impact on the domestic price of cotton yarn. However, it seems that the price difference alone was not the fundamental reason for disregarding the price for raw cotton. For it was also pointed out that the domestic prices of raw cotton and cotton yarn were both fixed by the Egyptian government and that the cotton yarn spinning companies were state owned (Commission Regulation (EEC) No 2818/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports of cotton yarn originating in Brazil, Egypt and Turkey and terminating the anti-dumping proceeding in respect of cotton yarn originating in India and Thailand, *O.J.*, 27 September 1991, No L 271/17). It seems that these circumstances are the reason why the price for raw cotton was disregarded, or, at least, they make low input prices suspicious. A government that determines both the input price and the price of the finished product, may circumvent anti-dumping law. If it fixes a low input price, a low domestic market price of the finished product will not be below the production costs and, therefore, cannot be

and social dumping are not actionable under European anti-dumping law. This may seem quite peculiar because, in respect of domestic market prices, sales at a loss are not considered to be made in the ordinary course of trade (see : Article 2.2.1. GATT Anti-dumping Code ; Article 2(4) basic EC legislation⁴⁶⁸). From an economic point of view, however, the absence of a strict identical interpretation of the concept «ordinary course of trade» in respect of domestic market prices and input prices below production costs, is justified since anti-dumping law should not sanction a producer for buying his inputs at the lowest possible price, even if these prices are below production costs⁴⁶⁹.

There is only one exception to the rule that actually incurred production costs are the minimum to be taken into account. It concerns the case of dumping exporters established in an East-European country at the time that this country had switched from a non-market economy system to a market economy system. In view of the different stages of economic and commercial reforms within the companies established in that country, the accounting data did not always reflect the costs normally borne by companies that produce in a market economy and had to be adjusted⁴⁷⁰.

2.2.7.4. A reasonable amount for selling, administrative and other general expenses and a reasonable profit margin

The constructed value must include a reasonable amount for selling, administrative and other general expenses as well as a reasonable profit margin (Article VI(1) GATT ; Article 2.2. GATT Anti-dumping Code ; Article 2(3) basic EC Regulation ; Article 2(3)(b)(ii) basic ECSC Decision).

considered as not being in the ordinary course of trade. As a result, that low domestic market price must be used as normal value standard and the lower the normal value, the lower the probability of finding dumping.

⁴⁶⁸ *Supra*, 130-133.

⁴⁶⁹ *Supra*, 167-169.

⁴⁷⁰ Commission Decision No 67/94/ECSC of 12 January 1994 imposing a provisional anti-dumping duty on imports into the Community of hematite pig iron, originating in Brazil, Poland, Russia and Ukraine, *O.J.*, 15 January 1994, No L 12/5.

The fundamental reason⁴⁷¹ why a positive⁴⁷² amount for general expenses and profit must always be added, is the fact that the constructed value is a surrogate method to obtain a normal value, as if sales on the domestic market had taken place in the ordinary course of trade. Under European anti-dumping law, the price for such sales is assumed to include a reasonable amount for general expenses and profit⁴⁷³. This assumption, however, does not match economic realities. It may, indeed, be economically justified not to make any profits, or even to suffer some losses⁴⁷⁴. Therefore, in cases where no profits or loss are economically justified, the dumping margin will be higher than if the constructed value is applied as normal value standard.

⁴⁷¹ Another, more legalistic reason has also been used: European anti-dumping law imposes the constructed value to be determined «by adding cost of production and a reasonable margin of profit» (Article 2(3)(b)(ii) basic ECSC Decision) (emphasis added). According to the European anti-dumping authorities, the question, therefore, is not whether or not a profit margin should be added, but rather what is a reasonable profit margin (Commission Decision 86/151/EEC of 29 April 1986 terminating the anti-dumping proceeding concerning imports of certain ball bearings originating in Thailand, *O.J.*, 30 April 1986, No L 113/61; Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1). GATT and EC anti-dumping law probably also allow this legalistic interpretation since they define the constructed value as «the cost of production plus a reasonable amount for (...) profits» (Article 2.2. GATT Anti-dumping Code; Article 2(3) basic EC Regulation) (emphasis added). This legalistic reason is, in fact, the legal consequence of the fundamental reason: if the constructed value is not considered to be a surrogate of the domestic market price in the ordinary course of trade and if the domestic market price in the ordinary course of trade is not defined as comprising all production costs, including administrative, selling and other general expenses, and a profit margin, the constructed value would not be defined as the addition of the production costs and a profit margin (see: C.J.E.C., joined cases 260/85 and 106/86, 5 October 1988, *Tokyo Electric Company Ltd (TEC) a.o. v Council, E.C.R.*, 1988, (5855), 5898-5899 and 5921).

⁴⁷² A positive amount for general expenses and profit has always to be added, even if no general expenses are incurred or if no profits are made (BELLIS, J.-F., «La réglementation anti-dumping de la Communauté Economique Européenne», *Cahiers de Droit Européen*, 1979, (496), 507; BESELER, J.-F., *Die Abwehr von Dumping und Subventionen durch die Europäische Gemeinschaften*, Baden-Baden, Nomos, 1980, 48; BESELER, J.-F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 60; DIDIER, P., «EEC Antidumping Rules and Practices», *Common Market Law Review*, 1980, (349), 355).

See, however: *angles, shapes and sections of iron or steel from Romania*, where the constructed value of the reference country was used as normal value standard (see: Article 2(7) basic EC Regulation; Article 2(5) basic ECSC Decision; *infra*, 191). However, no profit margin was added (Commission Decision 80/253/EEC of 26 February 1980 accepting undertakings offered in connection with the anti-dumping procedure concerning imports of certain angles, shapes and sections of iron or steel originating in Romania, and terminating that procedure, *O.J.*, 29 February 1980, No L 56/34). The fact that it concerned the determination of normal value for a NME country is not relevant. In respect of NME countries, European anti-dumping law treats of «the constructed value» without any further specification (Article 2(7) basic EC Regulation; Article 2(5)(b) basic ECSC Decision). Therefore, the constructed value when used as normal value standard for NME countries, has to be taken in its normal meaning, i.e., in conformity with its definition given in respect of ME countries (Article 2(3) basic EC Regulation; Article 2(3)(b)(ii) basic ECSC Decision). As a consequence, the constructed value should include a reasonable positive margin of profit, even in respect of NME countries.

⁴⁷³ Commission Regulation (EEC) No 3643/84 of 20 December 1984 imposing a provisional anti-dumping duty on imports of electronic typewriters originating in Japan and terminating the anti-dumping proceeding with regard to Nakajima All Co. Ltd, *O.J.*, 22 December 1984, No L 335/43; Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1; Commission Regulation (EEC) No 2865/85 of 14 October 1985 imposing a provisional anti-dumping duty on imports of certain electronic scales originating in Japan and accepting undertakings and terminating the proceeding in respect of certain imports of such products originating in Japan, *O.J.*, 16 October 1985, No L 275/5; Council Regulation (EEC) No 1058/86 of 8 April 1986 imposing a definitive anti-dumping duty on imports of certain electronic scales originating in Japan, *O.J.*, 12 April 1986, No L 97/1; Commission Decision 86/151/EEC of 29 April 1986 terminating the anti-dumping proceeding concerning imports of certain ball bearings originating in Thailand, *O.J.*, 30 April 1986, No L 113/61; Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12; Commission Regulation (EEC) No 2005/88 of 5 July 1988 imposing a provisional anti-dumping duty on imports of serial impact fully formed character printers originating in Japan, *O.J.*, 8 July 1988, No L 177/1.

⁴⁷⁴ *Supra*, 38-42.

Under GATT and EC anti-dumping law, the amount for general expenses and profit has to be calculated on the basis of actual data pertaining to production and sales in the ordinary course of trade (Article 2.2.2. GATT Anti-dumping Code ; Article 2(6) basic EC Regulation). Under ECSC anti-dumping law, the amount for general expenses and profit has to be calculated with reference to the general expenses incurred and the profit realized by the dumping producers/exporters on the profitable sales on their domestic market (Article 2(3)(b)(ii) basic ECSC Decision). ECSC anti-dumping law, as interpreted by the European anti-dumping authorities coincides with GATT and EC anti-dumping law : the actual costs and profits are taken into account, unless they do not pertain to sales in the ordinary course of trade. Indeed, as a rule, the general expenses actually incurred and the profit margin actually realized are used⁴⁷⁵. It is of no importance whether the expenses which are necessarily included in the selling price, are incurred by the producer or by his associated sales company with which he forms an economic unit, even when this sales company is a legally distinct entity⁴⁷⁶. In the case of such an economic unit, the combined profit margins of the two companies may also be used in order to construct the normal value⁴⁷⁷. The profit margin actually realized is seen as the most realistic one, even if it is exceptional, exorbitant or the result of special circumstances. The European anti-dumping authorities argue that the domestic market price, when used as normal value standard, cannot be challenged for the reason that it contains such a profit margin⁴⁷⁸. They only require that the profit margin is realized on sales made in the ordinary course of trade. For

475 VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 425.

476 C.J.E.C., joined cases 260/85 and 106/86, 5 October 1988, *Tokyo Electric Company Ltd (TEC) a.o. v Council*, E.C.R., 1988, (5855), 5919 ; C.J.E.C., case C-178/87, 10 March 1992, *Minolta Camera Co. Ltd v Council*, E.C.R., 1992, I, (1577), 1604-1605 (Opinion of Advocate General MISCHO) and 1625 ; C.J.E.C., case C-179/87, 10 March 1992, *Sharp Corporation v Council*, E.C.R., 1992, I, (1635), 1674. See also : WAER, P., «Constructed Normal Values in EC Dumping Margin Calculations. Fiction, or a Realistic Approach», *Journal of World Trade*, 1993/3, (47), 49.

477 C.J.E.C., joined cases 273/85 and 107/86, 5 October 1988, *Silver Seiko Limited a.o. v Council*, E.C.R., 1988, (5927), 5976 ; C.J.E.C., case C-178/87, 10 March 1992, *Minolta Camera Co. Ltd v Council*, E.C.R., 1992, I, (1577), 1627.

478 Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1 ; Commission Decision 86/497/EEC of 7 October 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of silicon carbide originating in the People's Republic of China, Norway, Poland and the USSR, and terminating the investigation regarding imports of that product originating in the People's Republic of China, Norway, Poland, Czechoslovakia, the USSR and Yugoslavia, *O.J.*, 10 October 1986, No L 287/25 ; Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 24 November 1988, No L 317/33.

The European anti-dumping authorities' argument must have convinced Advocate-General Sir GORDON SLYNN who held, in respect of the use of the actually realized profit margin, that : «(t)he purpose of constructed normal value is to act as a substitute for domestic selling price as a basis for normal value where there are no domestic sales or where such sales do not permit a proper comparison. A way of constructing normal value which brings it closer to actual domestic prices is in line with that purpose» (C.J.E.C., joined cases 260/85 and 106/86, 5 October 1988, *Tokyo Electric Company Ltd (TEC) o.a. v Council*, E.C.R., 1988, (5855), 5889. See also : C.J.E.C., joined cases 273/85 and 107/86, 5 October 1988, *Silver Seiko Limited a.o. v Council*, E.C.R., 1988, (5927), 5961).

example, profits realized⁴⁷⁹, as well as general expenses incurred⁴⁸⁰ on sales made to the amount of less than 5 % of the volume of total exports to the Community, are not taken into account. When the dumping producers/exporters do not sell sufficient quantities on their domestic market, the general expenses incurred and the profit realized by other producers/exporters in the exporting country on profitable sales of the like product have to be used as reference under European anti-dumping law. Also here, the amount for general expenses and for profit added in order to calculate the constructed value coincides with the actual general expenses and profits of the producers/exporters, irrespective of whether these amounts are rather high such as in the case of producers/exporters who sell their products through associated sales companies. Only if the producers/exporters concerned can prove that it is possible to be present on their domestic market without having an integrated sales structure, the general expenses actually incurred by the other producers/exporters will not be used⁴⁸¹. If the producers/exporters are not present on their domestic market, such evidence will probably be impossible to provide⁴⁸². Needless to point out that this application of European anti-dumping law results in high constructed values and, consequently, high dumping margins.

Nevertheless, GATT and European anti-dumping law allow a flexible approach. Indeed, by requiring that the amount for general expenses and for profits be reasonable (Article 2.2. GATT Anti-dumping Code ; Article 2(3) basic EC Regulation ; Article 2(3)(b)(ii) basic ECSC Decision), they allow the European anti-dumping authorities a wide margin of discretion in evaluating that amount⁴⁸³. Only a marginal judicial control will be possible in view of the vague wording of

⁴⁷⁹ Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 24 November 1988, No L 317/33 ; Council Regulation (EEC) No 112/90 of 16 January 1990 imposing a definitive anti-dumping duty on imports of certain compact disc players originating in Japan and the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 17 January 1990, No L 13/21.

⁴⁸⁰ Commission Regulation (EEC) No 313/92 of 4 February 1992 imposing a provisional anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in South Korea, *O.J.*, 11 February 1992, No L 34/8 ; Commission Decision 92/313/EEC of 13 June 1992 accepting an undertaking given in connection with the review proceeding of the anti-dumping measure concerning imports of container corner fittings of worked cast steel originating in Austria and terminating the investigation, *O.J.*, 19 June 1992, No L 165/37 ; Council Regulation (EC) No 3359/93 of 2 December 1993 imposing amended anti-dumping measures on imports of ferro-silicon originating in Russia, Kazakhstan, Ukraine, Iceland, Norway, Sweden, Venezuela and Brazil, *O.J.*, 9 December 1993, No L 302/1 ; Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50.

⁴⁸¹ C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, *E.C.R.*, 1991, I, (2069), 2187 and 2201.

⁴⁸² VERMULST, E.A., and HOOIJER, J.J., «Annotation on Case C-69/89, *Nakajima All Precision Co. v. Council*, Judgment of 7 May 1991, not yet reported ; Case C-358/89, *Extramet v. Council*, Judgment of 16 May 1991, not yet reported ; Case C-49/88, *Al-Jubail Fertilizer Company (Samad) and Saudi Arabian Fertilizer Company (Safco) v. Council*, Judgment of 17 June 1991, not yet reported ; Case C-16/90, *Detlef Nölle v. Hauptzollamt Bremen-Freihafen*, Judgment of 22 October 1991, not yet reported», *Common Market Law Review*, 1992, (380), 384.

⁴⁸³ C.J.E.C., joined cases 260/85 and 106/86, 5 October 1988, *Tokyo Electric Company Ltd (TEC) o.a. v Council*, *E.C.R.*, 1988, (5855), 5888 and 5898 (Opinion of Advocate General Sir Gordon SLYNN), and 5920 ; C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, *E.C.R.*, 1991, I, (2069), 2089 (Report for the Hearing : conclusions of the Council) and 2186.

European anti-dumping law in this respect («reasonable»)⁴⁸⁴. For example, they do not require that the amount to be added for profits equals the profit realized.

This flexible approach may result in lower profit margins than the profit actually realized⁴⁸⁵.

⁴⁸⁴ C.J.E.C., joined cases 260/85 and 106/86, 5 October 1988, *Tokyo Electric Company Ltd (TEC) o.a. v Council, E.C.R.*, 1988, (5855), 5888 and 5898 (Opinion of Advocate General Sir Gordon SLYNN), and 5920 ; C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council, E.C.R.*, 1991, I, (2069), 2186 ; C.J.E.C., case C-171/87, 10 March 1992, *Canon Inc. v Council, E.C.R.*, 1992, I, (1237), 1268 (Opinion of Advocate General MISCHO) and 1289.

See in particular : C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council, E.C.R.*, 1991, I, (2069), 2130 and 2136 (Opinion of Advocate General LENZ), and 2179-2180, where the Court, along with Advocate General LENZ, stated that the same search for reasonableness governs European as GATT anti-dumping law in respect of the determination of *inter alia* the amount for profits.

⁴⁸⁵ In *ball bearings from Singapore*, a profit margin of 6 % was used for both the production units of the exporter, although the exporter had admitted that one of his production units realized a profit of 6,65 %. The reason why a lower profit margin was used, was that the other production unit was in an expansion phase (Council Regulation (EEC) No 2089/84 of 19 July 1984 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 21 July 1984, No L 193/1).

In *magnetic disks (3,5" microdisks) from Hong Kong*, a level of profit of 10 %, as alleged by the anti-dumping complaint, was used, though it was found to be less than that realized by the allegedly dumping producers on their domestic market sales, albeit in unrepresentative quantities (Council Regulation (EC) No 2199/94 of 9 September 1994 imposing a definitive anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, and collecting definitively the provisional duty imposed, *O.J.*, 10 September 1994, No L 236/2).

In *ammonium paratungstate from the Republic of Korea*, the profit margin was restricted to 10 % to take account of the very strong pressure on the ammonium paratungstate prices on the world market (Commission Decision 90/154/EEC of 26 March 1990 terminating the anti-dumping proceeding concerning imports of ammonium paratungstate originating in the People's Republic of China and the Republic of Korea, *O.J.*, 30 March 1990, No L 83/117).

In the definitive assessment concerning *urea from Kuwait and Trinidad and Tobago* the fact that market prices were depressed during the investigation period and that not any producer of urea was able to make some profit, were the reasons why a profit margin of 2,5 % was used. This profit margin was seen as the absolute minimum which is necessary in the sector to allow a producer to earn the necessary means to keep a factory technically up to the mark (Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1). Moreover, it probably lies below the profits actually realized. For in the provisional assessment a profit margin of 7 % was determined for Trinidad and Tobago on the basis of the profit margins realized by the other exporters of the other countries concerned in the same anti-dumping proceeding. One of these other countries was Kuwait, for which a profit margin of 7 % was found (Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia, *O.J.*, 9 May 1987, No L 121/11).

In *chemical fertilizers from the United States of America* a very low profit margin of 1 % was used because of the exceptional ratio between own and foreign capital (Council Regulation (EEC) No 349/81 of 9 February 1981 imposing a definitive anti-dumping duty on certain chemical fertilizer originating in the United States of America, *O.J.*, 12 February 1981, No L 39/4 ; Commission Decision 81/35/EEC of 9 February 1981 accepting undertakings in connection with the anti-dumping proceedings concerning certain chemical fertilizer originating in the United States of America, *O.J.*, 12 February 1981, No L 39/35).

In *plain paper photocopiers from Japan* (Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12 ; C.J.E.C., joined cases 133/87 and 150/87, 14 March 1990, *Nashua Corporation v Commission and Council, E.C.R.*, 1990, I, (719), 776 ; C.J.E.C., case 156/87, 14 March 1990, *Gestetner Holdings plc v Council and Commission, E.C.R.*, 1990, I, (781), 818 and 837 ; C.J.E.C., case C-172/87, 10 March 1992, *Mita Industrial Co. Ltd v Council, E.C.R.*, 1992, I, (1301), 1330 ; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council, E.C.R.*, 1992, I, (1409), 1476) and in *video cassette recorders from Japan and Korea* (Commission Regulation (EEC) No 2684/88 of 26 August 1988 imposing a provisional anti-dumping duty on certain imports of video cassette recorders originating in Japan and the Republic of Korea, *O.J.*, 31 August 1988, No L 240/5), a lower profit margin was used for some sales in order to take the difference either in production costs or in profits between different sales into account.

However, the flexibility allowed by GATT and European anti-dumping law cuts both ways. It may also result in higher profit margins⁴⁸⁶. As European anti-dumping case law is rather succinct, it cannot be predicted in which direction the flexibility will be applied in a particular case. Nevertheless, it is safe to make forecasts for general high profit margins. For example, under European anti-dumping law, only profits realized on profitable sales may be retained since the profits taken into account must pertain to sales in the ordinary course of trade and sales at a loss are not considered to have been made in the ordinary course of trade (Article 2(3) and (4) basic EC Regulation ; Article 2(3)(b)(ii) basic ECSC Decision). In some European anti-dumping cases, only sales made at prices above production costs have been taken into account in application of that rule⁴⁸⁷. In most European anti-dumping cases, however, the meaning of the

In *compact disc players from the Republic of Korea* the profit margin for sales to «original equipment manufacturers» (so-called OEMs) was determined at a rate of 30 % of that realized on own-brand sales (C.J.E.C., case C-105/90, 13 February 1992, *Goldstar Co. Ltd v Council, E.C.R.*, 1992, I, (677), 726-729). Similarly, in *linear tungsten halogen lamps from Japan* and in *colour television receivers from Malaysia, the Republic of Korea, Singapore and Thailand*, the profit margin of such sales was set at 33 % of that realized on own-brand sales (Council Regulation (EEC) No 117/91 of 16 January 1991 imposing a definitive anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 19 January 1991, No L 14/1 ; Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50) and in *audio tapes in cassettes from Japan, the Republic of Korea and Hong Kong*, it was set at 50 % of the profit realized on own-brand sales (Council Regulation (EEC) No 1251/91 of 13 May 1991 imposing a definitive anti-dumping duty on imports of audio tapes in cassettes originating in Japan and the Republic of Korea, collecting definitively the provisional duty and terminating the procedure concerning Hong Kong, *O.J.*, 14 May 1991, No L 119/35).

486 WAER, P., «Constructed Normal Values in EC Dumping Margin Calculations. Fiction, or a Realistic Approach», *Journal of World Trade*, 1993/3, (47), 67-68.

For example, in *radio-broadcast receivers of a kind used in motor vehicles, from the Republic of Korea* the profit margin actually realized on sales to car-manufacturers (5.7 %) was augmented (by an amount of 3.9 %) in order to estimate the profit margin on sales to distributors and retailers. Only this increased profit margin was used since exports were primarily sold to distributors and retailers (Council Regulation (EEC) No 2306/92 of 4 August 1992 imposing a definitive anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in the Republic of Korea, *O.J.*, 7 August 1992, No L 222/8 (corrigendum, *O.J.*, 21 January 1993, No L 13/20) ; Council Regulation (EEC) No 2306/92 of 4 August 1992 imposing a definitive anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in the Republic of Korea, *O.J.*, 7 August 1992, No L 222/8 (corrigendum, *O.J.*, 21 January 1993, No L 13/20)).

487 Different methods are used in order to disregard prices below production costs :

- in *chemical fertilizer from the United States of America*, only that part of the investigation period was taken into account for calculating the margin of profit during which the firm had been exporting to the Community and the new firm was operating under normal circumstances. As a consequence, the start-up period of the new firm, in which profits are made seldom, was left out of consideration. Therefore, the profit margin was undoubtedly higher than when the whole investigation period would have been taken into account (Council Regulation (EEC) No 349/81 of 9 February 1981 imposing a definitive anti-dumping duty on certain chemical fertilizer originating in the United States of America, *O.J.*, 12 February 1981, No L 39/4 ; Commission Decision 81/35/EEC of 9 February 1981 accepting undertakings in connection with the anti-dumping proceedings concerning certain chemical fertilizer originating in the United States of America, *O.J.*, 12 February 1981, No L 39/35) ;
- in *ball bearings originating in Japan and Singapore*, the profit margin was calculated on a weighted average basis, but where loss-making product types were left out of this calculation (Council Regulation (EEC) No 2685/90 of 17 September 1990 amending Regulation (EEC) No 2089/84 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 20 September 1990, No L 256/1 (corrigendum, *O.J.*, 10 January 1991, No L 7/38).

This aspect of European anti-dumping law has already been criticized by the allegedly dumping exporters because of leading to artificially high profit margins (C.J.E.C., case C-178/87, 10 march 1992, *Minolta Camera Co. Ltd v Council, E.C.R.*, 1992, I, (1577), 1587-1588 (Report for the Hearing : plea in law of the applicant) and 1626 ; Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12 (profit margin = 14.6 %) ; Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 24 November 1988, No L 317/33 (profit margin = 37 %) ; Council Regulation (EEC) No 2685/90 of 17 September 1990 amending Regulation (EEC) No 2089/84 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 20 September 1990, No L 256/1 (corrigendum, *O.J.*, 10 January 1991, No L 7/38)). See also : BELLIS, J.-F., VERMULST, E.A., and WAER, P., «Further Changes in the EEC Anti-Dumping Regulation : A Codification of Controversial Methodologies», *Journal of World Trade*, 1989,

concept «profitable sales» is based on an interpretation *a contrario* of the definition of the concept «sales at a loss» (see : Article 2.2.1. GATT Anti-dumping Code ; Article 2(4) basic EC legislation)⁴⁸⁸. Hence, sales have been held profitable in cases where individual sales might have been made at prices below production costs, provided that sufficient sales made at a profit led to overall profits being realized during the investigation period⁴⁸⁹. Only the latter interpretation is in accordance with GATT and European anti-dumping law. Indeed, under GATT and European anti-dumping law, sales at a loss do not fit in with the definition of sales made in the ordinary course of trade, if they are made in substantial quantities and at prices which, all sales being taken into account, prevent the recovery of all production costs (Article 2.2.1. GATT

(21), 25 ; WAER, P., «Constructed Normal Values in EC Dumping Margin Calculations. Fiction, or a Realistic Approach», *Journal of World Trade*, 1993/3, (47), 69-74 and 79-80.

488 C.J.E.C., case C-171/87, 10 March 1992, *Canon Inc. v Council*, E.C.R., 1992, I, (1237), 1268 (Opinion of Advocate General MISCHO) ; C.J.E.C., case C-178/87, 10 March 1992, *Minolta Camera Co. Ltd v Council*, E.C.R., 1992, I, (1577), 1592 (Report for the Hearing : Opinion of the Council) and 1626 ; Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79 ; corrigendum, *O.J.*, 10 February 1990, No L 38/44) ; Council Regulation (EEC) No 577/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as EPROMs (erasable programmable read only memories) originating in Japan, *O.J.*, 12 March 1991, No L 65/1.

In several other anti-dumping cases the profit realized during profitable periods has been taken into account. See e.g. : Commission Decision 83/93/EEC of 1 March 1983 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ferro-silicon originating in Iceland, Norway, Sweden, Venezuela and Yugoslavia and terminating that proceeding, *O.J.*, 4 March 1983, No L 57/20 ; Commission Decision 83/305/EEC of 16 June 1983 terminating the anti-dumping proceeding concerning imports of non-alloyed unwrought aluminium originating in Egypt, *O.J.*, 21 June 1983, No L 161/13 ; Commission Decision 83/306/EEC of 16 June 1983 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of low carbon ferro-chromium originating in South Africa, Sweden, Turkey and Zimbabwe, and terminating that proceeding, *O.J.*, 21 June 1983, No L 161/15 ; Commission Decision 83/360/EEC of 18 July 1983 terminating the anti-dumping proceeding in respect of imports of certain pears in syrup, originating in Australia, the People's Republic of China and the Republic of South Africa, *O.J.*, 20 July 1983, No L 196/22 ; Commission Decision 84/16/EEC of 16 January 1984 terminating the anti-dumping proceeding concerning imports of exterior panel doors originating in Taiwan, *O.J.*, 19 January 1984, No L 16/42 ; Commission Decision 84/103/EEC of 23 February 1984 terminating the anti-dumping proceeding concerning imports of non-alloyed unwrought aluminium originating in Norway, Surinam, the Soviet Union and Yugoslavia, *O.J.*, 28 February 1984, No L 57/19 ; Commission Regulation (EEC) No 3643/84 of 20 December 1984 imposing a provisional anti-dumping duty on imports of electronic typewriters originating in Japan and terminating the anti-dumping proceeding with regard to Nakajima All Co. Ltd, *O.J.*, 22 December 1984, No L 335/43 ; Commission Regulation (EEC) No 595/85 of 7 March 1985 imposing a provisional anti-dumping duty on imports of certain hydraulic excavators originating in Japan, *O.J.*, 8 March 1985, No L 68/13 ; Council Regulation (EEC) No 1739/85 of 24 June 1985 imposing a definitive anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan, *O.J.*, 27 June 1985, No L 167/3 ; Council Regulation (EEC) No 1877/85 of 4 July 1985 imposing a definitive anti-dumping duty on imports of certain hydraulic excavators originating in Japan, *O.J.*, 6 July 1985, No L 176/1 ; Council Decision 86/468/EEC of 22 September 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain acrylic fibres originating in Israel, Mexico, Romania and Turkey and terminating the investigation, *O.J.*, 24 September 1986, No L 272/29 ; Commission Decision 86/497/EEC of 7 October 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of silicon carbide originating in the People's Republic of China, Norway, Poland and the USSR, and terminating the investigation regarding imports of that product originating in the People's Republic of China, Norway, Poland, Czechoslovakia, the USSR and Yugoslavia, *O.J.*, 10 October 1986, No L 287/25 ; Commission Regulation (EEC) No 1696/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 June 1988, No L 151/47. In profitable periods, some sales may be made at a loss in so far as they are compensated for by profitable sales.

489 For the European anti-dumping authorities the notion of profitable sales «does not, in certain circumstances, exclude a normal value which covers sales of like products on the domestic market which are not made under normal conditions, such as sales at a loss» (C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, E.C.R., 1991, I, (2069), 2085 (Report for the Hearing : conclusions of the Council)) (emphasis added). See also : WAER, P., «Constructed Normal Values in EC Dumping Margin Calculations. Fiction, or a Realistic Approach», *Journal of World Trade*, 1993/3, (47), 68.

Anti-dumping Code ; Article 2(4) basic EC legislation)⁴⁹⁰. As a result, only the profit realized on all sales, including sales at prices below the production costs, which permit the recovery of all costs, may be used⁴⁹¹. Only the latter interpretation of the concept «profitable sales» is, in principle, justified from an economic point of view. Indeed, sales at a loss are not uncommon in a world characterized by uncertainty and adjustment costs, in which, in the long run, the losses incurred are compensated for by the profits made on profitable sales⁴⁹². The only problem is that the legal definition of sales at a loss leaves much room for manoeuvre : it may be that, from a legal point of view, sales are considered to have been made at a loss because too short a period of time was taken into account, *i.e.*, because that period is shorter than the business cycle during which, from an economic point of view, production costs should be covered⁴⁹³. Thus, if that part of a business cycle is selected during which profits are earned which in part serve to compensate the losses incurred during the rest of the business cycle, the profit margin will be over-evaluated.

2.2.7.5. Cost allocation

If a producer manufactures several products, production costs must be allocated among the various products. Similarly, if a producer incurs investment costs, those costs must be allocated over the years during which they should normally be recovered.

Under GATT and EC anti-dumping law, costs should normally be calculated on the basis of the records kept by the exporter, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and it is shown that the records reasonably reflect the costs associated with the production and sale of the product (Article 2.2.1.1. GATT Anti-dumping Code ; Article 2(5) basic EC Regulation). Under ECSC anti-dumping law, all costs

⁴⁹⁰ *Supra*, 130-135.

⁴⁹¹ C.J.E.C., case C-178/87, 10 March 1992, *Minolta Camera Co. Ltd v Council*, E.C.R., 1992, I, (1577), 1626-1627.

⁴⁹² *Supra*, 38-39.

⁴⁹³ *Supra*, 134-135.

calculations must be based on available accounting data (Article 2(11) basic ECSC Decision), insofar as they are reliable⁴⁹⁴.

Pursuant to GATT and EC anti-dumping law, consideration must be given to all evidence submitted on the proper allocation of costs, provided that the allocation of costs has been historically utilized. In the absence of a more appropriate method, EC anti-dumping law prefers the allocation of costs on the basis of turnover. Furthermore, costs must also be adjusted appropriately for those non-recurring items of costs which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations⁴⁹⁵ (Article 2.2.1.1. GATT Anti-dumping Code ; Article 2(5) basic EC Regulation).

Under ECSC anti-dumping law too, the production costs should normally be allocated in proportion to the turnover of each product and market under consideration (Article 2(11) basic ECSC Decision). Deviations from cost allocation on the basis of turnover are difficult to predict as European anti-dumping case law contains only incomplete information. Thus, other methods of cost allocation have been accepted when it was demonstrated that the proposed method was

⁴⁹⁴ Commission Regulation (EC) No 1506/94 of 27 June 1994 imposing provisional duties on imports of urea ammonium nitrate solution originating in Bulgaria and Poland, *O.J.*, 30 June 1994, No L 162/16 ; Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50 ; Council Regulation (EC) No 3319/94 of 22 December 1994 imposing a definitive anti-dumping duty on imports of urea ammonium nitrate solution originating in Bulgaria and Poland, exported by companies not exempted from the duty, and collecting definitively the provisional duty imposed, *O.J.*, 31 December 1994, No L 350/20.

On the other hand, accounting data will not be used if reported costs do not fully reflect the overall costs incurred during the investigation period, if the amount reported for depreciation under manufacturing overheads or for other costs (*e.g.*, salary and wage costs) is understated, if certain general expenses are offset against other income unrelated to the sales under consideration, if the allocation used for financing costs is not justified, or if a large interest-free loan from the parent company artificially reduces the real cost of long-term financing (Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50).

⁴⁹⁵ *Supra*, 164-165.

reasonable⁴⁹⁶, that it did not deviate considerably from the allocation on the basis of the turnover⁴⁹⁷ or that it was in accordance with generally accepted principles of cost accounting⁴⁹⁸. A deviation from cost allocation on the basis of turnover has also been allowed,

496 Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5 ; Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12 ; Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12 ; Commission Regulation (EEC) No 2005/88 of 5 July 1988 imposing a provisional anti-dumping duty on imports of serial impact fully formed character printers originating in Japan, *O.J.*, 8 July 1988, No L 177/1 ; Commission Regulation (EEC) No 4062/88 of 23 December 1988 imposing a provisional anti-dumping duty on imports of video cassettes and video tape reels originating in the Republic of Korea and Hong Kong, *O.J.*, 24 December 1988, No L 356/47 ; Council Regulation (EEC) No 1768/89 of 19 June 1989 imposing a definitive anti-dumping duty on imports of video cassettes originating in the Republic of Korea and Hong Kong, collecting definitively the provisional duty and terminating the anti-dumping proceeding with regard to the imports of video tape reels originating in the Republic of Korea, *O.J.*, 22 June 1989, No L 174/1 ; Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79 ; corrigendum, *O.J.*, 10 February 1990, No L 38/44) ; Commission Regulation (EEC) No 3262/90 of 5 November 1990 imposing a provisional anti-dumping duty on imports of audio tapes in cassettes originating in Japan, the Republic of Korea and Hong Kong, *O.J.*, 13 November 1990, No L 313/5 (corrigendum, *O.J.*, 12 January 1991, No L 9/36) ; Council Regulation (EEC) No 577/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as EPROMs (erasable programmable read only memories) originating in Japan, *O.J.*, 12 March 1991, No L 65/1 ; BESELER, J.-F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 60.

497 Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5 ; Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12.

498 Council Regulation (EEC) No 2024/83 of 18 July 1983 establishing a definitive anti-dumping duty on 4,4'-isopropylidenediphenol originating in the United States of America, *O.J.*, 22 July 1983, No L 199/4 ; Commission Decision 86/497/EEC of 7 October 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of silicon carbide originating in the People's Republic of China, Norway, Poland and the USSR, and terminating the investigation regarding imports of that product originating in the People's Republic of China, Norway, Poland, Czechoslovakia, the USSR and Yugoslavia, *O.J.*, 10 October 1986, No L 287/25 ; Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12 ; Commission Regulation (EEC) No 2005/88 of 5 July 1988 imposing a provisional anti-dumping duty on imports of serial impact fully formed character printers originating in Japan, *O.J.*, 8 July 1988, No L 177/1 ; Commission Regulation (EEC) No 4062/88 of 23 December 1988 imposing a provisional anti-dumping duty on imports of video cassettes and video tape reels originating in the Republic of Korea and Hong Kong, *O.J.*, 24 December 1988, No L 356/47 ; Council Regulation (EEC) No 1768/89 of 19 June 1989 imposing a definitive anti-dumping duty on imports of video cassettes originating in the Republic of Korea and Hong Kong, collecting definitively the provisional duty and terminating the anti-dumping proceeding with regard to the imports of video tape reels originating in the Republic of Korea, *O.J.*, 22 June 1989, No L 174/1 ; BESELER, J.-F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 60 ; VAN BAEL, I., and BELLIS, J.-F., *Anti-Dumping and other Trade Protection Laws of the EEC*, Bicester, CCH Editions, 1990, 57.

e.g., when it was proven that some costs were specific to the production of a particular product⁴⁹⁹; in such a case, those specific costs were allocated to the product concerned. For this reason, fixed production costs may also be allocated to only one of several types of the like product⁵⁰⁰. Sometimes, however, the European anti-dumping authorities strongly adhere to cost allocation on the basis of turnover, irrespective of whether such allocation is at variance with generally accepted principles of cost accounting. They have, for instance, allocated research and development expenses to the turnover during the investigation period, though they (implicitly) recognized that those expenses related to current, as well as future sales⁵⁰¹. Their argument as to the uncertain recovery of those expenses in the future is hardly convincing, but it should be clear that their approach results in an excessively high constructed value. Furthermore, ECSC anti-dumping law does not provide for any adjustments for start-up periods⁵⁰². Clearly, ECSC anti-dumping law does not comply with GATT anti-dumping law and should be adjusted as soon as possible in order to allow adjustments for start-up costs.

From an economic point of view, the use of accounting records can be criticized, because they do not necessarily state the real economic value⁵⁰³. Moreover, as GATT and EC anti-dumping

499 Commission Regulation (EEC) No 3643/84 of 20 December 1984 imposing a provisional anti-dumping duty on imports of electronic typewriters originating in Japan and terminating the anti-dumping proceeding with regard to Nakajima All Co. Ltd, *O.J.*, 22 December 1984, No L 335/43; Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1; Commission Regulation (EEC) No 2865/85 of 14 October 1985 imposing a provisional anti-dumping duty on imports of certain electronic scales originating in Japan and accepting undertakings and terminating the proceeding in respect of certain imports of such products originating in Japan, *O.J.*, 16 October 1985, No L 275/5; Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12; Commission Regulation (EEC) No 4062/88 of 23 December 1988 imposing a provisional anti-dumping duty on imports of video cassettes and video tape reels originating in the Republic of Korea and Hong Kong, *O.J.*, 24 December 1988, No L 356/47; Council Regulation (EEC) No 1768/89 of 19 June 1989 imposing a definitive anti-dumping duty on imports of video cassettes originating in the Republic of Korea and Hong Kong, collecting definitively the provisional duty and terminating the anti-dumping proceeding with regard to the imports of video tape reels originating in the Republic of Korea, *O.J.*, 22 June 1989, No L 174/1; Council Regulation (EEC) No 341/90 of 5 February 1990 accepting undertakings and imposing a definitive anti-dumping duty on imports of ferro-silicon originating in Iceland, Norway, Sweden, Venezuela or Yugoslavia, except those sold for export to the Community by companies whose undertakings have been accepted, *O.J.*, 10 February 1990, No L 38/1; Council Regulation (EEC) No 830/92 of 30 March 1992 imposing a definitive anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and collecting definitively the provisional duty, *O.J.*, 3 April 1992, No L 88/1 (corrigendum, *O.J.*, 5 June 1992, No L 153/16); VAN BAEL, I., and BELLIS, J.-F., *Anti-Dumping and other Trade Protection Laws of the EEC*, Bicester, CCH Editions, 1990, 58; VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 423.

500 Council Regulation (EEC) No 2024/83 of 18 July 1983 establishing a definitive anti-dumping duty on 4,4'-isopropylidenediphenol originating in the United States of America, *O.J.*, 22 July 1983, No L 199/4.

501 Commission Regulation (EEC) No 2686/92 of 16 September 1992 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea, *O.J.*, 17 September 1992, No L 272/13; Council Regulation (EEC) No 611/93 of 15 March 1993 imposing a definitive anti-dumping duty on imports into the Community of certain electronic microcircuits known as DRAMs originating in the Republic of Korea and exported by companies not exempted from this duty, and collecting definitively the provisional anti-dumping duty, *O.J.*, 18 March 1993, No L 66/1.

502 *Supra*, 164-166.

503 DEMSETZ, H., «Barriers to Entry», *American Economic Review*, 1982, (47), 47; KOHLER, H., *Intermediate Economics. Theory and Applications*, Glenview (Ill.), Scott, Foreman and Company, 1986, 149-150.

law indicate, the generally accepted accounting principles may vary from country to country and, thus, it will be a matter of discussion which principles are generally accepted. However, the accounting records will frequently be the only available objective data⁵⁰⁴. Moreover, although the market price cannot be merely taken from the average total production costs, production costs are generally the starting point for the producer's decisions. Besides the fact that they are easy to verify, accounting records are used in European anti-dumping law because at the time they were decisive criteria for the production and sales decision⁵⁰⁵.

2.2.8. Basic prices⁵⁰⁶

In ECSC anti-dumping cases, basic prices, *i.e.*, prices determined on the basis of the production costs of the most efficient producer in the world, may be used as normal value standard. There is, however, some reticence as to the use of basic prices, because the other normal value standards should be applied when it becomes apparent that the use of basic prices would bring about a significantly different result (Article 2(6)(b) basic ECSC Decision). Therefore, basic

504 DIDIER, P., «Deux années d'application du nouveau règlement antidumping de la CEE», *Cahiers de Droit Européen*, 1982, (21), 30-31.

505 Commission Decision 86/497/EEC of 7 October 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of silicon carbide originating in the People's Republic of China, Norway, Poland and the USSR, and terminating the investigation regarding imports of that product originating in the People's Republic of China, Norway, Poland, Czechoslovakia, the USSR and Yugoslavia, *O.J.*, 10 October 1986, No L 287/25.

506 For more information, especially about the history of the basic price system, see : BENYON, F., and BOURGEOIS, J., «The European Community-United States Steel Arrangement», *Common Market Law Review*, 1984, (305), 305-354 ; BESELER, J.-F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 74-78 ; BOUDANT, J., *L'anti-dumping communautaire*, Paris, Economica, 1991, 89-97 ; BRYAN, G., *Taxing Unfair International Trade Practices. A Study of U.S. Antidumping and Countervailing Duty Laws*, Lexington, Lexington Books, 1980, 193-194 ; ENGLER, B., «Le marché sidérurgique américain et la pénétration européenne. Données et procédures», *Revue du Marché Commun*, 1978, (505), 512- 514 ; JACKSON, J.H., «United States-EEC Trade Relations : Constitutional Problems of Economic Interdependence», *Common Market Law Review*, (453), 470-473 ; LESGUILLONS, H., «Le régime anti-dumping de la Communauté européenne», *Droit et pratique du commerce international*, 1978, (459), 476-483 ; LESGUILLONS, H., *Le régime communautaire de protection contre le dumping et les subventions*, Paris, F.E.D.U.C.I., 1983, 69-73 ; MARKS, M.J., «Remedies to 'Unfair' Trade : American Action against Steel Imports», *World Economy*, 1977-1978, (223), 223-237 ; VAN BAEL, I., and BELLIS, J.-F., *Anti-Dumping and other Trade Protection Laws of the EEC*, Bicester, CCH Editions, 1990, 243-247 ; VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 136-137, note 49 ; WETTER, T., «Trade Policy Developments in the Steel Sector», *Journal of World Trade Law*, 1985, (485), 496.

prices are usually applied only as a last resort in cases where normal value should be established on the basis of the best information available⁵⁰⁷.

Contrary to the 1980 GATT Anti-dumping Code (Article 8(6)), the 1994 GATT Anti-dumping Code does not contain any provisions as to basic price systems. However, this does not imply that the use of basic prices will no longer be allowed. Indeed, under the GATT dispute settlement procedure, basic prices were found to be consistent with GATT anti-dumping law, provided that they did not fall below the lowest normal value of the exporting country, though, at the time of the dispute, GATT anti-dumping law did not contain any explicit provisions as to basic prices⁵⁰⁸. As ECSC anti-dumping law does not make this a condition, its application may easily result in an infringement upon GATT anti-dumping law, if the basic prices are higher than the production costs of the most efficient producer in the world. In order to respect GATT anti-dumping law, the European anti-dumping authorities must know exactly which producer is the

507 BESELER, J.F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 78.

The use of basic prices has been motivated by the fact that basic prices were the best facts available in : Commission Decision No 702/83/ECSC of 24 March 1983 imposing provisional anti-dumping duties on certain iron or steel coils for re-rolling originating in Argentina, Brazil, Canada and Venezuela and accepting price undertakings from two Canadian exporters, *O.J.*, 29 March 1983, No L 82/9 ; Commission Decision No 295/84/ECSC of 2 February 1984 imposing a definitive anti-dumping duty on imports of concrete reinforcing bars originating in Spain, *O.J.*, 4 February 1984, No L 33/15 (corrigendum, *O.J.*, 7 March 1984, No L 65/15) ; Commission Decision No 2767/86/ECSC of 5 September 1986 imposing a provisional anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Yugoslavia, *O.J.*, 6 September 1986, No L 254/18 ; Commission Decision No 163/88/ECSC of 20 January 1988 imposing a provisional anti-dumping duty on imports of certain iron or steel coils, originating in Algeria, Mexico and Yugoslavia, *O.J.*, 22 January 1988, No L 18/31 ; Commission Decision No 2131/88/ECSC of 18 July 1988 imposing a definitive anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Yugoslavia and definitively collecting the provisional anti-dumping duty imposed on those imports, *O.J.*, 19 July 1988, No L 188/14 ; Commission Decision No 2158/88/ECSC of 20 July 1988 imposing a provisional anti-dumping duty on imports of certain iron or steel sections originating in Yugoslavia or Turkey, *O.J.*, 21 July 1988, No L 190/5 ; Commission Decision No 708/89/ECSC of 17 March 1989 imposing a provisional anti-dumping duty on imports of certain flat-rolled products of iron or non-alloy steel, cold-rolled, originating in Yugoslavia, *O.J.*, 21 March 1989, No L 78/14 ; Commission Decision No 3692/91/ECSC of 12 December 1991 repealing Decision No 2132/88/ECSC imposing definitive anti-dumping duties on imports of certain iron or steel coils, originating in Algeria, Mexico and Yugoslavia, *O.J.*, 19 December 1991, No L 350/11 ; Commission Decision No 2297/92/ECSC of 31 July 1992 amending Decision No 2131/88/ECSC, accepting undertakings offered in connection with imports of certain sheets and plates, of iron or steel, originating in the Republic of Slovenia and the Yugoslav republics of Macedonia, Montenegro and Serbia, and terminating the anti-dumping proceeding with regard to the Republic of Croatia and the Republic of Bosnia-Herzegovina, *O.J.*, 6 August 1992, No L 221/36.

See also : *concrete reinforcing bars from Spain*, where in the provisional assessment basic prices were used pending the verification of the Spanish domestic market prices. However, such verification proved to be impossible due to the lack of cooperation of the Spanish exporters. Therefore, basic prices were used even in the definitive assessment as the most reasonable and fitted information available (Commission Decision No 3113/83/ECSC of 4 November 1983 imposing a provisional anti-dumping duty on imports of concrete reinforcing bars originating in Spain, *O.J.*, 5 November 1983, No L 303/13 ; Commission Decision No 295/84/ECSC of 2 February 1984 imposing a definitive anti-dumping duty on imports of concrete reinforcing bars originating in Spain, *O.J.*, 4 February 1984, No L 33/15 (corrigendum, *O.J.*, 7 March 1984, No L 65/15)).

See, however : *iron or steel coils, hot-rolled, from Argentina and Canada*, where the use of the basic prices was considered to be sufficiently explained by the fact that the domestic market price could not be used because of lack of sales in the ordinary course of trade. It was not investigated whether the other normal value standards might have been used and whether they produced a significantly different result (Commission Decision No 1056/89/ECSC of 19 April 1989 terminating the review of anti-dumping measures concerning imports of certain iron or steel coils, hot-rolled, originating in Argentina and Canada and confirming the expiry of those measures, *O.J.*, 25 April 1989, No L 112/5).

508 See : *B.I.S.D.*, Third Supplement, Geneva, GATT, 1955, 86, consideration 17.

most efficient worldwide, and must constantly follow the global evolution in production costs⁵⁰⁹. This might prove a too high or too unrealistic obligation imposed on the European anti-dumping authorities. In fact, basic prices probably will not always reflect the production costs of the most efficient producer. As a consequence, producers/exporters may be held to practise dumping merely because they are able to produce at lower production costs than the production costs used to determine the basic prices. Obviously, this result infringes upon GATT anti-dumping law.

The basic price system may have also the reverse effect : producers/exporters will not be found dumping if their prices are not below the basic prices, irrespective of whether their prices are below their domestic market prices, their production costs or their export prices to third countries⁵¹⁰. In other words, a less efficient producer is allowed to practise price discrimination or to sell at a loss, while an efficient producer is not allowed to charge the prices he normally would when maximizing his profits. As such a result is not justified from an economic point of view, the basic price system should be repealed.

2.2.9. *Normal value on the basis of the facts available*

Normal value may be determined on the basis of the facts available, whenever any interested party or third country refuses access to, or otherwise does not provide, necessary information within a reasonable period, or significantly impedes the investigation (Article 6.8. and Annex II GATT Anti-dumping Code ; Article 18 basic EC Regulation ; Article 7(7)(b) basic EC legislation)⁵¹¹.

Direct information as well as indirect information has been used as best information available. Sources of direct information are the constructed value (when, in principle, the domestic market

⁵⁰⁹ See : *B.I.S.D.*, Third Supplement, Geneva, GATT, 1955, 86, consideration 17.

⁵¹⁰ See : *sheets and plates of iron or steel from Brazil*, where basic prices were used instead of the Brazilian domestic market prices because the dumping margin obtained with basic prices was lower than with domestic market prices (Commission Recommendation No 2975/82/ECSC of 8 November 1982 imposing a definitive anti-dumping duty on certain sheets and plates, of iron or steel, originating in Brazil, *O.J.*, 9 November 1982, No L 312/10). This anti-dumping case is an application of prior European anti-dumping law, under which it was not required to investigate whether the use of the basic price system led to a significantly different result.

Under current European anti-dumping law, this anti-dumping case would be illegal for the use of basic prices results in a different result than the other normal value standards. See : Commission Decision No 2247/87/ECSC of 28 July 1987 imposing a provisional anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Mexico, *O.J.*, 29 July 1987, No L 207/21, where the domestic market price was used because the use of the basic prices would have produced a significantly different result.

⁵¹¹ See : *B.I.S.D.*, Thirty-second Supplement, Geneva, GATT, 1986, 55 and 70.

price should be used)⁵¹², the complaint⁵¹³, information obtained from the Community industry⁵¹⁴ or from EC Member States⁵¹⁵, findings from the previous anti-dumping investigation⁵¹⁶, previous but still applicable anti-dumping undertakings⁵¹⁷, reports of studies centers⁵¹⁸ and published statistics⁵¹⁹. Sources of indirect information are prices and

⁵¹² Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5.

⁵¹³ Commission Regulation (EEC) No 2297/80 of 29 August 1980 imposing a provisional anti-dumping duty on imports of certain polyester yarn originating in the United States of America, *O.J.*, 2 September 1980, No L 231/5 ; Commission Regulation (EEC) No 163/83 of 21 January 1983 imposing a provisional anti-dumping duty on 4,4'-isopropylidenediphenol originating in the United States of America, *O.J.*, 26 January 1983, No L 23/9 ; Council Regulation (EEC) No 2024/83 of 18 July 1983 establishing a definitive anti-dumping duty on 4,4'-isopropylidenediphenol originating in the United States of America, *O.J.*, 22 July 1983, No L 199/4 ; Commission Regulation (EEC) No 328/85 of 6 February 1985 imposing a provisional anti-dumping duty on imports of certain glass mirrors originating in South Africa, *O.J.*, 8 February 1985, No L 36/10 ; Commission Regulation (EEC) No 2221/85 of 29 July 1985 imposing a provisional anti-dumping duty on imports of basic chromium sulphate originating in Yugoslavia, *O.J.*, 3 August 1985, No L 205/12 ; Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia, *O.J.*, 9 May 1987, No L 121/11 ; Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1 ; Commission Regulation (EEC) No 699/88 of 15 March 1988 imposing a provisional anti-dumping duty on imports of oxalic acid originating in Taiwan and South Korea, *O.J.*, 18 March 1988, No L 72/12 ; Commission Regulation (EEC) No 2623/88 of 24 August 1988 imposing a provisional anti-dumping duty on imports of urea originating in Austria, Hungary, Malaysia, Romania, the USA and Venezuela, *O.J.*, 25 August 1988, No L 235/5 ; Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7 ; Commission Regulation (EC) No 371/94 of 17 February 1994 imposing a provisional anti-dumping duty on imports into the Community of large aluminium electrolytic capacitors originating in the Republic of Korea and Taiwan, *O.J.*, 19 February 1994, No L 48/10 ; Commission Regulation (EC) No 1076/94 of 6 May 1994 imposing a provisional anti-dumping duty on imports of certain watch movements originating in Malaysia and Thailand, *O.J.*, 11 May 1994, No L 120/3.

⁵¹⁴ Council Regulation (EEC) No 2024/83 of 18 July 1983 establishing a definitive anti-dumping duty on 4,4'-isopropylidenediphenol originating in the United States of America, *O.J.*, 22 July 1983, No L 199/4 ; Commission Decision 84/404/EEC of 25 July 1984 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of copper sulphate originating in Yugoslavia and terminating the proceeding, *O.J.*, 11 August 1984, No L 215/16 ; Commission Decision 90/241/EEC of 22 May 1990 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of photo albums originating in South Korea and Hong Kong, and terminating the investigation, *O.J.*, 31 May 1990, No L 138/48 ; Commission Regulation (EEC) No 2818/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports of cotton yarn originating in Brazil, Egypt and Turkey and terminating the anti-dumping proceeding in respect of cotton yarn originating in India and Thailand, *O.J.*, 27 September 1991, No L 271/17.

⁵¹⁵ Commission Decision 84/404/EEC of 25 July 1984 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of copper sulphate originating in Yugoslavia and terminating the proceeding, *O.J.*, 11 August 1984, No L 215/16.

⁵¹⁶ Commission Decision 93/521/EEC of 3 September 1993 accepting undertakings given in connection with the anti-dumping review in respect of imports of binder and baler twine originating in Brazil, terminating the anti-subsidy review proceeding with regard to these imports and terminating the anti-dumping and anti-subsidy review in respect of imports of binder and baler twine originating in Mexico, *O.J.*, 8 October 1993, No L 251/28.

⁵¹⁷ Council Regulation (EEC) No 101/83 of 17 January 1983 imposing a definitive anti-dumping duty on certain chemical fertilizer originating in the United States of America, *O.J.*, 19 January 1983, No L 15/1.

⁵¹⁸ Council Regulation (EEC) No 1100/80 of 30 April 1980 imposing a definitive anti-dumping duty on certain acrylic fibres originating in the United States of America, *O.J.*, 3 May 1980, No L 114/37.

costs of other sellers or producers in the exporting country⁵²⁰ or even in another country⁵²¹,

⁵¹⁹ Commission Decision 84/404/EEC of 25 July 1984 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of copper sulphate originating in Yugoslavia and terminating the proceeding, *O.J.*, 11 August 1984, No L 215/16 ; Council Regulation (EEC) No 738/92 of 23 March 1992 imposing a definitive anti-dumping duty on imports of cotton yarn originating in Brazil and Turkey, *O.J.*, 27 March 1992, No L 82/1.

⁵²⁰ Commission Regulation (EEC) No 2182/80 of 14 August 1980 imposing a provisional anti-dumping duty on certain chemical fertilizer originating in the United States of America, *O.J.*, 15 August 1980, No L 212/43 ; Council Regulation (EEC) No 349/81 of 9 February 1981 imposing a definitive anti-dumping duty on certain chemical fertilizer originating in the United States of America, *O.J.*, 12 February 1981, No L 39/4 ; Commission Decision 81/35/EEC of 9 February 1981 accepting undertakings in connection with the anti-dumping proceedings concerning certain chemical fertilizer originating in the United States of America, *O.J.*, 12 February 1981, No L 39/35 ; Commission Regulation (EEC) No 1321/81 of 15 May 1981 amending Regulation (EEC) No 384/81 imposing a provisional anti-dumping duty on styrene monomer originating in the United States of America, *O.J.*, 19 May 1981, No L 132/17 ; Commission Regulation (EEC) No 1591/81 of 10 June 1981 imposing a provisional anti-dumping duty on paraxylene (p-xylene) originating in Puerto Rico, the United States of America and the US Virgin Islands, *O.J.*, 16 June 1981, No L 158/7 ; Commission Regulation (EEC) No 2017/81 of 15 July 1981 imposing a provisional anti-dumping duty on phenol originating in the United States of America, *O.J.*, 18 July 1981, No L 195/22 ; Council Regulation (EEC) No 90/82 of 18 January 1982 imposing a definitive anti-dumping duty on phenol originating in the United States of America, *O.J.*, 18 January 1982, No L 12/1 ; Commission Decision 82/397/EEC of 14 June 1982 accepting undertakings in connection with the anti-dumping procedure concerning imports of certain polypropylene film for capacitors originating in Japan and terminating that procedure, *O.J.*, 18 June 1982, No L 172/44 ; Council Regulation (EEC) No 407/83 of 21 February 1983 amending Regulation (EEC) No 3439/80 imposing a definitive anti-dumping duty on imports of certain polyester yarn originating in the United States of America, *O.J.*, 23 February 1983, No L 50/1 ; Council Decision 83/162/EEC of 18 April 1983 terminating the anti-dumping proceeding in respect of imports of acrylonitrile originating in the United States of America, *O.J.*, 20 April 1983, No L 101/29 ; Commission Regulation (EEC) No 2823/85 of 7 October 1985 imposing a provisional anti-dumping duty on imports of certain clogs originating in Sweden, *O.J.*, 10 October 1985, No L 268/11 ; Council Regulation (EEC) No 264/86 of 4 February 1986 imposing a definitive anti-dumping duty on imports of certain clogs originating in Sweden and definitively collecting the provisional anti-dumping duty, *O.J.*, 7 February 1986, No L 32/1 ; Commission Decision 86/232/EEC of 9 June 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of hardboard originating in Argentina, Switzerland and Yugoslavia and terminating the investigation, *O.J.*, 12 June 1986, No L 157/61 ; Council Decision 86/468/EEC of 22 September 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain acrylic fibres originating in Israel, Mexico, Romania and Turkey and terminating the investigation, *O.J.*, 24 September 1986, No L 272/29 ; Commission Decision 88/306/EEC of 27 May 1988 accepting undertakings given in connection with the anti-dumping investigation concerning imports of inner tubes and new tyre cases for bicycles originating in the Republic of Korea and Taiwan and terminating the investigation, *O.J.*, 31 May 1988, No L 134/61 ; Council Regulation (EEC) No 341/90 of 5 February 1990 accepting undertakings and imposing a definitive anti-dumping duty on imports of ferro-silicon originating in Iceland, Norway, Sweden, Venezuela or Yugoslavia, except those sold for export to the Community by companies whose undertakings have been accepted, *O.J.*, 10 February 1990, No L 38/1 ; Commission Regulation (EEC) No 129/91 of 11 January 1991 imposing a provisional anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China, *O.J.*, 19 January 1991, No L 14/31 ; Commission Regulation (EC) No 1076/94 of 6 May 1994 imposing a provisional anti-dumping duty on imports of certain watch movements originating in Malaysia and Thailand, *O.J.*, 11 May 1994, No L 120/3.

For sanctioning uncooperative behaviour, the European anti-dumping authorities may apply the highest normal value found for exporters who fully cooperate (Council Regulation (EEC) No 490/90 of 26 February 1990 repealing Regulations (EEC) No 1826/84 and (EEC) No 1282/81 imposing definitive anti-dumping duties on imports of vinyl acetate monomer originating in Canada and the United States of America respectively, *O.J.*, 1 March 1990, No L 53/1 ; Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50).

⁵²¹ Commission Regulation (EEC) No 1591/81 of 10 June 1981 imposing a provisional anti-dumping duty on paraxylene (p-xylene) originating in Puerto Rico, the United States of America and the US Virgin Islands, *O.J.*, 16 June 1981, No L 158/7 ; Commission Decision 84/103/EEC of 23 February 1984 terminating the anti-dumping proceeding concerning imports of non-alloyed unwrought aluminium originating in Norway, Surinam, the Soviet Union and Yugoslavia, *O.J.*, 28 February 1984, No L 57/19 ; Commission Regulation (EEC) No 2690/84 of 21 September 1984 imposing a provisional anti-dumping duty on imports of artificial corundum originating in the People's Republic of China and Czechoslovakia and terminating the proceeding in respect of imports of artificial corundum originating in Spain and Yugoslavia, *O.J.*, 25 September 1984, No L 255/9 ; Commission Regulation (EEC) No 3421/90 of 26 November 1990 imposing a provisional anti-dumping duty on imports of aspartame originating in Japan and the United States of America, *O.J.*, 29 November 1990, No L 330/16 ; Council Regulation (EC) No 821/94 of 12 April 1994 imposing a definitive anti-dumping duty on imports of silicon carbide, originating in the People's Republic of China, Poland, the Russian Federation and Ukraine, *O.J.*, 13 April 1994, No L 94/21 ; Commission Regulation (EC) No 1076/94 of 6 May 1994 imposing a provisional anti-dumping duty on imports of certain watch movements originating in Malaysia and Thailand, *O.J.*, 11 May 1994, No L 120/3.

their price lists⁵²², as well as prices and costs of other products⁵²³.

At first sight, direct information should be preferred to indirect information. For the prices and costs of other sellers and producers or products usually will not coincide with the prices and costs of the producer/exporter or the product. Therefore, a producer/exporter may be found to be dumping while he is not and *vice versa*. However, certain types of direct information are not a guarantee against erroneously found dumping either. Indeed, providing information resulting in an as high as possible normal value is in the interest of the complainant Community industry and probably also of the Community Member States which want to protect their domestic industry. Therefore, no source of information should be excluded *a priori*.

Indeed, according to Annex II GATT Anti-dumping Code, anti-dumping authorities are allowed to use information from any source whatsoever, on the condition that they take all reasonable steps to avoid the use of information coming from unreliable sources. Thus, if they have to base their findings on information from secondary sources, including the information supplied in the complaint, they should do so with special circumspection. In such cases, they should check the reasonableness of the information from other independent sources at their disposal, such as published price lists, and from the information obtained from other interested parties during the

⁵²² Council Regulation (EEC) No 117/91 of 16 January 1991 imposing a definitive anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 19 January 1991, No L 14/1.

⁵²³ Commission Regulation (EEC) No 1633/82 of 23 June 1982 imposing a provisional anti-dumping duty on imports of fibre building board (hardboard) originating in Romania, repealing Commission Decision No 80/564/EEC of 4 June 1980 and accepting undertakings in connection with the proceeding in respect of imports of fibre building board from Czechoslovakia, Finland, Hungary, Norway, Poland, Spain, Sweden and the Soviet Union and terminating the proceeding with regard to those countries and Bulgaria, *O.J.*, 25 June 1982, No L 181/19; Commission Decision 82/397/EEC of 14 June 1982 accepting undertakings in connection with the anti-dumping procedure concerning imports of certain polypropylene film for capacitors originating in Japan and terminating that procedure, *O.J.*, 18 June 1982, No L 172/44; Commission Decision 84/259/EEC of 10 May 1984 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain sensitized paper for colour photographs originating in Japan and terminating that proceeding, *O.J.*, 11 May 1984, No L 124/45; Commission Regulation (EEC) No 3669/84 of 21 December 1984 imposing a provisional anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan, *O.J.*, 28 December 1984, No L 340/37; Council Regulation (EEC) No 1739/85 of 24 June 1985 imposing a definitive anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan, *O.J.*, 27 June 1985, No L 167/3; Commission Decision 86/36/EEC of 26 February 1986 accepting undertakings entered into in connection with the anti-dumping proceeding concerning imports into Greece of certain categories of glass originating in Turkey, Yugoslavia, Romania, Bulgaria, Hungary and Czechoslovakia and terminating the investigation, *O.J.*, 28 February 1986, No L 51/73; Commission Regulation (EEC) No 1361/87 of 18 May 1987 imposing a provisional anti-dumping duty on imports of ferro-silico-calcium/calcium silicide originating in Brazil, *O.J.*, 19 May 1987, No L 129/5; Commission Regulation (EEC) No 1695/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of polyester yarn originating in Mexico, South Korea, Taiwan and Turkey, *O.J.*, 17 June 1988, No L 151/39 (corrigendum, *O.J.*, 18 June 1988, No L 152/58); Commission Regulation (EEC) No 1696/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 June 1988, No L 151/47; Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 24 November 1988, No L 317/33; Council Regulation (EEC) No 3905/88 of 12 December 1988 imposing a definitive anti-dumping duty on imports of polyester yarn originating in Mexico, South Korea, Taiwan and Turkey, *O.J.*, 16 December 1988, No L 347/10; Council Regulation (EEC) No 3946/88 of 16 December 1988 imposing a definitive anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 December 1988, No L 348/49; Council Regulation (EEC) No 501/89 of 27 February 1989 imposing a definitive anti-dumping duty on imports of certain video cassette recorders originating in Japan and the Republic of Korea and definitively collecting the provisional duty, *O.J.*, 28 February 1989, No L 57/55; Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5.

investigation. EC anti-dumping law has already copied the requirement to use information from independent sources as a touchstone (Article 18(5) basic EC Regulation). The fact that ECSC anti-dumping law does not encompass this «safety rule», seems not pose any problems in practice. Indeed, in accordance with that GATT anti-dumping law⁵²⁴, the Court of Justice has held that the use of direct and indirect information is acceptable upon the condition that the information used approaches economic reality very closely⁵²⁵.

2.3. *NORMAL VALUE STANDARDS FOR NON-MARKET ECONOMY COUNTRIES*

2.3.1. *Hierarchy*

GATT anti-dumping law, on the one hand, does not impose specific normal value standards in respect of NME countries. It only specifies that a comparison between the domestic price of a NME country and its export price may not always be appropriate (Note No 2 *ad* Article VI(1) GATT ; Article 2.7. GATT Anti-dumping Code). European anti-dumping law, on the other hand, provides the following specific normal value standards in regard to NME countries :

- (i) the price at which the like product of a market economy country is actually sold for consumption on the domestic market of that country (Article 2(7) basic EC Regulation ; Article 2(5)(a)(i) basic ECSC Decision) ;
- (ii) the price at which the like product of a market economy country is actually sold to other countries, including the Community (Article 2(7) basic EC Regulation ; Article 2(5)(a)(ii) basic ECSC Decision) ;
- (iii) the constructed value of the like product in a market economy third country (Article 2(7) basic EC Regulation ; Article 2(5)(b) basic ECSC Decision) ;
- (iv) if not any of the above mentioned normal value standards is possible⁵²⁶, (any other reasonable basis including)⁵²⁷ the price actually paid or payable in the Community for the like product, duly adjusted, if necessary, to include a reasonable profit margin (Article 2(7) basic EC Regulation ; Article 2(5)(c) basic ECSC Decision) ;
- (v) within the framework of the ECSC Treaty, basic prices, if the normal value standards mentioned above do not produce a significantly different result (Article 2(6)(b) basic ECSC Decision) ;

⁵²⁴ This judgement of the Court is based on an agreement reached under former GATT anti-dumping law (*B.I.S.D.*, Thirty-first Supplement, Geneva, GATT, 1985, 283-284). That agreement now constitutes Annex II GATT Anti-dumping Code.

⁵²⁵ C.J.E.C., case 53/83, 23 mei 1985, *Allied Corporation a.o. v Council, E.C.R.*, 1985, (1621), 1658.

⁵²⁶ Under ECSC anti-dumping law : the price actually paid or payable in the Community may be used if the other normal value standards do not provide an adequate basis.

⁵²⁷ Under ECSC anti-dumping law, the third standard must always be the price actually paid or payable in the Community for the like product. Any other reasonable basis is legally impossible.

- (vi) when necessary and just information is lacking, the normal value on the basis of the facts available (Article 18 basic EC Regulation ; Article 7(7)(b) basic ECSC Decision).

As its list of normal value standards is exhaustive⁵²⁸, European anti-dumping law violates GATT anti-dumping law. Indeed, though GATT anti-dumping law indicates that the domestic price of a NME country may not always be appropriate, it sometimes may be.

The determination of the domestic market price, constructed value and export price is identical to that in respect of ME countries, but for two differences. First, normal value for NME countries is determined not on the basis of their own prices and costs, but on the basis of those of another, ME country, the so-called reference country. That reference country must be selected in an appropriate and not unreasonable manner.

Second, European anti-dumping law does not impose a proper hierarchy among the different normal value standards. It only states that the Community may be used as reference country, if

⁵²⁸ Therefore, are not accepted as normal value standard :

- the domestic price in the NME country (Commission Regulation (EEC) No 2623/88 of 24 August 1988 imposing a provisional anti-dumping duty on imports of urea originating in Austria, Hungary, Malaysia, Romania, the USA and Venezuela, *O.J.*, 25 August 1988, No L 235/5 ; Commission Decision 88/623/EEC of 12 December 1988 accepting undertakings given in connection with the anti-dumping review concerning imports of oxalic acid originating in China or Czechoslovakia and terminating the review, *O.J.*, 13 December 1988, No L 343/34) ;
- the export price of the NME country's producers to a third ME country (Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5) ;
- normal value constructed on the basis of the structure of the own production costs of the NME country (Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1) ;
- normal value constructed on the basis of the costs of the components sourced by the NME country's producers from related companies situated in ME countries and, for the remaining costs, on the basis of the costs in a reference ME country (Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5) ;
- indicative prices published in specialized bulletins (Commission Regulation (EEC) No 2450/87 of 12 August 1987 imposing a provisional anti-dumping duty on imports of mercury originating in the Union of Soviet Socialist Republics, *O.J.*, 14 August 1987, No L 227/8 ; Council Regulation (EEC) No 3687/87 of 8 December 1987 imposing a definitive anti-dumping duty on imports of mercury originating in the Soviet Union and definitively collecting the provisional anti-dumping duty imposed on such imports, *O.J.*, 10 December 1987, No L 346/27 ; Commission Regulation (EEC) No 761/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten ores and concentrates originating in the People's Republic of China, and terminating the proceeding concerning imports originating in Hong Kong, *O.J.*, 30 March 1990, No L 83/23) ;
- prices on the international market (Commission Regulation (EEC) No 1631/83 of 15 June 1983 imposing a provisional anti-dumping duty on imports of certain glass textile fibres (rovings) originating in Czechoslovakia, the German Democratic Republic and Japan, accepting a price undertaking from one Japanese exporter and terminating the proceeding in respect of imports of certain glass textile fibres (mats), originating in Czechoslovakia and the German Democratic Republic, *O.J.*, 18 June 1983, No L 160/18 ; Commission Decision 84/103/EEC of 23 February 1984 terminating the anti-dumping proceeding concerning imports of non-alloyed unwrought aluminium originating in Norway, Surinam, the Soviet Union and Yugoslavia, *O.J.*, 28 February 1984, No L 57/19).

See also : Commission Regulation (EEC) No 3798/90 of 21 December 1990 imposing a provisional anti-dumping duty on imports of espadrilles originating in the People's Republic of China, *O.J.*, 28 December 1990, No L 365/25, where the price corresponding to an offer from the producer in the reference country was refused to be used for not being adequate. Perhaps it was not adequate because it does not fit into one of the possible normal value standards. Indeed, it does not correspond to the price at which the product is actually sold because an offer is not an actual sale.

the normal value standards in another ME country are not possible. Moreover, as is the case for ME countries, basic prices may be used only if the other NME normal value standards do not produce a significantly different result and normal value may be based on the facts available only if the other normal value standards are not available, because the producers/exporters do not cooperate or act in bad faith. When either a third NME country or the Community⁵²⁹ is chosen as reference country, the choice between domestic market price and constructed value and, if the reference country is a third ME country, the export price is free⁵³⁰. Under ECSC anti-dumping law, it is only required that the normal value standard is chosen in an appropriate and not unreasonable manner⁵³¹. According to the Court of Justice, the requirements of appropriateness and reasonableness involve that the domestic market price be taken in the first instance since the constructed value is only a substitute which must be resorted to when it would be unreasonable, in view of the specific circumstances of the case, to use the domestic market price⁵³². The Court's judgements seem to go a step beyond ECSC anti-dumping law which does not provide any hierarchy between domestic market price, constructed value and export price. As it presumes the domestic market price to be appropriate and not unreasonable insofar as comparable sales are made in the ordinary course of trade⁵³³, the Court applies the same hierarchy of normal value standards to NME countries as the one imposed by European anti-dumping law in respect to ME countries, and, thus, respects the principle of equal treatment. In general, there is, indeed, no reason why there should be a differential treatment for NME

⁵²⁹ Not only the price on the domestic market of the Community may be used as normal value standard; also the constructed value within the Community may be used, be it in its simplified form of the adjustment of the sub-production-cost price by the elimination of the loss and the incorporation of a reasonable profit margin. Indeed, in *barium chloride from the People's Republic of China and the German Democratic Republic*, the use of the production costs of Community producers was rejected because of the hierarchy between third ME countries and the Community as reference country, but not because this standard is not provided for by European anti-dumping law (Commission Regulation (EEC) No 985/83 of 26 April 1983 imposing a provisional anti-dumping duty on imports of barium chloride originating in the People's Republic of China and the German Democratic Republic, *O.J.*, 27 April 1983, No L 110/11). *Contra*: BESELER, J.-F., *Die Abwehr von Dumping und Subventionen durch die Europäische Gemeinschaften*, Baden-Baden, Nomos, 1980, 64.

⁵³⁰ C.J.E.C., joined cases 294/86 and 77/87, 5 October 1988, *Technointerg v Commission and Council*, *E.C.R.*, 1988, (6077), 6101-6102 and 6114; BELLIS, J.-F., «La réglementation anti-dumping de la Communauté Economique Européenne», *Cahiers de Droit Européen*, 1979, (495), 509; BESELER, J.-F., *Die Abwehr von Dumping und Subventionen durch die Europäische Gemeinschaften*, Baden-Baden, Nomos, 1980, 64; BUCKSCH, G., «Die Angemessenheit bei der Festsetzung des Normalwertes bei Antidumping (Art. 5 EWG-VO Nr. 3017/79)», *Recht der Internationalen Wirtschaft*, 1983, (839), 840; DAILLIER, P., «La réglementation communautaire anti-dumping - Aspects matériels», *Droit et pratique du commerce international*, 1991, (17), 26; KRETSCHMER, H., *Das Antidumping- und Antisubventionsrecht der Europäischen Gemeinschaften*, Frankfurt/Main, VVW-Verlag, 1980, 34; LANDSITTEL, R., *Dumping im Außenhandels- und Wettbewerbsrecht*, Baden-Baden, Nomos, 1987, 32.

⁵³¹ C.J.E.C., joined cases 294/86 and 77/87, 5 October 1988, *Technointerg v Commission and Council*, *E.C.R.*, 1988, (6077), 6113-6114; BUCKSCH, G., «Die Angemessenheit bei der Festsetzung des Normalwertes bei Antidumping (Art. 5 EWG-VO Nr. 3017/79)», *Recht der Internationalen Wirtschaft*, 1983, (839), 840; DAILLIER, P., «La réglementation communautaire anti-dumping - Aspects matériels», *Droit et pratique du commerce international*, 1991, (17), 26; FINE, F.L., «EEC Antidumping: The Problem of Imports from State-Trading Countries», *Law and Policy in International Business*, 1988, (91), 101.

⁵³² C.J.E.C., joined cases 294/86 and 77/87, 5 October 1988, *Technointerg v Commission and Council*, *E.C.R.*, 1988, (6077), 6113-6114; C.J.E.C., joined cases C-320/86 and C-188/87, 11 July 1990, *Stanko France v Commission and Council*, *E.C.R.*, 1990, I, (3013), 3014; C.J.E.C., case C-323/88, 11 July 1990, *SA Sermes v Directeur des services des douanes de Strasbourg*, *E.C.R.*, 1990, I, (3027), 3051.

⁵³³ *Infra*, 220-221.

countries. However, if such a reason would appear in a particular anti-dumping case involving a NME country, another hierarchy should be applied, insofar as it is appropriate and not unreasonable. ECSC anti-dumping law, indeed, does not impose such a strict hierarchy as the Court of Justice ; it requires only that normal value be determined in an appropriate and not unreasonable way which may sometimes require a deviation of the usual hierarchy. Perhaps, in order to underscore the absence of hierarchy, EC anti-dumping law does not contain anymore the requirement that normal value is selected in an appropriate and not unreasonable manner.

After an investigation into the definition of the concept «NME country» (section 2.3.2.), it is examined which impact this requirement has on the choice of the reference country (section 2.3.3.) and the normal value standard (section 2.3.4.). Like section 2.2. for ME countries, all three sections also inquire how normal value for NME countries is determined, whether «one-way flexibility» is penetrated into European anti-dumping law (*i.e.*, whether (too) high normal values are found), whether legal certainty is guaranteed (*i.e.*, whether NME exporters may know in advance whether or not they will be found to dump) and whether the method to determine NME dumping is economically justified. In this respect, it has to be borne in mind that the method to determine NME dumping is severely criticized in Chapter I : because normal value is exclusively determined on the basis of the prices and costs in a reference country, it does not guarantee legal certainty and it disregards the fact that NME countries may be more efficient than ME countries⁵³⁴.

2.3.2. *The concept «NME country»*

GATT anti-dumping law defines a NME country as a country which has a complete or a substantially complete monopoly of its trade and where all domestic prices are fixed by the State (Note No 2 *ad* Article VI(1) GATT). European anti-dumping law does not define the concept «NME country». Instead, reference is made to «non-market economy countries and, in particular, those to which Regulation (EC) No 519/94 applies» (Article 2(7) basic EC Regulation ; Article 2(5) basic ECSC Decision⁵³⁵). European anti-dumping law, thus, refers to a list of countries contained in Council Regulation (EC) No 519/94⁵³⁶. Those countries are Albania, Armenia, Azerbaijan, Belarus, the People's Republic of China, Estonia, Georgia, Kazakhstan, North Korea,

⁵³⁴ *Supra*, 60-68.

⁵³⁵ As amended by Article 23 of Council Regulation (EC) No 519/94 of 7 March 1994 on common rules for imports from certain third countries and repealing Regulations (EEC) Nos 1765/82, 1766/82 and 3420/83, *O.J.*, 10 March 1994, No L 67/89.

⁵³⁶ Council Regulation (EC) No 519/94 of 7 March 1994 on common rules for imports from certain third countries and repealing Regulations (EEC) Nos 1765/82, 1766/82 and 3420/83, *O.J.*, 10 March 1994, No L 67/89.

Kyrgyzstan, Latvia, Lithuania, Moldova, Mongolia, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan and Vietnam.

Using a list has the advantage of limiting legal uncertainty. It is immediately clear which countries are considered to be NME countries⁵³⁷. However, such an approach is rather rigid⁵³⁸. A legislative action of the Council is required to strike off a country or to put it on the list⁵³⁹. It is possible that such legislative action comes too late⁵⁴⁰. As a consequence,

⁵³⁷ VERMULST, E.A., and GRAAFSMA, F., «A Decade of European Community Anti-Dumping Law and Practice Applicable to Imports from China», *Journal of World Trade*, 1992/3, (5), 15.

From a legal point of view, Czechoslovakia, Hungary and Poland were, for example, still being treated as NME countries at the end of 1992 as they figured on the list of NME countries at the date the anti-dumping proceeding was initiated, although since then fundamental economic as well as political changes to ensure their transition toward market economies were taken place in these countries (Commission Regulation (EEC) No 3296/92 of 12 November 1992 imposing a provisional anti-dumping duty on imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in Czechoslovakia, Hungary, Poland and the Republic of Croatia and terminating the anti-dumping proceeding with regard to the Republics of Serbia and of Montenegro, the former Yugoslav Republic of Macedonia, the Republic of Bosnia-Herzegovina and the Republic of Slovenia, *O.J.*, 14 November 1992, No L 328/15). See also : Council Regulation (EEC) No 2474/93 of 8 September 1993 imposing a definitive anti-dumping duty on imports into the Community of bicycles originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 9 September 1993, No L 228/1.

⁵³⁸ VERMULST, E.A., and GRAAFSMA, F., «A Decade of European Community Anti-Dumping Law and Practice Applicable to Imports from China», *Journal of World Trade*, 1992/3, (5), 15-16.

⁵³⁹ Until 31 January 1991, the countries listed were : Bulgaria, the German Democratic Republic, Hungary, Poland, Romania, Czechoslovakia, the U.S.S.R., Vietnam, North Korea, Mongolia and the People's Republic of China (see : Council Regulation (EEC) No 1765/82 of 30 June 1982 on common rules for imports from state trading countries, *O.J.*, 5 July 1982, No L 195/1 ; Council Regulation (EEC) No 1766/82 of 30 June 1982 on common rules for imports from the People's Republic of China, *O.J.*, 5 June 1982, No L 195/21).

In order to take account of the economic systemic reforms in East and Central Europe, as well as of the dissolution of the former U.S.S.R., it was necessary to modify the list three times in less than an half year and, eventually, after two years later, to replace it by an entirely new list :

- on 1 January 1992, Estonia, Latvia and Lithuania were placed on the list, whereas Czechoslovakia was replaced by the Czech and Slovak Federal Republic (Council Regulation (EEC) No 3859/91 of 23 December 1991, *O.J.*, 31 December 1991, No L 362/83) ;
- on 3 March 1992, Hungary, Poland and the Czech and Slovak Federal Republic were removed from the list (Council Regulation (EEC) No 517/92 amending the autonomous import arrangements for products originating in Hungary, Poland and the Czech and Slovak Federal Republic (CSFR), *O.J.*, 29 February 1992, No L 56/1) ;
- on 7 April 1992, the U.S.S.R. was replaced in the list by Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kirgizstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan (Council Regulation (EEC) No 848/92 of 31 March 1992 amending Regulations (EEC) No 288/82, No 1765/82 and (EEC) No 3420/83 in order to establish the import arrangements for products originating in the independent States resulting from the former Soviet Union and suspend the application of certain quantitative restrictions to the Yugoslav Republic of Montenegro, *O.J.*, 4 April 1992, No L 89/1) ;
- on 10 March 1994, an entirely new list was enacted, which is yet into force (Council Regulation (EC) No 519/94 of 7 March 1994 on common rules for imports from certain third countries and repealing Regulations (EEC) Nos 1765/82, 1766/82 and 3420/83, *O.J.*, 10 March 1994, No L 67/89). This new list implied that Bulgaria, the German Democratic Republic and Romania were stricken of the list, whereas Albania, Estonia, Latvia and Lithuania were put on it.

Moreover, on 3 October 1990, the German Democratic Republic has become part of the Federal Republic of Germany and, as a consequence, became an integral part of the Community. As European anti-dumping law does not apply to Member States of the Community, the anti-dumping measures imposed on dumped imports from the former German Democratic Republic into the Community of Twelve have no longer a legal basis and have become without any object (Council Regulation (EEC) No 1794/90 of 28 June 1990 on transitional measures concerning trade with the German Democratic Republic, *O.J.*, 29 June 1990, No L 166/1 ; Notice concerning anti-dumping measures on products originating in the territory formerly known as the German Democratic Republic, *O.J.*, 29 December 1990, No C 327/14). Only on 10 March 1994, the German Democratic Republic did not figure anymore on the list of NME countries (Council Regulation (EC) No 519/94 of 7 March 1994 on common rules for imports from certain third countries and repealing Regulations (EEC) Nos 1765/82, 1766/82 and 3420/83, *O.J.*, 10 March 1994, No L 67/89).

the list, at least temporarily, may be too extensive⁵⁴¹. In such a case, European anti-dumping law is in violation of GATT anti-dumping law. For too extensive a list implies that ME countries are treated as NME countries which is contrary to GATT anti-dumping law. The list may also be too restrictive. Then it will be impossible to treat not enlisted MNE countries as NME countries, at least if the list is exhaustive.

As the Court of Justice has investigated whether a country not enlisted did have a NME system, it must consider the list as not exhaustive⁵⁴². The Court, however, did offer an explanation for doing so. The main reason why the list should not be exhaustive, is the wording of European anti-dumping law (Article 2(7) basic EC Regulation ; Article 2(5) basic ECSC Decision) which reads as follows : «in the case of imports from, non-market economy countries and, *in particular*, those to which Regulation (EC) No 519/94 (...) applies, ... » (emphasis added). Thus, the special provisions of this Article apply «in general» to NME countries⁵⁴³. Another reason is the fact that Cuba, though not enlisted, is an obvious candidate to be classified as NME country⁵⁴⁴. In

⁵⁴⁰ On 7 April 1992, the U.S.S.R. was replaced in the list by Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kirgizstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan. As the dissolution of the U.S.S.R. into those new countries had taken place before 7 April 1992, the amendment to the list was made applicable from 1 January 1992 (Council Regulation (EEC) No 848/92 of 31 March 1992 amending Regulations (EEC) No 288/82, No 1765/82 and (EEC) No 3420/83 in order to establish the import arrangements for products originating in the independent States resulting from the former Soviet Union and suspend the application of certain quantitative restrictions to the Yugoslav Republic of Montenegro, *O.J.*, 4 April 1992, No L 89/1).

⁵⁴¹ For example, a country that is removed from the list of NME countries after the initiation of the anti-dumping proceeding, will still be treated as NME country (Council Regulation (EEC) No 1189/93 of 14 May 1993 imposing definitive anti-dumping duties on imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in Hungary, Poland and the Republic of Croatia and definitively collecting provisional anti-dumping duties, *O.J.*, 15 May 1993, No L 120/34 ; Council Regulation (EC) No 821/94 of 12 April 1994 imposing a definitive anti-dumping duty on imports of silicon carbide, originating in the People's Republic of China, Poland, the Russian Federation and Ukraine, *O.J.*, 13 April 1994, No L 94/21 ; Commission Regulation (EC) No 1506/94 of 27 June 1994 imposing provisional duties on imports of urea ammonium nitrate solution originating in Bulgaria and Poland, *O.J.*, 30 June 1994, No L 162/16). See also : Council Regulation (EEC) No 1473/93 of 14 June 1993 imposing a definitive anti-dumping duty on imports of magnesium oxide originating in the People's Republic of China, *O.J.*, 17 June 1993, No L 145/1.

⁵⁴² C.J.E.C., joined cases C-305/86 and C-160/87, 11 July 1990, *Neotype Techmaslexport GmbH v Commission and Council*, *E.C.R.*, 1990, I, (2945), 3000. See also : C.J.E.C., case C-323/88, 11 July 1990, *SA Serres v Directeur des services des douanes de Strasbourg*, *E.C.R.*, 1990, I, (3027), 3052 ; BELLIS, J.-F., «The EEC Antidumping System», in *Antidumping Law and Practice. A Comparative Study*, JACKSON, J.H., and VERMULST, E.A. (eds.), New York, Harvester Wheatsheaf, 1990, (41), 76 ; VERMULST, E.A., and GRAAFSMA, F., «A Decade of European Community Anti-Dumping Law and Practice Applicable to Imports from China», *Journal of World Trade*, 1992/3, (5), 15.

⁵⁴³ C.J.E.C., joined cases C-305/86 and C-160/87, 11 July 1990, *Neotype Techmaslexport GmbH v Commission and Council*, *E.C.R.*, 1990, I, (2945), 2976 (Opinion of Advocate General VAN GERVEN) ; LESGUILLONS, H., *Le régime communautaire de protection contre le dumping et les subventions*, Paris, F.E.D.U.C.I., 1983, 54 ; VAN BAEL, I., and BELLIS, J.-F., *Anti-Dumping and other Trade Protection Laws of the EEC*, Bicester, CCH Editions, 1990, 67. See also : BESELER, J.F., *Die Abwehr von Dumping und Subventionen durch die Europäische Gemeinschaften*, Baden-Baden, Nomos, 1980, 91 ; BESELER, J.F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 67 ; KRETSCHMER, H., *Das Antidumping- und Antisubventionsrecht der Europäischen Gemeinschaften*, Frankfurt/Main, VWV-Verlag, 1980, 34. However, according to DENTON, R., «The Non-Market Economy Rules of the European Community's Anti-Dumping and Countervailing Duties Legislation», *International and Comparative Law Quarterly*, 1987, (198), 209, the wordings of European anti-dumping law (Article 2(7) basic EC Regulation ; Article 2(5) basic ECSC Decision) is by no means conclusive.

⁵⁴⁴ The Commission seems to share this opinion (see : Answer of the Commission to written question No 2430/92, *O.J.*, 3 March 1993, No C 61/33).

European anti-dumping case law, no evidence can be found as to whether or not enlisted countries have been treated as NME countries⁵⁴⁵.

As the list is not exhaustive, the certainty it creates, is limited : it only guarantees that the countries listed will be treated as NME country. It is, however, difficult to predict for not enlisted countries whether they will be treated as a NME country. The European approach, indeed, has the disadvantage that no criteria are provided as to the reason why countries are to be qualified as NME countries⁵⁴⁶. Hence, European anti-dumping authorities have discretionary powers on this point⁵⁴⁷, were it not for the definition of a NME country provided by GATT⁵⁴⁸.

That GATT definition should also apply to the list of NME countries : only countries which meet the GATT definition may be put on the list. It is, however, rather unclear to what extent the Community has applied the GATT definition to its list. The preamble to Council Regulation (EC) No 519/94⁵⁴⁹ does not refer to that definition. When Hungary, Poland and the Czech and Slovak Federal Republic were stricken of the list by Council Regulation (EEC) No 517/92, the preamble to that Regulation only provided that those countries had «embarked on a large-scale programme of economic reform, aimed at ensuring their transition towards a market economy»⁵⁵⁰. This certainly cannot be said to be an application of the GATT definition. On the contrary, the preamble implied that those countries were still NME countries, as they were

⁵⁴⁵ Anti-dumping proceedings have been initiated against Cuba, which has never been put on the list, and against Albania which, at the time, did not figure on the list. In its decisions terminating those proceedings, the Commission made no statement about the economic system of either of these two countries (sisal twine from Cuba, see : *O.J.*, 2 February 1971, No C 10/22 ; Commission Decision 91/182/EEC of 8 April 1991 terminating the anti-dumping proceeding concerning imports of high carbon ferro-chromium originating in Albania and the USSR, *O.J.*, 11 April 1991, No L 90/38).

⁵⁴⁶ DENTON, R., «The Non-Market Economy Rules of the European Community's Anti-Dumping and Countervailing Duties Legislation», *International and Comparative Law Quarterly*, 1987, (198), 210.

⁵⁴⁷ LESGUILLONS, H., *Le régime communautaire de protection contre le dumping et les subventions*, Paris, F.E.D.U.C.I., 1983, 55.

⁵⁴⁸ C.J.E.C., joined cases C-305/86 and C-160/87, 11 July 1990, *Neotype Techmashexport GmbH v Commission and Council*, *E.C.R.*, 1990, I, (2945), 2976 (Opinion of Advocate General VAN GERVEN).

The Court of Justice has applied the same criteria as the GATT definition of NME countries, without referring to GATT anti-dumping law though, in order to assess whether a particular country had a NME system (C.J.E.C., joined cases C-305/86 and C-160/87, 11 July 1990, *Neotype Techmashexport GmbH v Commission and Council*, *E.C.R.*, 1990, I, (2945), 3000-3001 ; C.J.E.C., case C-323/88, 11 July 1990, *SA Sermes v Directeur des services des douanes de Strasbourg*, *E.C.R.*, 1990, I, (3027), 3052).

⁵⁴⁹ Council Regulation (EC) No 519/94 of 7 March 1994 on common rules for imports from certain third countries and repealing Regulations (EEC) Nos 1765/82, 1766/82 and 3420/83, *O.J.*, 10 March 1994, No L 67/89.

⁵⁵⁰ Council Regulation (EEC) No 517/92 amending the autonomous import arrangements for products originating in Hungary, Poland and the Czech and Slovak Federal Republic (CSFR), *O.J.*, 29 February 1992, No L 56/1.

only moving towards a ME system⁵⁵¹. Nevertheless, this amendment to the list did not raise any problem in respect of GATT anti-dumping law which does not oblige to treat each NME country as such⁵⁵². The question, though, crops up why other countries, such as Estonia⁵⁵³ and Russia⁵⁵⁴, which have embarked on similar programmes of economic reform as well, are still on the list, whereas other countries, such as Romania, have been removed from it, though it is not yet entirely sure whether they will eventually adopt a full-fledged ME system⁵⁵⁵. Perhaps, Russia is not headed that straight for a ME system, as countries such as Poland⁵⁵⁶. Estonia, however, has opted for a swift systemic change and seems to be quite advanced in its economic reform⁵⁵⁷. Moreover, even in countries, such as Poland, where the transition towards a ME has gone farthest, a turnabout away from a ME system is not yet entirely to be excluded⁵⁵⁸. It seems that the list of NME countries is not the result of an application of the GATT definition of a NME country, but that it may have been inspired by mere foreign politics. All East-European countries have been removed from the list, whereas all countries emerged out of the dissolution of the U.S.S.R., as well as the Asian NME countries, such as the

⁵⁵¹ Still on 12 January 1994, *i.e.*, more than two years after the removal of Poland from the list, the European anti-dumping authorities have explicitly recognized that Poland was not yet a ME country, but was still in transition towards a ME system (Commission Decision No 67/94/ECSC of 12 January 1994 imposing a provisional anti-dumping duty on imports into the Community of hematite pig iron, originating in Brazil, Poland, Russia and Ukraine, *O.J.*, 15 January 1994, No L 12/5).

⁵⁵² GATT anti-dumping law refers to «the possibility that a strict comparison with domestic prices in such a country (*i.e.*, a NME country) may not always be appropriate» (Note No 2 *ad* Article VI(1) GATT) (emphasis added). In other words, under GATT anti-dumping law, a comparison with the domestic prices in a NME country may sometimes be appropriate.

⁵⁵³ ASLUND, A., «Lessons of the First Four Years of Systemic Change in Eastern Europe», *Journal of Comparative Economics*, 1994/19, (22), 29-30 and 33.

⁵⁵⁴ ELLMAN, M., «Transformation, Depression, and Economics : Some Lessons», *Journal of Comparative Economics*, 1994/19, (1), 12 ; FISCHER, S., «Socialist Economy Reform : Lessons of the First Three Years», *American Economic Review*, 1993, (390), 391.

⁵⁵⁵ ASLUND, A., «Lessons of the First Four Years of Systemic Change in Eastern Europe», *Journal of Comparative Economics*, 1994/19, (22), 29-31.

⁵⁵⁶ ELLMAN, M., «Transformation, Depression, and Economics : Some Lessons», *Journal of Comparative Economics*, 1994/19, (1), 12 and 16-17 ; FISCHER, S., «Socialist Economy Reform : Lessons of the First Three Years», *American Economic Review*, 1993, (390), 393.

⁵⁵⁷ ASLUND, A., «Lessons of the First Four Years of Systemic Change in Eastern Europe», *Journal of Comparative Economics*, 1994/19, (22), 29-30 and 33.

⁵⁵⁸ ELLMAN, M., «Transformation, Depression, and Economics : Some Lessons», *Journal of Comparative Economics*, 1994/19, (1), 14 and 16-17.

People's Republic of China⁵⁵⁹, are still on the list, irrespective of their economic reforms. The removal of the East European countries of the list was probably intended to support their efforts in moving towards a ME country and to tighten the ties with them⁵⁶⁰. From a legal point of view, the application of the GATT definition is more appropriate, as it provides two objective criteria (complete or a substantially complete monopoly of the country's trade and the fixing of all

⁵⁵⁹ In the People's Republic of China, as well as in other Asian countries, such as North Korea and Vietnam, economic reforms, implying increased price liberalisation, have been and are still being implemented. However, they differ from the economic reforms carried out in the East European countries in two respects. First, the economic reform is not accompanied by a political reform towards democratisation. Second, it is not a systemic reform: economic planning was not eliminated, but reduced in order to give way, within the planning system, to market activities (CHEN, K., JEFFERSON, G.H., and SINGH, I., «Lessons from China's Economic Reform», *Journal of Comparative Economics*, 1992/16, (201), 201-225; ELLMAN, M., «Transformation, Depression, and Economics: Some Lessons», *Journal of Comparative Economics*, 1994/19, (1), 18-19; FISCHER, S., «Socialist Economy Reform: Lessons of the First Three Years», *American Economic Review*, 1993, (390), 392-393).

Because economic planning is still predominant and, in particular, the central and, especially, the local authorities in China do interfere in the companies' management (see: CHEN, K., JEFFERSON, G.H., and SINGH, I., «Lessons from China's Economic Reform», *Journal of Comparative Economics*, 1992/16, (201), 216-221), the European anti-dumping authorities usually ignore the economic reforms in the People's Republic of China (Council Regulation (EEC) No 2474/93 of 8 September 1993 imposing a definitive anti-dumping duty on imports into the Community of bicycles originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 9 September 1993, No L 228/1; Commission Regulation (EEC) No 2477/93 of 6 September 1993 imposing a provisional anti-dumping duty on imports of certain photo albums originating in the People's Republic of China, *O.J.*, 9 September 1993, No L 228/16. See also: C.J.E.C., case C-16/90, 22 October 1991, *Eugen Nölle v Hauptzollamt Bremen-Freihafen*, *E.C.R.*, 1991, I, (5163), 5178-5179 (Opinion of Advocate General VAN GERVEN). Indeed, they treat the People's Republic of China as a NME country as a whole and reject special individual treatment to Chinese companies engaged in the Chinese market economy sector, because those companies do not operate independently of the State or because there is no guarantee that they will continue to operate autonomously in the future (Commission Regulation (EEC) No 550/93 of 5 March 1993 imposing a provisional anti-dumping duty on imports of bicycles originating in the People's Republic of China, *O.J.*, 11 March 1993, No L 58/12; Council Regulation (EEC) No 1473/93 of 14 June 1993 imposing a definitive anti-dumping duty on imports of magnesium oxide originating in the People's Republic of China, *O.J.*, 17 June 1993, No L 145/1; Commission Decision 93/377/EEC of 22 June 1993 terminating the proceeding to review anti-dumping measures applicable to certain imports of gas-fuelled, non-refillable pocket flint lighters originating in the People's Republic of China, *O.J.*, 30 June 1993, No L 158/43; Commission Regulation (EEC) No 2463/93 of 1 September 1993 imposing a provisional anti-dumping duty on imports of fluorspar originating in the People's Republic of China, *O.J.*, 7 September 1993, No L 226/3; Council Regulation (EEC) No 2474/93 of 8 September 1993 imposing a definitive anti-dumping duty on imports into the Community of bicycles originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 9 September 1993, No L 228/1; Commission Regulation (EEC) No 2477/93 of 6 September 1993 imposing a provisional anti-dumping duty on imports of certain photo albums originating in the People's Republic of China, *O.J.*, 9 September 1993, No L 228/16; Council Regulation (EC) No 3386/93 of 6 December 1993 imposing a definitive anti-dumping duty on imports of dead-burned (sintered) magnesia originating in the People's Republic of China, *O.J.*, 11 December 1993, No L 306/16; Council Regulation (EC) No 3664/93 of 22 December 1993 imposing a definitive anti-dumping duty on imports into the Community of photo albums in bookbound form originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 31 December 1993, No L 333/67; Commission Decision 94/82/EC of 10 January 1994 terminating the anti-dumping proceeding concerning imports of gum rosin originating in the People's Republic of China, *O.J.*, 12 February 1994, No L 41/50; Council Regulation (EC) No 821/94 of 12 April 1994 imposing a definitive anti-dumping duty on imports of silicon carbide, originating in the People's Republic of China, Poland, the Russian Federation and Ukraine, *O.J.*, 13 April 1994, No L 94/21). There is but one exception which involved a company which was profit orientated, was totally independent in the administration of its business, in the setting of export prices and in the transfer of profits outside the People's Republic of China (Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5; Council Regulation (EEC) No 2861/93 of 18 October 1993 imposing a definitive anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, and collecting definitively the provisional duty imposed, *O.J.*, 21 October 1993, No L 262/4). This special treatment does not concern the determination of normal value, but is confined to the use of the individual export prices of the companies in question and, thus, to the assessment of individual dumping margins. In principle, uniform normal values, export prices and, consequently, dumping margins are determined for NME countries (Commission Regulation (EEC) No 550/93 of 5 March 1993 imposing a provisional anti-dumping duty on imports of bicycles originating in the People's Republic of China, *O.J.*, 11 March 1993, No L 58/12; Council Regulation (EEC) No 2474/93 of 8 September 1993 imposing a definitive anti-dumping duty on imports into the Community of bicycles originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 9 September 1993, No L 228/1; Commission Regulation (EEC) No 2477/93 of 6 September 1993 imposing a provisional anti-dumping duty on imports of certain photo albums originating in the People's Republic of China, *O.J.*, 9 September 1993, No L 228/16; Council Regulation (EC) No 3664/93 of 22 December 1993 imposing a definitive anti-dumping duty on imports into the Community of photo albums in bookbound form originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 31 December 1993, No L 333/67).

⁵⁶⁰ There was widespread hope in many NME countries when starting their economic systemic reform, that they would soon be treated as full-fledged ME countries. The refusal of the Community, as well as of the United States of America, to treat them as such, consequently, caused much ill will (ELLMAN, M., «Transformation, Depression, and Economics: Some Lessons», *Journal of Comparative Economics*, 1994/19, (1), 4-5). Conversely, their being treated as ME countries will probably cause good will.

domestic prices by the State) and, thus, increases legal certainty. Nevertheless, both criteria are quite vague and must be further implemented. Insofar as they are applied so as to assess whether prices are not determined by the market, both criteria are also appropriate from an economic point of view.

2.3.3. Selection of the reference country

European anti-dumping authorities may choose any ME country in the world, including the Community (at least if another ME country is not available as reference country⁵⁶¹), as

⁵⁶¹ Only five times, the Community has been used as reference country :

- in *oxalic acid from China and Czechoslovakia* six ME countries had been taken into consideration, but were, for different reasons, unfitted to serve as reference country (Commission Decision 88/623/EEC of 12 December 1988 accepting undertakings given in connection with the anti-dumping review concerning imports of oxalic acid originating in China or Czechoslovakia and terminating the review, *O.J.*, 13 December 1988, No L 343/34). The use of the Community as reference country was undoubtedly the consequence of the enlargement of the European Community to Spain because in the previous proceedings concerning oxalic acid from China and Czechoslovakia, Spain (then not a Member State of the Community) was used as reference country (Commission Regulation (EEC) No 171/82 of 25 January 1982 imposing a provisional anti-dumping duty on imports of oxalic acid originating in China and Czechoslovakia, *O.J.*, 27 January 1982, No L 19/26 (corrigendum, *O.J.*, 9 February 1982, No L 34/11); Council Regulation (EEC) No 1283/82 of 17 May 1982 imposing a definitive anti-dumping duty on oxalic acid originating in China and definitively collecting the amounts secured by way of provisional duty on oxalic acid originating in China and Czechoslovakia, *O.J.*, 27 May 1982, No L 148/37; Commission Decision 82/335/EEC of 18 May 1982 accepting an undertaking offered by the Czechoslovakian producer and terminating the anti-dumping procedure concerning oxalic acid originating in Czechoslovakia, Hungary and the German Democratic Republic, *O.J.*, 27 May 1982, No L 148/51);
- in *silicon metal from the People's Republic of China*, *video tapes in cassettes from the People's Republic of China* and *barium chloride originating in the People's Republic of China* respectively four, nine and an unidentified number ME countries were taken into consideration, but were not withheld because of lack of cooperation or incomplete information (Commission Regulation (EEC) No 720/90 of 22 March 1990 imposing a provisional anti-dumping duty on imports of silicon metal originating in the People's Republic of China, *O.J.*, 27 March 1990, No L 80/9; Council Regulation (EEC) No 2200/90 of 27 July 1990 imposing a definitive anti-dumping duty on imports of silicon metal originating in the People's Republic of China, *O.J.*, 28 July 1990, No L 198/57; Council Regulation (EEC) No 541/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of barium chloride originating in the People's Republic of China, *O.J.*, 7 March 1991, No L 60/1; Commission Regulation (EEC) No 1034/91 of 23 April 1991 imposing a provisional anti-dumping duty on imports of video tapes in cassettes originating in the People's Republic of China, *O.J.*, 26 April 1991, No L 106/15);
- in *pure silk typewriter ribbon fabrics from the People's Republic of China* the Community producer and the Chinese producer were the only producers of the product in the world (Commission Regulation (EEC) No 1937/90 of 4 July 1990 imposing a provisional anti-dumping duty on imports of pure silk typewriter ribbon fabrics originating in the People's Republic of China, and accepting an undertaking offered by the exporter, *O.J.*, 7 July 1990, No L 174/27).

In *seamless pipes and tubes, of iron or non-alloy steel, from Czechoslovakia, Hungary and Poland*, the Commission hesitated to use the proposed reference country. It then examined all other possible reference countries, including the Community. The Commission finally selected the proposed reference country as its use proved to result in the lowest normal value (Commission Regulation (EEC) No 3296/92 of 12 November 1992 imposing a provisional anti-dumping duty on imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in Czechoslovakia, Hungary, Poland and the Republic of Croatia and terminating the anti-dumping proceeding with regard to the Republics of Serbia and of Montenegro, the former Yugoslav Republic of Macedonia, the Republic of Bosnia-Herzegovina and the Republic of Slovenia, *O.J.*, 14 November 1992, No L 328/15).

In *photo albums in bookbound form from the People's Republic of China*, the exporters requested that the Community be used as reference country. The European anti-dumping authorities rejected this request, as another ME country provided an adequate basis and, as a consequence, the Community was excluded as reference country (Council Regulation (EC) No 3664/93 of 22 December 1993 imposing a definitive anti-dumping duty on imports into the Community of photo albums in bookbound form originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 31 December 1993, No L 333/67).

reference country. The use of the Community as reference country has been severely criticised⁵⁶². It offers the Community industry the opportunity to increase the dumping margin by raising its prices or production costs⁵⁶³. However, the same applies for other reference countries: the producers of these countries may give false information about their prices and production costs; by declaring higher prices and costs, they increase the dumping margin and, thereby, the chance that their competitors from the NME countries are found to be dumping⁵⁶⁴.

The risk of using false information, however, is reduced by the great importance the European anti-dumping authorities attach to investigations on the spot⁵⁶⁵. Indeed, the possibility of verifying on the spot the information obtained, is a determining criterion for selecting the reference country⁵⁶⁶ insofar as the European anti-dumping authorities have made serious or

⁵⁶² DENTON, R., «The Non-Market Economy Rules of the European Community's Anti-Dumping and Countervailing Duties Legislation», *International and Comparative Law Quarterly*, 1987, (198), 212-213.

⁵⁶³ DENTON, R., «The Non-Market Economy Rules of the European Community's Anti-Dumping and Countervailing Duties Legislation», *International and Comparative Law Quarterly*, 1987, (198), 213.

⁵⁶⁴ BELLIS, J.-F., «The EEC Antidumping System», in *Antidumping Law and Practice. A Comparative Study*, JACKSON, J.H., and VERMULST, E.A. (eds.), New York, Harvester Wheatsheaf, 1990, (41), 78; SPAK, G.L., «Georgetown Steel Corp v. United States: Applying the Countervailing Duty Law to Imports from Nonmarket Economy Countries», *Law and Policy in International Business*, 1986, (313), 331.

⁵⁶⁵ LESGUILLONS, H., *Le régime communautaire de protection contre le dumping et les subventions*, Paris, F.E.D.U.C.I., 1983, 63.

⁵⁶⁶ A ME country has been selected as reference country because it was possible to verify at the spot the information obtained in: Commission Regulation (EEC) No 250/82 of 29 January 1982 imposing a provisional anti-dumping duty on certain welded iron or steel tubes originating in Romania, *O.J.*, 3 February 1982, No L 26/5; Commission Regulation (EEC) No 2051/90 of 17 July 1990 imposing a temporary anti-dumping duty on imports of woven polyolefin bags originating in the People's Republic of China, *O.J.*, 19 July 1990, No L 187/36 (corrigendum, *O.J.*, 20 September 1990, No L 256/38).

ME countries have not been retained as reference country because investigations on the spot were refused or because, for some other reason, no suitable information can be obtained or verified, in: Commission Regulation (EEC) No 84/82 of 14 January 1982 imposing a provisional anti-dumping duty on mechanical wrist-watches originating in the USSR, *O.J.*, 16 January 1982, No L 11/14; Commission Decision 82/881/EEC of 23 December 1982 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of perchlorethylene originating in Czechoslovakia, Romania, Spain and the United States of America and terminating that proceeding, *O.J.*, 30 December 1982, No L 371/47; Commission Decision 84/182/EEC of 23 March 1984 accepting an undertaking offered in connection with an anti-dumping proceeding concerning imports of certain iron or steel angles, shapes and sections originating in Romania, and terminating that proceeding, *O.J.*, 27 March 1984, No L 83/9; Commission Regulation (EEC) No 2690/84 of 21 September 1984 imposing a provisional anti-dumping duty on imports of artificial corundum originating in the People's Republic of China and Czechoslovakia and terminating the proceeding in respect of imports of artificial corundum originating in Spain and Yugoslavia, *O.J.*, 25 September 1984, No L 255/9; Commission Decision 84/465/EEC of 26 September 1984 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of asbestos-cement corrugated sheets originating in Czechoslovakia and the German Democratic Republic and terminating that proceeding, *O.J.*, 28 September 1984, No L 259/48; Commission Regulation (EEC) No 2317/85 of 12 August 1985 imposing a provisional anti-dumping duty on imports of roller chains for cycles originating in the USSR and the People's Republic of China, *O.J.*, 14 August 1985, No L 217/7; Commission Decision 86/344/EEC of 17 July 1986 terminating the anti-dumping proceeding concerning imports of Portland cement originating in the German Democratic Republic, Poland and Yugoslavia, *O.J.*, 25 July 1986, No L 202/43; Commission Regulation (EEC) No 3019/86 of 30 September 1986 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania and the USSR, *O.J.*, 1 October 1986, No L 280/68; Council Regulation (EEC) No 2347/87 of 23 July 1987 imposing a definitive anti-dumping duty on mechanical wrist-watches originating in the USSR, *O.J.*, 4 August 1987, No L 213/5; Council Regulation (EEC) No 2512/87 of 18 August 1987 amending Regulation (EEC) No 2786/83 imposing a definitive anti-dumping duty on imports of copper sulphate originating in Czechoslovakia and the USSR, *O.J.*, 20 August 1987, No L 235/18 (corrigendum, *O.J.*, 9 September 1987, No L 259/7); Commission Decision 87/443/EEC of 30 July 1987 amending an undertaking and accepting an undertaking given in connection with the anti-dumping

sufficient attempts to obtain the necessary information from the foreign producers⁵⁶⁷. Because of that criterion, there may be but one country which can serve as reference country. In most

review investigation concerning imports of copper sulphate originating in Poland and the USSR respectively, and terminating the investigation as it concerns these countries, *O.J.*, 20 August 1987, No L 235/22 ; Commission Decision 88/623/EEC of 12 December 1988 accepting undertakings given in connection with the anti-dumping review concerning imports of oxalic acid originating in China or Czechoslovakia and terminating the review, *O.J.*, 13 December 1988, No L 343/34 ; Council Regulation (EEC) No 176/89 of 23 January 1989 imposing a definitive anti-dumping duty on imports of copper sulphate originating in Bulgaria or the Soviet Union, *O.J.*, 27 January 1989, No L 23/1 ; Council Regulation (EEC) No 725/89 of 20 March 1989 imposing a definitive anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty on such imports, *O.J.*, 22 March 1989, No L 79/24 ; Council Regulation (EEC) No 1306/89 of 11 May 1989 imposing a definitive anti-dumping duty on imports of light sodium carbonate originating in Bulgaria, the German Democratic Republic, Poland and Romania, *O.J.*, 13 May 1989, No L 131/4 ; Commission Regulation (EEC) No 720/90 of 22 March 1990 imposing a provisional anti-dumping duty on imports of silicon metal originating in the People's Republic of China, *O.J.*, 27 March 1990, No L 80/9 ; Commission Decision 90/196/EEC of 10 April 1990 terminating the anti-dumping proceeding concerning imports of methenamine (hexamethylenetetramine) originating in Hungary and Yugoslavia and accepting undertakings offered in connection with the proceeding concerning imports of methenamine (hexamethylenetetramine) originating in Bulgaria, Czechoslovakia, Poland and Romania, *O.J.*, 24 April 1990, No L 104/14 ; Commission Regulation (EEC) No 2051/90 of 17 July 1990 imposing a temporary anti-dumping duty on imports of woven polyolefin bags originating in the People's Republic of China, *O.J.*, 19 July 1990, No L 187/36 (corrigendum, *O.J.*, 20 September 1990, No L 256/38) ; Council Regulation (EEC) No 541/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of barium chloride originating in the People's Republic of China, *O.J.*, 7 March 1991, No L 60/1 ; Commission Regulation (EEC) No 1034/91 of 23 April 1991 imposing a provisional anti-dumping duty on imports of video tapes in cassettes originating in the People's Republic of China, *O.J.*, 26 April 1991, No L 106/15 ; Commission Regulation (EEC) No 2463/93 of 1 September 1993 imposing a provisional anti-dumping duty on imports of fluorspar originating in the People's Republic of China, *O.J.*, 7 September 1993, No L 226/3 ; Commission Regulation (EEC) No 2477/93 of 6 September 1993 imposing a provisional anti-dumping duty on imports of certain photo albums originating in the People's Republic of China, *O.J.*, 9 September 1993, No L 228/16 ; Council Regulation (EEC) No 2717/93 of 28 September 1993 imposing a definitive anti-dumping duty on imports of ferro-chrome with a carbon content by weight of maximum 0,5 % (low carbon ferro-chrome), originating in Kazakhstan, Russia and Ukraine, *O.J.*, 2 October 1993, No L 246/1 ; Commission Decision 94/82/EC of 10 January 1994 terminating the anti-dumping proceeding concerning imports of gum rosin originating in the People's Republic of China, *O.J.*, 12 February 1994, No L 41/50 ; Council Regulation (EC) No 821/94 of 12 April 1994 imposing a definitive anti-dumping duty on imports of silicon carbide, originating in the People's Republic of China, Poland, the Russian Federation and Ukraine, *O.J.*, 13 April 1994, No L 94/21.

When a verification visit to the producers in the reference country are provisionally impossible, another country will be used during the provisional anti-dumping assessment in order not to delay the proceeding unduly. Then, the European anti-dumping authorities promise to use the reference country in the definitive assessment (Commission Regulation (EEC) No 2800/92 of 25 September 1992 imposing a provisional anti-dumping duty on imports of magnesium oxide originating in the People's Republic of China, *O.J.*, 26 September 1992, No L 282/23 ; Commission Regulation (EEC) No 797/93 of 30 March 1993 imposing a provisional anti-dumping duty on imports of ferro-chrome with a carbon content by weight of max. 0,5 % (low carbon ferro-chrome) originating in Kazakhstan, Russia and Ukraine, *O.J.*, 2 April 1993, No L 80/8), but sometimes actually do not (Council Regulation (EEC) No 1473/93 of 14 June 1993 imposing a definitive anti-dumping duty on imports of magnesium oxide originating in the People's Republic of China, *O.J.*, 17 June 1993, No L 145/1). If, in the definitive assessment, the reference country submits complete and conclusive information and there is no indication that it is incorrect, normal value will be established on the basis of that information, though it the producers in that country do not allow verification of the information at their premises (Council Regulation (EEC) No 2717/93 of 28 September 1993 imposing a definitive anti-dumping duty on imports of ferro-chrome with a carbon content by weight of maximum 0,5 % (low carbon ferro-chrome), originating in Kazakhstan, Russia and Ukraine, *O.J.*, 2 October 1993, No L 246/1).

⁵⁶⁷ C.J.E.C., case C-16/90, 22 October 1991, *Eugen Nölle v Hauptzollamt Bremen-Freihafen*, E.C.R., 1991, I, (5163), 5208.

cases, this country has been taken as reference country⁵⁶⁸. When the producers in all possible reference countries refuse to cooperate, but the European anti-dumping authorities have some information as to one of these countries, they will use that country as reference country if the normal value calculated on that basis would be more favourable to the NME country than a normal value based on the Community as reference⁵⁶⁹.

Parties having an interest in the anti-dumping case have a say in the selection of the reference country⁵⁷⁰, at least if they in time come up with sufficient evidence which underbuilds their

⁵⁶⁸ Council Regulation (EEC) No 955/79 of 15 May 1979 imposing a definitive anti-dumping duty on a certain herbicide originating in Romania, *O.J.*, 17 May 1979, No L 121/5; Council Regulation (EEC) No 191/80 of 29 January 1980 imposing a definitive anti-dumping duty on lithium hydroxide originating in the United States of America and the Soviet Union, *O.J.*, 30 January 1980, No L 23/19 (corrigendum, *O.J.*, 8 February 1980, No L 31/23); Commission Decision 80/564/EEC of 4 June 1980 accepting undertakings in connection with the anti-dumping proceedings concerning imports of fibre building board originating in Czechoslovakia, Finland, Norway, Poland, Romania, Spain, the Soviet Union and Sweden and determining those proceedings, *O.J.*, 11 June 1980, No L 145/39; Commission Regulation (EEC) No 84/82 of 14 January 1982 imposing a provisional anti-dumping duty on mechanical wrist-watches originating in the USSR, *O.J.*, 16 January 1982, No L 11/14; Commission Decision 82/285/EEC of 6 May 1982 terminating the review of the anti-dumping proceedings concerning imports of a herbicide from Romania, *O.J.*, 11 May 1982, No L 128/17; Council Regulation (EEC) No 2978/83 of 24 October 1983 amending Regulation (EEC) No 191/80 imposing a definitive anti-dumping duty on lithium hydroxide originating in the United States of America and the Soviet Union, *O.J.*, 26 October 1983, No L 294/3; Commission Decision 83/522/EEC of 24 October 1983 accepting the undertaking given in connection with the anti-dumping proceeding in respect of imports of lithium hydroxide originating in the People's Republic of China and terminating that proceeding, *O.J.*, 26 October 1983, No L 294/29; Council Regulation (EEC) No 2347/87 of 23 July 1987 imposing a definitive anti-dumping duty on mechanical wrist-watches originating in the USSR, *O.J.*, 4 August 1987, No L 213/5; Commission Decision 88/47/EEC of 26 January 1988 accepting an undertaking given in connection with the anti-dumping review proceeding concerning imports of a herbicide originating in Romania, *O.J.*, 30 January 1988, No L 26/107; Commission Decision 90/196/EEC of 10 April 1990 terminating the anti-dumping proceeding concerning imports of methenamine (hexamethylenetetramine) originating in Hungary and Yugoslavia and accepting undertakings offered in connection with the proceeding concerning imports of methenamine (hexamethylenetetramine) originating in Bulgaria, Czechoslovakia, Poland and Romania, *O.J.*, 24 April 1990, No L 104/14; Commission Regulation (EEC) No 1537/90 of 28 May 1990 imposing a provisional anti-dumping duty on imports of potassium permanganate originating in the USSR, *O.J.*, 8 June 1990, No L 145/9; Commission Regulation (EEC) No 2051/90 of 17 July 1990 imposing a temporary anti-dumping duty on imports of woven polyolefin bags originating in the People's Republic of China, *O.J.*, 19 July 1990, No L 187/36 (corrigendum, *O.J.*, 20 September 1990, No L 256/38); Commission Decision 94/389/EC of 6 June 1994 terminating the anti-dumping proceeding regarding imports of refined antimony trioxide originating in the People's Republic of China, *O.J.*, 9 July 1994, No L 176/41.

⁵⁶⁹ Commission Regulation (EEC) No 797/93 of 30 March 1993 imposing a provisional anti-dumping duty on imports of ferro-chrome with a carbon content by weight of max. 0,5 % (low carbon ferro-chrome) originating in Kazakhstan, Russia and Ukraine, *O.J.*, 2 April 1993, No L 80/8.

⁵⁷⁰ BELLIS, J.-F., «The EEC Antidumping System», in *Antidumping Law and Practice. A Comparative Study*, JACKSON, J.H., and VERMULST, E.A. (eds.), New York, Harvester Wheatsheaf, 1990, (41), 77; DENTON, R., «The Non-Market Economy Rules of the European Community's Anti-Dumping and Countervailing Duties Legislation», *International and Comparative Law Quarterly*, 1987, (198), 216; FINE, F.L., «EEC Antidumping: The Problem of Imports from State-Trading Countries», *Law and Policy in International Business*, 1988, (91), 94-95; LESGUILLONS, H., *Le régime communautaire de protection contre le dumping et les subventions*, Paris, F.E.D.U.C.I., 1983, 62; VERMULST, E.A., and GRAAFSMA, F., «A Decade of European Community Anti-Dumping Law and Practice Applicable to Imports from China», *Journal of World Trade*, 1992/3, (5), 19.

propositions and arguments⁵⁷¹. Although the European anti-dumping authorities are not required to consider every reference country suggested, they must examine them when there are doubts as to their own choice⁵⁷². Only in a minority of cases another reference country is

⁵⁷¹ If there is no sufficient evidence is lacking, their suggestions and objections are usually not taken into consideration, see : Commission Regulation (EEC) No 84/82 of 14 January 1982 imposing a provisional anti-dumping duty on mechanical wrist-watches originating in the USSR, *O.J.*, 16 January 1982, No L 11/14 ; Commission Regulation (EEC) No 3541/82 of 22 December 1982 imposing a provisional anti-dumping duty on imports of natural magnesite, caustic-burned, originating in the People's Republic of China, *O.J.*, 30 December 1982, No L 371/21 ; Commission Regulation (EEC) No 3542/82 of 22 December 1982 imposing a provisional anti-dumping duty on imports of natural magnesite, dead-burned (sintered), originating in the People's Republic of China and in North Korea, *O.J.*, 30 December 1982, No L 371/25 ; Commission Regulation (EEC) No 985/83 of 26 April 1983 imposing a provisional anti-dumping duty on imports of barium chloride originating in the People's Republic of China and the German Democratic Republic, *O.J.*, 27 April 1983, No L 110/11 ; Commission Decision 84/465/EEC of 26 September 1984 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of asbestos-cement corrugated sheets originating in Czechoslovakia and the German Democratic Republic and terminating that proceeding, *O.J.*, 28 September 1984, No L 259/48 ; Commission Decision 86/497/EEC of 7 October 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of silicon carbide originating in the People's Republic of China, Norway, Poland and the USSR, and terminating the investigation regarding imports of that product originating in the People's Republic of China, Norway, Poland, Czechoslovakia, the USSR and Yugoslavia, *O.J.*, 10 October 1986, No L 287/25 ; Council Regulation (EEC) No 29/87 of 22 December 1986 imposing a definitive anti-dumping duty on imports of certain deep freezers originating in the Soviet Union, *O.J.*, 8 January 1987, No L 6/1 ; Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia, *O.J.*, 9 May 1987, No L 121/11 ; Commission Regulation (EEC) No 1696/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 June 1988, No L 151/47 ; Commission Regulation (EEC) No 1745/88 of 21 June 1988 imposing a provisional anti-dumping duty on imports of paracetamol originating in the People's Republic of China, *O.J.*, 22 June 1988, No L 155/29 ; Commission Decision 89/143/EEC of 21 February 1989 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of urea originating in Austria, Hungary, Malaysia or Romania, confirming the undertakings accepted pursuant to Council Regulation (EEC) No 3339/87 and terminating the investigations, *O.J.*, 24 February 1989, No L 52/37 ; Commission Regulation (EEC) No 707/89 of 17 March 1989 imposing a provisional anti-dumping duty on imports of calcium metal originating in the People's Republic of China or the Soviet Union, *O.J.*, 21 March 1989, No L 78/10 ; Commission Regulation (EEC) No 2799/92 of 25 September 1992 imposing a provisional anti-dumping duty on imports of deadburned (sintered) magnesia originating in the People's Republic of China, *O.J.*, 26 September 1992, No L 282/15 ; VERMULST, E.A., and HOOIJER, J.J., «Annotation on Case C-69/89, *Nakajima All Precision Co. v. Council*, Judgment of 7 May 1991, not yet reported ; Case C-358/89, *Extramet v. Council*, Judgment of 16 May 1991, not yet reported ; Case C-49/88, *Al-Jubail Fertilizer Company (Samad) and Saudi Arabian Fertilizer Company (Safco) v. Council*, Judgment of 17 June 1991, not yet reported ; Case C-16/90, *Detlef Nölle v. Hauptzollamt Bremen-Freihafen*, Judgment of 22 October 1991, not yet reported», *Common Market Law Review*, 1992, (380), 402.

If the exporters do not contest in time the choice of the reference country as proposed by the complainants and do not suggest another reference country, the first one will be used as reference without inquiring other possible reference countries, see : C.J.E.C., joined cases C-305/86 and C-160/87, 11 July 1990, *Neotype Techmasheexport GmbH v Commission and Council*, *E.C.R.*, 1990, I, (2945), 2956 (Report for the Hearing : conclusions of the Council) and 2960 (Report for the Hearing : conclusions of the Council).

If no alternative reference country is proposed, the European anti-dumping authorities will retain the reference country originally selected (Council Regulation (EC) No 2557/94 of 19 October 1994 imposing a definitive anti-dumping duty on imports of calcium metal originating in the People's Republic of China and Russia, *O.J.*, 21 October 1994, No L 270/27).

⁵⁷² C.J.E.C., case C-16/90, 22 October 1991, *Eugen Nölle v Hauptzollamt Bremen-Freihafen*, *E.C.R.*, 1991, I, (5163), 5188-5190 (Opinion of Advocate General VAN GERVEN) and 5207 ; VERMULST, E.A., and HOOIJER, J.J., «Annotation on Case C-69/89, *Nakajima All Precision Co. v. Council*, Judgment of 7 May 1991, not yet reported ; Case C-358/89, *Extramet v. Council*, Judgment of 16 May 1991, not yet reported ; Case C-49/88, *Al-Jubail Fertilizer Company (Samad) and Saudi Arabian Fertilizer Company (Safco) v. Council*, Judgment of 17 June 1991, not yet reported ; Case C-16/90, *Detlef Nölle v. Hauptzollamt Bremen-Freihafen*, Judgment of 22 October 1991, not yet reported», *Common Market Law Review*, 1992, (380), 402.

chosen than the one suggested either by the complainants or the exporters and importers⁵⁷³. If

⁵⁷³ Commission Regulation (EEC) No 1579/80 of 19 June 1980 imposing a provisional anti-dumping duty on mechanical alarm clocks originating in the German Democratic Republic and the Soviet Union, and withdrawing a national anti-dumping duty on mechanical alarm clocks originating in China, *O.J.*, 25 June 1980, No L 158/5; Commission Decision 80/600/EEC of 19 June 1980 accepting the undertakings given by Chinese and Czechoslovakian exporters in connection with the anti-dumping proceeding in respect of imports of mechanical alarm clocks originating in China, Czechoslovakia, the German Democratic Republic, Hong-Kong and the USSR, terminating the proceeding in respect of China, Czechoslovakia and Hong-Kong, *O.J.*, 25 June 1980, No L 158/18; Commission Decision 81/247/EEC of 15 April 1981 terminating the anti-dumping procedure concerning imports of hermetic compressors originating in Brazil, Spain, Hungary, Japan and Singapore, *O.J.*, 25 April 1981, No L 113/53; Commission Regulation (EEC) No 871/82 of 14 April 1982 imposing a provisional anti-dumping duty on upright pianos originating in the USSR, *O.J.*, 16 April 1982, No L 101/30 (corrigendum, *O.J.*, 29 April 1982, No L 115/22); Council Decision 82/220/EEC of 14 April 1982 terminating an anti-dumping proceeding in respect of imports of upright pianos originating in Czechoslovakia, the German Democratic Republic and Poland, *O.J.*, 16 April 1982, No L 101/45; Commission Decision 82/398/EEC of 14 June 1982 accepting undertakings given in connection with the anti-dumping procedure concerning cylinder vacuum cleaners originating in Czechoslovakia, the German Democratic Republic and Poland and terminating the procedure, *O.J.*, 18 June 1982, No L 172/47; Commission Regulation (EEC) No 1633/82 of 23 June 1982 imposing a provisional anti-dumping duty on imports of fibre building board (hardboard) originating in Romania, repealing Commission Decision No 80/564/EEC of 4 June 1980 and accepting undertakings in connection with the proceeding in respect of imports of fibre building board from Czechoslovakia, Finland, Hungary, Norway, Poland, Spain, Sweden and the Soviet Union and terminating the proceeding with regard to those countries and Bulgaria, *O.J.*, 25 June 1982, No L 181/19; Commission Decision 82/543/EEC of 6 August 1982 accepting an undertaking given in connection with the anti-dumping proceeding concerning paracetamol (INN) crystals or powder originating in China and terminating the proceeding, *O.J.*, 11 August 1982, No L 236/23; Commission Regulation (EEC) No 348/83 of 10 February 1983 imposing a provisional anti-dumping duty on imports of hexamethylenetetramine originating in the German Democratic Republic and the Soviet Union, and accepting undertakings and terminating the proceeding in respect of imports of hexamethylenetetramine originating in Czechoslovakia and Romania, *O.J.*, 12 February 1983, No L 40/24; Commission Regulation (EEC) No 1631/83 of 15 June 1983 imposing a provisional anti-dumping duty on imports of certain glass textile fibres (rovings) originating in Czechoslovakia, the German Democratic Republic and Japan, accepting a price undertaking from one Japanese exporter and terminating the proceeding in respect of imports of certain glass textile fibres (mats), originating in Czechoslovakia and the German Democratic Republic, *O.J.*, 18 June 1983, No L 160/18; Council Regulation (EEC) No 2786/83 of 3 October 1983 imposing a definitive anti-dumping duty on imports of copper sulphate originating in Czechoslovakia and the USSR, *O.J.*, 7 October 1983, No L 274/1; Commission Decision 83/502/EEC of 10 October 1983 accepting the offer of an undertaking of a Czechoslovakian exporter of copper sulphate, *O.J.*, 13 October 1983, No L 281/22; Commission Decision 84/103/EEC of 23 February 1984 terminating the anti-dumping proceeding concerning imports of non-alloyed unwrought aluminium originating in Norway, Surinam, the Soviet Union and Yugoslavia, *O.J.*, 28 February 1984, No L 57/19; Commission Regulation (EEC) No 2690/84 of 21 September 1984 imposing a provisional anti-dumping duty on imports of artificial corundum originating in the People's Republic of China and Czechoslovakia and terminating the proceeding in respect of imports of artificial corundum originating in Spain and Yugoslavia, *O.J.*, 25 September 1984, No L 255/9; Commission Decision 86/36/EEC of 26 February 1986 accepting undertakings entered into in connection with the anti-dumping proceeding concerning imports into Greece of certain categories of glass originating in Turkey, Yugoslavia, Romania, Bulgaria, Hungary and Czechoslovakia and terminating the investigation, *O.J.*, 28 February 1986, No L 51/73; Commission Decision 86/100/EEC of 15 April 1986 terminating the anti-dumping proceeding concerning imports of ball bearings and tapered roller bearings originating in Poland, Romania and the Soviet Union, *O.J.*, 18 April 1986, No L 102/31; Commission Decision 86/344/EEC of 17 July 1986 terminating the anti-dumping proceeding concerning imports of Portland cement originating in the German Democratic Republic, Poland and Yugoslavia, *O.J.*, 25 July 1986, No L 202/43; Commission Regulation (EEC) No 2800/86 of 9 September 1986 imposing a provisional anti-dumping duty on imports of certain deep freezers originating in the USSR, accepting the undertakings in connection with the investigation of imports of certain deep freezers originating in Yugoslavia or in the German Democratic Republic and terminating the investigation, and terminating the proceeding concerning imports of certain deep freezers, *O.J.*, 11 September 1986, No L 259/14; Commission Decision 86/497/EEC of 7 October 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of silicon carbide originating in the People's Republic of China, Norway, Poland and the USSR, and terminating the investigation regarding imports of that product originating in the People's Republic of China, Norway, Poland, Czechoslovakia, the USSR and Yugoslavia, *O.J.*, 10 October 1986, No L 287/25; Council Regulation (EEC) No 864/87 of 23 March 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union, and definitively collecting the amounts secured as provisional duties, *O.J.*, 27 March 1987, No L 83/1; Commission Regulation (EEC) No 2450/87 of 12 August 1987 imposing a provisional anti-dumping duty on imports of mercury originating in the Union of Soviet Socialist Republics, *O.J.*, 14 August 1987, No L 227/8; Council Regulation (EEC) No 3687/87 of 8 December 1987 imposing a definitive anti-dumping duty on imports of mercury originating in the Soviet Union and definitively collecting the provisional anti-dumping duty imposed on such imports, *O.J.*, 10 December 1987, No L 346/27; Commission Decision 88/623/EEC of 12 December 1988 accepting undertakings given in connection with the anti-dumping review concerning imports of oxalic acid originating in China or Czechoslovakia and terminating the review, *O.J.*, 13 December 1988, No L 343/34; Commission Regulation (EEC) No 3074/89 of 11 October 1989 imposing a provisional anti-dumping duty on imports of welded tubes originating in Yugoslavia and Romania, *O.J.*, 13 October 1989, No L 294/10; Commission Regulation (EEC) No 720/90 of 22 March 1990 imposing a provisional anti-dumping duty on imports of silicon metal originating in the People's Republic of China, *O.J.*, 27 March 1990, No L 80/9; Commission Regulation (EEC) No 762/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungstic oxide and tungstic acid originating in the People's Republic of China, *O.J.*, 30 March 1990, No L 83/29; Commission Regulation (EEC)

that happens, it is usually a country subject to the same or to a similar anti-dumping proceeding⁵⁷⁴ (see : Article 2(7)(a) basic EC Regulation). As a consequence, the fact that a

No 763/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten carbide and fused tungsten carbide originating in the People's Republic of China and terminating the anti-dumping proceeding concerning imports of those products from the Republic of Korea, *O.J.*, 30 March 1990, No L 83/36 ; Commission Decision 90/154/EEC of 26 March 1990 terminating the anti-dumping proceeding concerning imports of ammonium paratungstate originating in the People's Republic of China and the Republic of Korea, *O.J.*, 30 March 1990, No L 83/117 ; Commission Regulation (EEC) No 1034/91 of 23 April 1991 imposing a provisional anti-dumping duty on imports of video tapes in cassettes originating in the People's Republic of China, *O.J.*, 26 April 1991, No L 106/15 ; Commission Decision 91/512/EEC of 25 July 1991 accepting undertakings given in connection with the review of anti-dumping measures concerning imports of artificial corundum originating in the Soviet Union, Hungary, Poland, Czechoslovakia and the People's Republic of China and in connection with the anti-dumping proceeding concerning imports of artificial corundum originating in Brazil and Yugoslavia, and terminating the investigation, *O.J.*, 2 October 1991, No L 275/27.

⁵⁷⁴ Commission Regulation (EEC) No 1579/80 of 19 June 1980 imposing a provisional anti-dumping duty on mechanical alarm clocks originating in the German Democratic Republic and the Soviet Union, and withdrawing a national anti-dumping duty on mechanical alarm clocks originating in China, *O.J.*, 25 June 1980, No L 158/5 ; Commission Decision 80/600/EEC of 19 June 1980 accepting the undertakings given by Chinese and Czechoslovakian exporters in connection with the anti-dumping proceeding in respect of imports of mechanical alarm clocks originating in China, Czechoslovakia, the German Democratic Republic, Hong-Kong and the USSR, terminating the proceeding in respect of China, Czechoslovakia and Hong-Kong, *O.J.*, 25 June 1980, No L 158/18 ; Commission Decision 81/247/EEC of 15 April 1981 terminating the anti-dumping procedure concerning imports of hermetic compressors originating in Brazil, Spain, Hungary, Japan and Singapore, *O.J.*, 25 April 1981, No L 113/53 ; Commission Regulation (EEC) No 1633/82 of 23 June 1982 imposing a provisional anti-dumping duty on imports of fibre building board (hardboard) originating in Romania, repealing Commission Decision No 80/564/EEC of 4 June 1980 and accepting undertakings in connection with the proceeding in respect of imports of fibre building board from Czechoslovakia, Finland, Hungary, Norway, Poland, Spain, Sweden and the Soviet Union and terminating the proceeding with regard to those countries and Bulgaria, *O.J.*, 25 June 1982, No L 181/19 ; Council Regulation (EEC) No 2786/83 of 3 October 1983 imposing a definitive anti-dumping duty on imports of copper sulphate originating in Czechoslovakia and the USSR, *O.J.*, 7 October 1983, No L 274/1 ; Commission Decision 83/502/EEC of 10 October 1983 accepting the offer of an undertaking of a Czechoslovakian exporter of copper sulphate, *O.J.*, 13 October 1983, No L 281/22 ; Commission Decision 84/103/EEC of 23 February 1984 terminating the anti-dumping proceeding concerning imports of non-alloyed unwrought aluminium originating in Norway, Surinam, the Soviet Union and Yugoslavia, *O.J.*, 28 February 1984, No L 57/19 ; Commission Regulation (EEC) No 2690/84 of 21 September 1984 imposing a provisional anti-dumping duty on imports of artificial corundum originating in the People's Republic of China and Czechoslovakia and terminating the proceeding in respect of imports of artificial corundum originating in Spain and Yugoslavia, *O.J.*, 25 September 1984, No L 255/9 ; Commission Decision 86/36/EEC of 26 February 1986 accepting undertakings entered into in connection with the anti-dumping proceeding concerning imports into Greece of certain categories of glass originating in Turkey, Yugoslavia, Romania, Bulgaria, Hungary and Czechoslovakia and terminating the investigation, *O.J.*, 28 February 1986, No L 51/73 ; Commission Decision 86/100/EEC of 15 April 1986 terminating the anti-dumping proceeding concerning imports of ball bearings and tapered roller bearings originating in Poland, Romania and the Soviet Union, *O.J.*, 18 April 1986, No L 102/31 ; Commission Decision 86/344/EEC of 17 July 1986 terminating the anti-dumping proceeding concerning imports of Portland cement originating in the German Democratic Republic, Poland and Yugoslavia, *O.J.*, 25 July 1986, No L 202/43 ; Commission Regulation (EEC) No 2800/86 of 9 September 1986 imposing a provisional anti-dumping duty on imports of certain deep freezers originating in the USSR, accepting the undertakings in connection with the investigation of imports of certain deep freezers originating in Yugoslavia or in the German Democratic Republic and terminating the investigation, and terminating the proceeding concerning imports of certain deep freezers, *O.J.*, 11 September 1986, No L 259/14 ; Commission Decision 86/497/EEC of 7 October 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of silicon carbide originating in the People's Republic of China, Norway, Poland and the USSR, and terminating the investigation regarding imports of that product originating in the People's Republic of China, Norway, Poland, Czechoslovakia, the USSR and Yugoslavia, *O.J.*, 10 October 1986, No L 287/25 ; Council Regulation (EEC) No 864/87 of 23 March 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union, and definitively collecting the amounts secured as provisional duties, *O.J.*, 27 March 1987, No L 83/1 ; Commission Decision 88/623/EEC of 12 December 1988 accepting undertakings given in connection with the anti-dumping review concerning imports of oxalic acid originating in China or Czechoslovakia and terminating the review, *O.J.*, 13 December 1988, No L 343/34 ; Commission Regulation (EEC) No 3074/89 of 11 October 1989 imposing a provisional anti-dumping duty on imports of welded tubes originating in Yugoslavia and Romania, *O.J.*, 13 October 1989, No L 294/10 ; Commission Regulation (EEC) No 762/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungstic oxide and tungstic acid originating in the People's Republic of China, *O.J.*, 30 March 1990, No L 83/29 ; Commission Regulation (EEC) No 763/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten carbide and fused tungsten carbide originating in the People's Republic of China and terminating the anti-dumping proceeding concerning imports of those products from the Republic of Korea, *O.J.*, 30 March 1990, No L 83/36 ; Commission Decision 90/154/EEC of 26 March 1990 terminating the anti-dumping proceeding concerning imports of ammonium paratungstate originating in the People's Republic of China and the Republic of Korea, *O.J.*, 30 March 1990, No L 83/117 ; Commission Decision 91/512/EEC of 25 July 1991 accepting undertakings given in connection with the review of anti-dumping measures concerning imports of artificial corundum originating in the Soviet Union, Hungary, Poland, Czechoslovakia and the People's Republic of China and in connection with the anti-dumping proceeding concerning imports of artificial corundum originating in Brazil and

country is accused of dumping, does not render this country unqualified to be used as reference country⁵⁷⁵. Similarly, the fact that a country is subject to anti-dumping relief, has not prevented that country from being selected as reference country⁵⁷⁶.

The efficient administration of the anti-dumping proceeding⁵⁷⁷ or the principle of non-discrimination⁵⁷⁸ may justify the selection of a ME country - subject to the same anti-dumping proceeding -, as reference country. It is not clear how non-discrimination interferes with the selection of the reference country. The only similarity between the NME country and the reference country is the coincidence that the Community industry has filed an anti-dumping complaint against both these countries. In fact, the application of the principle of non-discrimination as well as the need of efficiently administered proceedings may help the Community industry to manipulate the anti-dumping investigation against NME countries. Indeed,

Yugoslavia, and terminating the investigation, *O.J.*, 2 October 1991, No L 275/27 ; Council Regulation (EEC) No 3017/92 of 19 October 1992 modifying the anti-dumping duties following the review of the anti-dumping measures applicable to imports of synthetic polyester fibres originating in Romania, Taiwan, Turkey and the Republics of Serbia and of Montenegro and the former Yugoslav Republic of Macedonia and terminating the said review in respect of imports of synthetic polyester fibres originating in Mexico and the United States of America, *O.J.*, 22 October 1992, No L 306/1 (corrigendum, *O.J.*, 6 February 1993, No L 30/68).

However, if the information gathered about a ME country in the course of another, though similar anti-dumping proceeding does not relate to the investigation period selected for the anti-dumping proceeding against the NME country and this information cannot be updated, the ME country will not be chosen as reference country (Commission Regulation (EEC) No 1034/91 of 23 April 1991 imposing a provisional anti-dumping duty on imports of video tapes in cassettes originating in the People's Republic of China, *O.J.*, 26 April 1991, No L 106/15).

⁵⁷⁵ Commission Regulation (EEC) No 1633/82 of 23 June 1982 imposing a provisional anti-dumping duty on imports of fibre building board (hardboard) originating in Romania, repealing Commission Decision No 80/564/EEC of 4 June 1980 and accepting undertakings in connection with the proceeding in respect of imports of fibre building board from Czechoslovakia, Finland, Hungary, Norway, Poland, Spain, Sweden and the Soviet Union and terminating the proceeding with regard to those countries and Bulgaria, *O.J.*, 25 June 1982, No L 181/19.

⁵⁷⁶ Council Regulation (EC) No 3664/93 of 22 December 1993 imposing a definitive anti-dumping duty on imports into the Community of photo albums in bookbound form originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 31 December 1993, No L 333/67.

⁵⁷⁷ C.J.E.C., joined cases C-305/86 and C-160/87, 11 July 1990, *Neotype Techmasheexport GmbH v Commission and Council*, *E.C.R.*, 1990, I, (2945), 2978 (Opinion of Advocate General VAN GERVEN) ; Commission Decision 80/564/EEC of 4 June 1980 accepting undertakings in connection with the anti-dumping proceedings concerning imports of fibre building board originating in Czechoslovakia, Finland, Norway, Poland, Romania, Spain, the Soviet Union and Sweden and determining those proceedings, *O.J.*, 11 June 1980, No L 145/39 ; Commission Regulation (EEC) No 1633/82 of 23 June 1982 imposing a provisional anti-dumping duty on imports of fibre building board (hardboard) originating in Romania, repealing Commission Decision No 80/564/EEC of 4 June 1980 and accepting undertakings in connection with the proceeding in respect of imports of fibre building board from Czechoslovakia, Finland, Hungary, Norway, Poland, Spain, Sweden and the Soviet Union and terminating the proceeding with regard to those countries and Bulgaria, *O.J.*, 25 June 1982, No L 181/19 ; Council Decision 83/9/EEC of 17 January 1983 terminating the anti-dumping proceeding concerning imports of codeine and its salts originating in Czechoslovakia, Hungary, Poland and Yugoslavia, *O.J.*, 20 January 1983, No L 16/30 ; Commission Regulation (EEC) No 1479/83 of 7 June 1983 imposing a provisional anti-dumping duty on imports of copper sulphate originating in Czechoslovakia and the USSR, *O.J.*, 9 June 1983, No L 151/24 ; Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia, *O.J.*, 9 May 1987, No L 121/11.

⁵⁷⁸ C.J.E.C., joined cases C-305/86 and C-160/87, 11 July 1990, *Neotype Techmasheexport GmbH v Commission and Council*, *E.C.R.*, 1990, I, (2945), 3004 ; Council Decision 83/9/EEC of 17 January 1983 terminating the anti-dumping proceeding concerning imports of codeine and its salts originating in Czechoslovakia, Hungary, Poland and Yugoslavia, *O.J.*, 20 January 1983, No L 16/30.

the Community industry may file a complaint against a ME country whose different normal value standards exceed the NME country's export prices, anticipating the selection of that ME country as reference country.

The margin of discretion the European anti-dumping authorities enjoy in choosing a reference country, is wide, but not unlimited, as the reference country must be selected in an appropriate and not unreasonable manner⁵⁷⁹. No formal, but material criteria must be applied for determining which ME countries are appropriate and not unreasonable reference countries. The reference country should resemble as much as possible the NME country⁵⁸⁰. The European anti-dumping authorities have refused to establish the resemblance between reference country and NME country on macro-economic indicia, such as level of development, gross national product, rate of inflation, population, division of labour, for reasons of irrelevancy, as there is no direct relationship between them and the cost of production⁵⁸¹. The size of the market, though, is an

⁵⁷⁹ C.J.E.C., joined cases C-305/86 and C-160/87, 11 July 1990, *Neotype Techmasheexport GmbH v Commission and Council*, E.C.R., 1990, I, (2945), 2977 (Opinion of Advocate General VAN GERVEN) and 3001-3002; C.J.E.C., case C-16/90, 22 October 1991, *Eugen Nölle v Hauptzollamt Bremen-Freihafen*, E.C.R., 1991, I, (5163), 5179 (Opinion of Advocate General VAN GERVEN) and 5203; BUCKSCH, G., «Die Angemessenheit bei der Festsetzung des Normalwertes bei Antidumping (Art. 5 EWG-VO Nr. 3017/79)», RIW/AWD, 1983, (839), 841; KRETSCHMER, H., *Das Antidumping- und Antisubventionsrecht der Europäischen Gemeinschaften*, Frankfurt/Main, VWV-Verlag, 1980, 35; VAN BAEL, I., and BELLIS, J.-F., *Anti-Dumping and other Trade Protection Laws of the EEC*, Bicester, CCH Editions, 1990, 68; VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 434; VERMULST, E.A., and GRAAFSMA, F., «A Decade of European Community Anti-Dumping Law and Practice Applicable to Imports from China», *Journal of World Trade*, 1992/3, (5), 17; VERMULST, E.A., and HOIJER, J.J., «Annotation on Case C-69/89, *Nakajima All Precision Co. v. Council*, Judgment of 7 May 1991, not yet reported; Case C-358/89, *Extramet v. Council*, Judgment of 16 May 1991, not yet reported; Case C-49/88, *Al-Jubail Fertilizer Company (Samad) and Saudi Arabian Fertilizer Company (Safco) v. Council*, Judgment of 17 June 1991, not yet reported; Case C-16/90, *Detlef Nölle v. Hauptzollamt Bremen-Freihafen*, Judgment of 22 October 1991, not yet reported», *Common Market Law Review*, 1992, (380), 400.

⁵⁸⁰ C.J.E.C., case C-16/90, 22 October 1991, *Eugen Nölle v Hauptzollamt Bremen-Freihafen*, E.C.R., 1991, I, (5163), 5179-5180 and 5182 (Opinion of Advocate General VAN GERVEN).

⁵⁸¹ Commission Regulation (EEC) No 2402/89 of 31 July 1989 imposing a provisional anti-dumping duty on imports of barium chloride originating in the People's Republic of China or the German Democratic Republic, O.J., 4 August 1989, No L 227/24; Council Regulation (EEC) No 2474/93 of 8 September 1993 imposing a definitive anti-dumping duty on imports into the Community of bicycles originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, O.J., 9 September 1993, No L 228/1. See also: *gum rosin from the People's Republic of China*, the rate of inflation did not (an adjustment was made to take account of the high inflation in the reference country) (Commission Decision 94/82/EC of 10 January 1994 terminating the anti-dumping proceeding concerning imports of gum rosin originating in the People's Republic of China, O.J., 12 February 1994, No L 41/50).

In most anti-dumping cases, the reference country selected has a higher gross national product than the NME country concerned (DENTON, R., «The Non-Market Economy Rules of the European Community's Anti-Dumping and Countervailing Duties Legislation», *International and Comparative Law Quarterly*, 1987, (198), 220; VAN BAEL, I., and BELLIS, J.-F., *Anti-Dumping and other Trade Protection Laws of the EEC*, Bicester, CCH Editions, 1990, 72; VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 435). Indeed, in *refrigerators from the Soviet Union* the argument of the exporter that the purchasing power in the reference country was three times as high as the purchasing power in the non-market economy country, was disregarded (Council Regulation (EEC) No 29/87 of 22 December 1986 imposing a definitive anti-dumping duty on imports of certain deep freezers originating in the Soviet Union, O.J., 8 January 1987, No L 6/1).

However, in some anti-dumping cases the level of development proved to be important:

- in *ferrosilicon from the Soviet Union*, *woven polyolefin bags from the People's Republic of China* and *polyester yarns from the People's Republic of China* the comparable level of development was considered as a positive element (Commission Regulation (EEC) No 2409/87 of 6 August 1987 imposing a provisional anti-dumping duty on imports of ferro-silicon originating in Brazil and accepting undertakings offered by Italmagnesio SA of Brazil and from Promsyrio-Import of the USSR, O.J., 8 August

important factor in the choice of the reference country⁵⁸². However, along with the number of producers in competition⁵⁸³, it is held to indicate whether or not the domestic prices in the

1987, No L 219/24 ; Commission Regulation (EEC) No 2051/90 of 17 July 1990 imposing a temporary anti-dumping duty on imports of woven polyolefin bags originating in the People's Republic of China, *O.J.*, 19 July 1990, No L 187/36 (corrigendum, *O.J.*, 20 September 1990, No L 256/38) ; Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7)

- in *barium chloride from the People's Republic of China and the German Democratic Republic* the difference in the level of development was found to have little or no influence on the manufacture of the product because the labour content was not decisive in fixing costs. Thus, if the labour content is decisive, the difference in the level of development could be important, if not decisive in the selection of the reference country (Commission Regulation (EEC) No 2402/89 of 31 July 1989 imposing a provisional anti-dumping duty on imports of barium chloride originating in the People's Republic of China or the German Democratic Republic, *O.J.*, 4 August 1989, No L 227/24) ;

- in *tungstic oxide and tungstic acid from the People's Republic of China, tungsten carbide and fused tungsten carbide from the People's Republic of China and ammonium paratungstate from the People's Republic of China* the Commission had to choose between Austria and South Korea as possible reference countries. South Korea was chosen because the economies of the People's Republic of China and South Korea were less dissimilar (Commission Regulation (EEC) No 762/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungstic oxide and tungstic acid originating in the People's Republic of China, *O.J.*, 30 March 1990, No L 83/29 ; Commission Regulation (EEC) No 763/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten carbide and fused tungsten carbide originating in the People's Republic of China and terminating the anti-dumping proceeding concerning imports of those products from the Republic of Korea, *O.J.*, 30 March 1990, No L 83/36 ; Commission Decision 90/154/EEC of 26 March 1990 terminating the anti-dumping proceeding concerning imports of ammonium paratungstate originating in the People's Republic of China and the Republic of Korea, *O.J.*, 30 March 1990, No L 83/117) ;

- in *deadburned (sintered) magnesia from the People's Republic of China and magnesium oxide from the People's Republic of China* the level of economic development was one of the reasons for selecting the reference country. In *magnesium oxide from the People's Republic of China* it was even a decisive criterion for choosing another reference country than the one proposed by the complainant Community producers (Commission Regulation (EEC) No 2799/92 of 25 September 1992 imposing a provisional anti-dumping duty on imports of deadburned (sintered) magnesia originating in the People's Republic of China, *O.J.*, 26 September 1992, No L 282/15 ; Commission Regulation (EEC) No 2800/92 of 25 September 1992 imposing a provisional anti-dumping duty on imports of magnesium oxide originating in the People's Republic of China, *O.J.*, 26 September 1992, No L 282/23).

Moreover, in the GATT Committee on Anti-dumping Practices, the representative of the Community held that the standards of living of the NME country are taken into account (*B.I.S.D., Twenty-fourth Supplement*, Geneva, GATT, 1978, consideration 18), an opinion shared by Advocate-General M. DARMON (C.J.E.C., case 264/82, 20 March 1985, *Timex Corporation v Council and Commission*, E.C.R., 1985, 859).

582 Commission Decision 94/82/EC of 10 January 1994 terminating the anti-dumping proceeding concerning imports of gum rosin originating in the People's Republic of China, *O.J.*, 12 February 1994, No L 41/50 ; Council Regulation (EC) No 643/94 of 21 March 1994 amending Regulation (EEC) No 3068/92 in respect of definitive anti-dumping duties on imports of potassium chloride originating in Belarus, Russia and Ukraine, *O.J.*, 24 March 1994, No L 80/1 ; Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries ; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24 ; Commission Regulation (EC) No 1506/94 of 27 June 1994 imposing provisional duties on imports of urea ammonium nitrate solution originating in Bulgaria and Poland, *O.J.*, 30 June 1994, No L 162/16 ; Commission Regulation (EC) No 1648/94 of 6 July 1994 imposing a provisional anti-dumping duty on imports of furazolidone originating in the People's Republic of China, *O.J.*, 8 July 1994, No L 174/4 ; Council Regulation (EC) No 2557/94 of 19 October 1994 imposing a definitive anti-dumping duty on imports of calcium metal originating in the People's Republic of China and Russia, *O.J.*, 21 October 1994, No L 270/27 ; Council Regulation (EC) No 2819/94 of 17 November 1994 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in the People's Republic of China, *O.J.*, 19 November 1994, No L 298/32.

583 See e.g. : Council Regulation (EC) No 643/94 of 21 March 1994 amending Regulation (EEC) No 3068/92 in respect of definitive anti-dumping duties on imports of potassium chloride originating in Belarus, Russia and Ukraine, *O.J.*, 24 March 1994, No L 80/1 ; Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries ; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24 ; Commission Regulation (EC) No 1506/94 of 27 June 1994 imposing provisional duties on imports of urea ammonium nitrate solution originating in Bulgaria and Poland, *O.J.*, 30 June 1994, No L 162/16 ; Commission Regulation (EC) No 1648/94 of 6 July 1994 imposing a provisional anti-dumping duty on imports of furazolidone originating in the People's Republic of China, *O.J.*, 8 July 1994, No L 174/4 ; Council Regulation (EC) No 2819/94 of 17 November 1994 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in the People's Republic of China, *O.J.*, 19 November 1994, No L 298/32.

reference country are governed by normal market forces⁵⁸⁴. Indeed, the European anti-dumping authorities require the market of the reference country to be representative in comparison with the allegedly dumped exports of the NME country, and to be open and competitive as well⁵⁸⁵. The difficult political situation (*e.g.*, civil war or looming civil war in some parts of the country) in the proposed reference country does not prevent this country either from being selected, especially not when there are no other ME countries which would constitute an appropriate and not unreasonable alternative⁵⁸⁶. In the great majority of anti-dumping cases, a sector approach is adopted and the similarity in the level of development of the branch of industry⁵⁸⁷, the product involved⁵⁸⁸, the production processes, including technology and

⁵⁸⁴ Council Regulation (EC) No 643/94 of 21 March 1994 amending Regulation (EEC) No 3068/92 in respect of definitive anti-dumping duties on imports of potassium chloride originating in Belarus, Russia and Ukraine, *O.J.*, 24 March 1994, No L 80/1 ; Commission Regulation (EC) No 1648/94 of 6 July 1994 imposing a provisional anti-dumping duty on imports of furazolidone originating in the People's Republic of China, *O.J.*, 8 July 1994, No L 174/4 ; Council Regulation (EC) No 2819/94 of 17 November 1994 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in the People's Republic of China, *O.J.*, 19 November 1994, No L 298/32.

⁵⁸⁵ See *e.g.* : Council Regulation (EC) No 821/94 of 12 April 1994 imposing a definitive anti-dumping duty on imports of silicon carbide, originating in the People's Republic of China, Poland, the Russian Federation and Ukraine, *O.J.*, 13 April 1994, No L 94/21 ; Commission Regulation (EC) No 892/94 of 21 April 1994 imposing a provisional anti-dumping duty on imports of calcium metal originating in the People's Republic of China and Russia, *O.J.*, 23 April 1994, No L 104/5 ; Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries ; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24 ; Commission Regulation (EC) No 1506/94 of 27 June 1994 imposing provisional duties on imports of urea ammonium nitrate solution originating in Bulgaria and Poland, *O.J.*, 30 June 1994, No L 162/16 ; Commission Decision 94/389/EC of 6 June 1994 terminating the anti-dumping proceeding regarding imports of refined antimony trioxide originating in the People's Republic of China, *O.J.*, 9 July 1994, No L 176/41 ; Commission Regulation (EC) No 3119/94 of 19 December 1994 imposing a provisional anti-dumping duty on imports of ferro-silico-manganese originating in Russia, Ukraine, Brazil and South Africa, *O.J.*, 21 December 1994, No L 330/15.

See, however :

- *furfuraldehyde from the People's Republic of China*, where the market of the suggested reference country was found to be representative in comparison with the allegedly dumped NME exports, but where no imports of the like product into the suggested reference country had been recorded. Nevertheless, the suggested reference country was retained because there were two producers whose size appeared similar to that of the NME producers and whose domestic market prices were in reasonable proportion to production costs, and because the access to raw materials in the reference country was favourable. It seems, however, that the suggested reference country was the only possible one. Indeed, in the other suggested reference country willing to cooperate, there were no imports either and there was but one producer who produced mostly for the captive market (Commission Regulation (EC) No 1783/94 of 18 July 1994 imposing a provisional anti-dumping duty on imports of furfuraldehyde originating in the People's Republic of China, *O.J.*, 21 July 1994, No L 186/11) ;
- *furazolidone from the People's Republic of China*, where the existence high customs duties on imports of the like product in the proposed reference country was considered not to detract from the competitive nature of its market (Council Regulation (EC) No 2674/94 of 31 October 1994 imposing a definitive anti-dumping duty on imports of furazolidone originating in the People's Republic of China and collecting definitively the provisional duty imposed, *O.J.*, 4 November 1994, No L 285/1).

⁵⁸⁶ Commission Regulation (EEC) No 3296/92 of 12 November 1992 imposing a provisional anti-dumping duty on imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in Czechoslovakia, Hungary, Poland and the Republic of Croatia and terminating the anti-dumping proceeding with regard to the Republics of Serbia and of Montenegro, the former Yugoslav Republic of Macedonia, the Republic of Bosnia-Herzegovina and the Republic of Slovenia, *O.J.*, 14 November 1992, No L 328/15.

⁵⁸⁷ Commission Regulation (EEC) No 2317/85 of 12 August 1985 imposing a provisional anti-dumping duty on imports of roller chains for cycles originating in the USSR and the People's Republic of China, *O.J.*, 14 August 1985, No L 217/7 ; Commission Regulation (EEC) No 3798/90 of 21 December 1990 imposing a provisional anti-dumping duty on imports of espadrilles originating in the People's Republic of China, *O.J.*, 28 December 1990, No L 365/25 ; Commission Regulation (EEC) No 1034/91 of 23 April 1991 imposing a provisional anti-dumping duty on imports of video tapes in cassettes originating in the People's Republic of China, *O.J.*, 26 April 1991, No L 106/15 ; Council Regulation (EEC) No 1812/91 of 24 June 1991 imposing a definitive anti-dumping duty on imports of espadrilles originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty, *O.J.*, 28 June 1991, No L 166/1.

technical norms⁵⁸⁹, the scale of production⁵⁹⁰, the access to the main components of the

588 Commission Decision 82/398/EEC of 14 June 1982 accepting undertakings given in connection with the anti-dumping procedure concerning cylinder vacuum cleaners originating in Czechoslovakia, the German Democratic Republic and Poland and terminating the procedure, *O.J.*, 18 June 1982, No L 172/47; Commission Regulation (EEC) No 2690/84 of 21 September 1984 imposing a provisional anti-dumping duty on imports of artificial corundum originating in the People's Republic of China and Czechoslovakia and terminating the proceeding in respect of imports of artificial corundum originating in Spain and Yugoslavia, *O.J.*, 25 September 1984, No L 255/9; Commission Decision 84/650/EEC of 21 December 1984 accepting undertakings and repealing the provisional duty in connection with the anti-dumping investigation concerning imports of artificial corundum originating in the People's Republic of China and Czechoslovakia and terminating the investigation with regard to these countries, *O.J.*, 28 December 1984, No L 340/82; Council Regulation (EEC) No 1306/89 of 11 May 1989 imposing a definitive anti-dumping duty on imports of light sodium carbonate originating in Bulgaria, the German Democratic Republic, Poland and Romania, *O.J.*, 13 May 1989, No L 131/4; Commission Regulation (EEC) No 3074/89 of 11 October 1989 imposing a provisional anti-dumping duty on imports of welded tubes originating in Yugoslavia and Romania, *O.J.*, 13 October 1989, No L 294/10; Council Regulation (EEC) No 385/90 of 12 February 1990 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in Czechoslovakia and definitively collecting the provisional anti-dumping duty imposed on those imports, *O.J.*, 16 February 1990, No L 42/1; Commission Regulation (EEC) No 761/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten ores and concentrates originating in the People's Republic of China, and terminating the proceeding concerning imports originating in Hong Kong, *O.J.*, 30 March 1990, No L 83/23; Commission Regulation (EEC) No 762/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungstic oxide and tungstic acid originating in the People's Republic of China, *O.J.*, 30 March 1990, No L 83/29; Commission Regulation (EEC) No 763/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten carbide and fused tungsten carbide originating in the People's Republic of China and terminating the anti-dumping proceeding concerning imports of those products from the Republic of Korea, *O.J.*, 30 March 1990, No L 83/36; Commission Decision 90/154/EEC of 26 March 1990 terminating the anti-dumping proceeding concerning imports of ammonium paratungstate originating in the People's Republic of China and the Republic of Korea, *O.J.*, 30 March 1990, No L 83/117; Commission Regulation (EEC) No 2051/90 of 17 July 1990 imposing a temporary anti-dumping duty on imports of woven polyolefin bags originating in the People's Republic of China, *O.J.*, 19 July 1990, No L 187/36 (corrigendum, *O.J.*, 20 September 1990, No L 256/38); 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production cost⁵⁹¹, and the level of domestic sales⁵⁹² may be decisive criteria. The Court

United States of America or Yugoslavia, *O.J.*, 17 June 1988, No L 151/47; Council Regulation (EEC) No 3946/88 of 16 December 1988 imposing a definitive anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 December 1988, No L 348/49; Council Regulation (EEC) No 725/89 of 20 March 1989 imposing a definitive anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty on such imports, *O.J.*, 22 March 1989, No L 79/24; Council Regulation (EEC) No 1306/89 of 11 May 1989 imposing a definitive anti-dumping duty on imports of light sodium carbonate originating in Bulgaria, the German Democratic Republic, Poland and Romania, *O.J.*, 13 May 1989, No L 131/4; Commission Regulation (EEC) No 3074/89 of 11 October 1989 imposing a provisional anti-dumping duty on imports of welded tubes originating in Yugoslavia and Romania, *O.J.*, 13 October 1989, No L 294/10; Commission Regulation (EEC) No 1808/92 of 30 June 1992 imposing a provisional anti-dumping duty on imports of ferro-silicon originating in Poland and Egypt, *O.J.*, 3 July 1992, No L 183/8; Commission Regulation (EEC) No 2799/92 of 25 September 1992 imposing a provisional anti-dumping duty on imports of deadburned (sintered) magnesia originating in the People's Republic of China, *O.J.*, 26 September 1992, No L 282/15; Commission Regulation (EEC) No 2800/92 of 25 September 1992 imposing a provisional anti-dumping duty on imports of magnesium oxide originating in the People's Republic of China, *O.J.*, 26 September 1992, No L 282/23; Council Regulation (EEC) No 3017/92 of 19 October 1992 modifying the anti-dumping duties following the review of the anti-dumping measures applicable to imports of synthetic polyester fibres originating in Romania, Taiwan, Turkey and the Republics of Serbia and of Montenegro and the former Yugoslav Republic of Macedonia and terminating the said review in respect of imports of synthetic polyester fibres originating in Mexico and the United States of America, *O.J.*, 22 October 1992, No L 306/1 (corrigendum, *O.J.*, 6 February 1993, No L 30/68); Commission Regulation (EEC) No 3296/92 of 12 November 1992 imposing a provisional anti-dumping duty on imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in Czechoslovakia, Hungary, Poland and the Republic of Croatia and terminating the anti-dumping proceeding with regard to the Republics of Serbia and of Montenegro, the former Yugoslav Republic of Macedonia, the Republic of Bosnia-Herzegovina and the Republic of Slovenia, *O.J.*, 14 November 1992, No L 328/15; Commission Regulation (EEC) No 550/93 of 5 March 1993 imposing a provisional anti-dumping duty on imports of bicycles originating in the People's Republic of China, *O.J.*, 11 March 1993, No L 58/12; Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5; Commission Regulation (EEC) No 2477/93 of 6 September 1993 imposing a provisional anti-dumping duty on imports of certain photo albums originating in the People's Republic of China, *O.J.*, 9 September 1993, No L 228/16; Commission Regulation (EEC) No 2720/93 of 28 September 1993 imposing a provisional anti-dumping duty on imports of isobutanol originating in the Russian Federation, *O.J.*, 2 October 1993, No L 246/12.

591 C.J.E.C., case C-16/90, 22 October 1991, *Eugen Nölle v Hauptzollamt Bremen-Freihafen*, E.C.R., 1991, I, (5163), 5184-5185 (Opinion of Advocate General VAN GERVEN) and 5206; Commission Regulation (EEC) No 1808/92 of 30 June 1992 imposing a provisional anti-dumping duty on imports of ferro-silicon originating in Poland and Egypt, *O.J.*, 3 July 1992, No L 183/8; Commission Regulation (EEC) No 2799/92 of 25 September 1992 imposing a provisional anti-dumping duty on imports of deadburned (sintered) magnesia originating in the People's Republic of China, *O.J.*, 26 September 1992, No L 282/15; Commission Regulation (EEC) No 2800/92 of 25 September 1992 imposing a provisional anti-dumping duty on imports of magnesium oxide originating in the People's Republic of China, *O.J.*, 26 September 1992, No L 282/23; Council Regulation (EEC) No 3017/92 of 19 October 1992 modifying the anti-dumping duties following the review of the anti-dumping measures applicable to imports of synthetic polyester fibres originating in Romania, Taiwan, Turkey and the Republics of Serbia and of Montenegro and the former Yugoslav Republic of Macedonia and terminating the said review in respect of imports of synthetic polyester fibres originating in Mexico and the United States of America, *O.J.*, 22 October 1992, No L 306/1 (corrigendum, *O.J.*, 6 February 1993, No L 30/68); Commission Regulation (EEC) No 3296/92 of 12 November 1992 imposing a provisional anti-dumping duty on imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in Czechoslovakia, Hungary, Poland and the Republic of Croatia and terminating the anti-dumping proceeding with regard to the Republics of Serbia and of Montenegro, the former Yugoslav Republic of Macedonia, the Republic of Bosnia-Herzegovina and the Republic of Slovenia, *O.J.*, 14 November 1992, No L 328/15; Commission Regulation (EEC) No 797/93 of 30 March 1993 imposing a provisional anti-dumping duty on imports of ferro-chrome with a carbon content by weight of max. 0,5 % (low carbon ferro-chrome) originating in Kazakhstan, Russia and Ukraine, *O.J.*, 2 April 1993, No L 80/8; Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5; Commission Regulation (EEC) No 2477/93 of 6 September 1993 imposing a provisional anti-dumping duty on imports of certain photo albums originating in the People's Republic of China, *O.J.*, 9 September 1993, No L 228/16; Commission Decision No 67/94/ECSC of 12 January 1994 imposing a provisional anti-dumping duty on imports into the Community of hematite pig iron, originating in Brazil, Poland, Russia and Ukraine, *O.J.*, 15 January 1994, No L 12/5; Commission Decision 94/82/EC of 10 January 1994 terminating the anti-dumping proceeding concerning imports of gum rosin originating in the People's Republic of China, *O.J.*, 12 February 1994, No L 41/50; Council Regulation (EC) No 821/94 of 12 April 1994 imposing a definitive anti-dumping duty on imports of silicon carbide, originating in the People's Republic of China, Poland, the Russian Federation and Ukraine, *O.J.*, 13 April 1994, No L 94/21; Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24; Commission Regulation (EC) No 1506/94 of 27 June 1994 imposing provisional duties on imports of urea ammonium nitrate solution originating in Bulgaria and Poland, *O.J.*, 30 June 1994, No L 162/16; Commission Regulation (EC) No 3119/94 of 19 December 1994 imposing a provisional anti-dumping duty on imports of ferro-silico-manganese originating in Russia, Ukraine, Brazil and South Africa, *O.J.*, 21 December 1994, No L 330/15.

of Justice agrees in principle with this approach⁵⁹³, but considers major differences on the macro-economic level liable to render the selection of the reference country inappropriate and unreasonable⁵⁹⁴. The Court further holds that, in principle, the size of the domestic market is not a factor capable of being taken into consideration in the choice of a reference country, insofar as there is a sufficient number of transactions to ensure the representative nature of the market in relation to the allegedly dumped exports of the NME country. In this respect, the Court has recalled European anti-dumping law which sets the minimum level of representativity of the market at 5 % of the allegedly dumped exports to the Community⁵⁹⁵. The sector approach is, nevertheless, to be preferred to the general macro-economic approach : similar macro-economic elements do not always imply that specific industrial sectors face a comparable production structure and production scale⁵⁹⁶. Factors, such as the size of the market and the number of competitors, therefore, are acceptable only insofar as they are used in order to determine whether the domestic prices of the reference country are governed by normal market forces.

The criterion of the similarity in the product involved should be decisive for European anti-dumping law explicitly states that normal value must be determined on the basis of the prices or costs of the *like* product in the reference country (Articles 1(2) and 2(7) basic EC Regulation ;

⁵⁹² Commission Regulation (EEC) No 2720/93 of 28 September 1993 imposing a provisional anti-dumping duty on imports of isobutanol originating in the Russian Federation, *O.J.*, 2 October 1993, No L 246/12.

⁵⁹³ C.J.E.C., case C-16/90, 22 October 1991, *Eugen Nölle v Hauptzollamt Bremen-Freihafen*, *E.C.R.*, 1991, I, (5163), 5203-5207.

⁵⁹⁴ The Court of Justice has held that, in principle, the size of the domestic market is not a factor liable of being taken into consideration in the choice of the reference country. It, nevertheless, considered that the fact that the reference country's total production represents less than 5 % of the allegedly dumping country's exports to the Community, amounts to an indication that the market of the reference country is not very representative (C.J.E.C., joined cases C-305/86 and C-160/87, 11 July 1990, *Neotype Techmashexport GmbH v Commission and Council*, *E.C.R.*, 1990, I, (2945), 3001 ; C.J.E.C., case C-16/90, 22 October 1991, *Eugen Nölle v Hauptzollamt Bremen-Freihafen*, *E.C.R.*, 1991, I, (5163), 5182-5183 (Opinion of Advocate General VAN GERVEN) and 5205)

⁵⁹⁵ C.J.E.C., joined cases C-305/86 and C-160/87, 11 July 1990, *Neotype Techmashexport GmbH v Commission and Council*, *E.C.R.*, 1990, I, (2945), 3001 ; C.J.E.C., case C-16/90, 22 October 1991, *Eugen Nölle v Hauptzollamt Bremen-Freihafen*, *E.C.R.*, 1991, I, (5163), 5205.

⁵⁹⁶ KRETSCHMER, H., *Das Antidumping- und Antisubventionsrecht der Europäischen Gemeinschaften*, Frankfurt/Main, VWV-Verlag, 1980, 35 ; SPAK, G.J., « *Georgetown Steel Corp v. United States : Applying the Countervailing Duty Law to Imports from Nonmarket Economy Countries* », *Law and Policy in International Business*, 1986, (313), 330-331 ; VERMULST, E.A., « *Dumping in the United States and the European Community : A Comparative Analysis* », *Legal Issues of European Integration*, 1984/2, (103), 110 ; VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 435 ; VERMULST, E.A., and HOOIJER, J.J., « *Annotation on Case C-69/89, Nakajima All Precision Co. v. Council*, Judgment of 7 May 1991, not yet reported ; Case C-358/89, *Extramet v. Council*, Judgment of 16 May 1991, not yet reported ; Case C-49/88, *Al-Jubail Fertilizer Company (Samad) and Saudi Arabian Fertilizer Company (Safco) v. Council*, Judgment of 17 June 1991, not yet reported ; Case C-16/90, *Detlef Nölle v. Hauptzollamt Bremen-Freihafen*, Judgment of 22 October 1991, not yet reported », *Common Market Law Review*, 1992, (380), 401 ; VERMULST, E.A., and GRAAFSMA, F., « *A Decade of European Community Anti-Dumping Law and Practice Applicable to Imports from China* », *Journal of World Trade*, 1992/3, (6), 18.

Admittedly, production costs may be higher in countries with a higher level of development (VERMULST, E.A., and GRAAFSMA, F., « *A Decade of European Community Anti-Dumping Law and Practice Applicable to Imports from China* », *Journal of World Trade*, 1992/3, (6), 19). Perhaps the European anti-dumping authorities have taken into account the level of development (*supra*, 207-208, note 581) when differences in level of development result in differences in production costs.

Article 2(5) basic ECSC Decision)⁵⁹⁷. However, none of those criteria, not even the similarity of the product involved, are necessarily decisive in the selection of the reference country. They may outweigh each other⁵⁹⁸. It is also possible that they are counterbalanced by the domestic market price in the reference country being lower than the prices in another ME country and in the Community⁵⁹⁹.

⁵⁹⁷ C.J.E.C., case 264/82, 20 March 1985, *Timex Corporation v Council and Commission*, E.C.R., 1985, (849), 859 (Opinion of Advocate General DARMON); C.J.E.C., joined cases C-305/86 and C-160/87, 11 July 1990, *Neotype Techmasexport GmbH v Commission and Council*, E.C.R., 1990, I, (2945), 2957 (Report for the Hearing : conclusions of the Commission).

⁵⁹⁸ The following elements have been outweighed by the other criteria :

- the similarity in the product involved (Commission Decision 89/143/EEC of 21 February 1989 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of urea originating in Austria, Hungary, Malaysia or Romania, confirming the undertakings accepted pursuant to Council Regulation (EEC) No 3339/87 and terminating the investigations, *O.J.*, 24 February 1989, No L 52/37);
- the similarity in production processes (C.J.E.C., case 264/82, 20 March 1985, *Timex Corporation v Council and Commission*, E.C.R., 1985, 859 (opinion of Advocate-General M. DARMON); Council Regulation (EEC) No 2347/87 of 23 July 1987 imposing a definitive anti-dumping duty on mechanical wrist-watches originating in the USSR, *O.J.*, 4 August 1987, No L 213/5);
- the similarity in production scale (Council Regulation (EEC) No 725/89 of 20 March 1989 imposing a definitive anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty on such imports, *O.J.*, 22 March 1989, No L 79/24).

⁵⁹⁹ Council Regulation (EEC) No 2512/87 of 18 August 1987 amending Regulation (EEC) No 2786/83 imposing a definitive anti-dumping duty on imports of copper sulphate originating in Czechoslovakia and the USSR, *O.J.*, 20 August 1987, No L 235/18 (corrigendum, *O.J.*, 9 September 1987, No L 259/7).

In several anti-dumping cases, the reference country has been selected, because it has a lower domestic market price than an alternative reference country, see : Council Regulation (EEC) No 2786/83 of 3 October 1983 imposing a definitive anti-dumping duty on imports of copper sulphate originating in Czechoslovakia and the USSR, *O.J.*, 7 October 1983, No L 274/1 ; Commission Decision 83/502/EEC of 10 October 1983 accepting the offer of an undertaking of a Czechoslovakian exporter of copper sulphate, *O.J.*, 13 October 1983, No L 281/22 ; Commission Regulation (EEC) No 3578/83 of 15 December 1983 imposing a provisional anti-dumping duty on imports of choline chloride originating in the German Democratic Republic and Romania, *O.J.*, 20 December 1983, No L 356/12 ; Commission Regulation (EEC) No 2495/86 of 1 August 1986 imposing a provisional anti-dumping duty on imports of potassium permanganate originating in Czechoslovakia, the German Democratic Republic and the People's Republic of China, *O.J.*, 5 August 1986, No L 217/12 ; Commission Decision 87/443/EEC of 30 July 1987 amending an undertaking and accepting an undertaking given in connection with the anti-dumping review investigation concerning imports of copper sulphate originating in Poland and the USSR respectively, and terminating the investigation as it concerns these countries, *O.J.*, 20 August 1987, No L 235/22.

The low domestic market prices must result from normal competition. If the low domestic market prices are influenced by low-priced imports, the ME country will not be selected as reference country, see : Commission Decision 82/881/EEC of 23 December 1982 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of perchlorethylene originating in Czechoslovakia, Romania, Spain and the United States of America and terminating that proceeding, *O.J.*, 30 December 1982, No L 371/47.

Since the European anti-dumping authorities select as reference country a country with the lowest domestic market price, a country which is one of the most efficient in the world⁶⁰⁰, one in which production costs are lower than the production costs in the NME country⁶⁰¹, one which has a comparative advantage (e.g., the availability, the quality and the price of the inputs and production factors⁶⁰²) or one which enjoys economies of scale⁶⁰³, NME countries are

⁶⁰⁰ Commission Decision 80/564/EEC of 4 June 1980 accepting undertakings in connection with the anti-dumping proceedings concerning imports of fibre building board originating in Czechoslovakia, Finland, Norway, Poland, Romania, Spain, the Soviet Union and Sweden and determining those proceedings, *O.J.*, 11 June 1980, No L 145/39; Commission Regulation (EEC) No 1633/82 of 23 June 1982 imposing a provisional anti-dumping duty on imports of fibre building board (hardboard) originating in Romania, repealing Commission Decision No 80/564/EEC of 4 June 1980 and accepting undertakings in connection with the proceeding in respect of imports of fibre building board from Czechoslovakia, Finland, Hungary, Norway, Poland, Spain, Sweden and the Soviet Union and terminating the proceeding with regard to those countries and Bulgaria, *O.J.*, 25 June 1982, No L 181/19; Commission Regulation (EEC) No 1613/83 of 15 June 1983 imposing a provisional anti-dumping duty on imports of unwrought nickel, not alloyed, in the form of cathodes produced by electrolysis, either uncut or cut into squares, originating in the Soviet Union, *O.J.*, 17 June 1983, No L 159/43; Commission Decision 84/103/EEC of 23 February 1984 terminating the anti-dumping proceeding concerning imports of non-alloyed unwrought aluminium originating in Norway, Surinam, the Soviet Union and Yugoslavia, *O.J.*, 28 February 1984, No L 57/19; Commission Regulation (EEC) No 761/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten ores and concentrates originating in the People's Republic of China, and terminating the proceeding concerning imports originating in Hong Kong, *O.J.*, 30 March 1990, No L 83/23; Commission Regulation (EEC) No 762/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungstic oxide and tungstic acid originating in the People's Republic of China, *O.J.*, 30 March 1990, No L 83/29; Commission Decision 90/154/EEC of 26 March 1990 terminating the anti-dumping proceeding concerning imports of ammonium paratungstate originating in the People's Republic of China and the Republic of Korea, *O.J.*, 30 March 1990, No L 83/117. See also: Commission Regulation (EEC) No 3798/90 of 21 December 1990 imposing a provisional anti-dumping duty on imports of espadrilles originating in the People's Republic of China, *O.J.*, 28 December 1990, No L 365/25; Commission Regulation (EEC) No 1808/92 of 30 June 1992 imposing a provisional anti-dumping duty on imports of ferro-silicon originating in Poland and Egypt, *O.J.*, 3 July 1992, No L 183/8; Council Regulation (EC) No 3359/93 of 2 December 1993 imposing amended anti-dumping measures on imports of ferro-silicon originating in Russia, Kazakhstan, Ukraine, Iceland, Norway, Sweden, Venezuela and Brazil, *O.J.*, 9 December 1993, No L 302/1.

⁶⁰¹ Commission Regulation (EC) No 892/94 of 21 April 1994 imposing a provisional anti-dumping duty on imports of calcium metal originating in the People's Republic of China and Russia, *O.J.*, 23 April 1994, No L 104/5.

⁶⁰² C.J.E.C., case C-16/90, 22 October 1991, *Eugen Nölle v Hauptzollamt Bremen-Freihafen*, *E.C.R.*, 1991, I, (5163), 5184-5185 (Opinion of Advocate General VAN GERVEN) and 5205; Council Regulation (EEC) No 407/80 of 18 February 1980 imposing a definitive anti-dumping duty on certain sodium carbonate originating in the Soviet Union, *O.J.*, 22 February 1980, No L 48/1; Commission Regulation (EEC) No 871/82 of 14 April 1982 imposing a provisional anti-dumping duty on upright pianos originating in the USSR, *O.J.*, 16 April 1982, No L 101/30 (corrigendum, *O.J.*, 29 April 1982, No L 115/22); Council Decision 82/220/EEC of 14 April 1982 terminating an anti-dumping proceeding in respect of imports of upright pianos originating in Czechoslovakia, the German Democratic Republic and Poland, *O.J.*, 16 April 1982, No L 101/45; Commission Regulation (EEC) No 348/83 of 10 February 1983 imposing a provisional anti-dumping duty on imports of hexamethylenetetramine originating in the German Democratic Republic and the Soviet Union, and accepting undertakings and terminating the proceeding in respect of imports of hexamethylenetetramine originating in Czechoslovakia and Romania, *O.J.*, 12 February 1983, No L 40/24; Commission Decision 84/129/EEC of 6 March 1984 terminating the anti-dumping proceeding concerning imports of caustic-burned natural magnesite originating in the People's Republic of China, *O.J.*, 8 March 1984, No L 66/32; Commission Decision 86/497/EEC of 7 October 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of silicon carbide originating in the People's Republic of China, Norway, Poland and the USSR, and terminating the investigation regarding imports of that product originating in the People's Republic of China, Norway, Poland, Czechoslovakia, the USSR and Yugoslavia, *O.J.*, 10 October 1986, No L 287/25; Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia, *O.J.*, 9 May 1987, No L 121/11; Council Regulation (EEC) No 1306/89 of 11 May 1989 imposing a definitive anti-dumping duty on imports of light sodium carbonate originating in Bulgaria, the German Democratic Republic, Poland and Romania, *O.J.*, 13 May 1989, No L 131/4; Commission Regulation (EEC) No 3074/89 of 11 October 1989 imposing a provisional anti-dumping duty on imports of welded tubes originating in Yugoslavia and Romania, *O.J.*, 13 October 1989, No L 294/10; Commission Regulation (EEC) No 2581/93 of 20 September 1993 imposing provisional anti-dumping duties on imports of ferro-silicon originating in South Africa and the People's Republic of China, *O.J.*, 22 September 1993, No L 237/2; Council Regulation (EC) No 3359/93 of 2 December 1993 imposing amended anti-dumping measures on imports of ferro-silicon originating in Russia, Kazakhstan, Ukraine, Iceland, Norway, Sweden, Venezuela and Brazil, *O.J.*, 9 December 1993, No L 302/1; Commission Regulation (EC) No 1783/94 of 18 July 1994 imposing a provisional anti-dumping duty on imports of furfuraldehyde originating in the People's Republic of China, *O.J.*, 21 July 1994, No L 186/11.

favoured. The same applies when they do not select a ME country as reference country because of its too high prices, production costs and wages⁶⁰⁴. Indeed, the lower the domestic market price of the reference country, the lower the normal value and, thus, the dumping margin of the NME country. The more efficient the reference country, the smaller the probability that NME countries are held liable for dumping⁶⁰⁵. The Court of Justice seems to approve the European anti-dumping authorities' case law in this respect, as it considered the fact that the domestic market prices of the selected reference country were lower than those of an alternative reference country, to prove or, at least, to sustain the appropriateness and the reasonableness of the choice

The comparative advantage must originate in the normal functioning of the market. Therefore, if the comparative advantage, e.g., low input prices, is caused by governmental price controls, it will be an element for not selecting the ME country in question as reference country, see : Commission Decision 83/248/EEC of 24 May 1983 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of polyethylene originating in the Soviet Union, the German Democratic Republic, Czechoslovakia and Poland and terminating that proceeding, *O.J.*, 27 May 1983, No L 138/65.

603 In several anti-dumping cases reference was made to the scale of production in absolute terms ; a comparison between the scale of production in the reference country and the scale of production in the NME country concerned was not made. The reference made to the absolute instead of the relative size of the production scale may indicate that economies of scale are taken into account as a favourable element in selecting the reference country : if economies of scale are positive, a large scale of production is in the favour of the NME country for the combination of positive economies of scale and a large production scale leads to a more efficient production. See : Commission Regulation (EEC) No 2599/79 of 22 November 1979 imposing a provisional anti-dumping duty on certain sodium carbonate originating in the Soviet Union, *O.J.*, 24 November 1979, No L 297/12 ; Council Regulation (EEC) No 191/80 of 29 January 1980 imposing a definitive anti-dumping duty on lithium hydroxide originating in the United States of America and the Soviet Union, *O.J.*, 30 January 1980, No L 23/19 (corrigendum, *O.J.*, 8 February 1980, No L 31/23) ; Council Regulation (EEC) No 407/80 of 18 February 1980 imposing a definitive anti-dumping duty on certain sodium carbonate originating in the Soviet Union, *O.J.*, 22 February 1980, No L 48/1 ; Commission Regulation (EEC) No 724/82 of 30 March 1982 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0.75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Poland, Romania and the USSR, and terminating the proceeding in respect of imports of said products originating in Hungary, *O.J.*, 31 March 1982, No L 85/9 ; Commission Regulation (EEC) No 2667/82 of 4 October 1982 imposing a provisional anti-dumping duty on imports of certain sodium carbonate originating in Bulgaria, the German Democratic Republic, Poland, Romania and the Soviet Union, *O.J.*, 6 October 1982, No L 283/9 ; Commission Regulation (EEC) No 3541/82 of 22 December 1982 imposing a provisional anti-dumping duty on imports of natural magnesite, caustic-burned, originating in the People's Republic of China, *O.J.*, 30 December 1982, No L 371/21 ; Commission Regulation (EEC) No 3542/82 of 22 December 1982 imposing a provisional anti-dumping duty on imports of natural magnesite, dead-burned (sintered), originating in the People's Republic of China and in North Korea, *O.J.*, 30 December 1982, No L 371/25 ; Commission Regulation (EEC) No 348/83 of 10 February 1983 imposing a provisional anti-dumping duty on imports of hexamethylenetetramine originating in the German Democratic Republic and the Soviet Union, and accepting undertakings and terminating the proceeding in respect of imports of hexamethylenetetramine originating in Czechoslovakia and Romania, *O.J.*, 12 February 1983, No L 40/24 ; Commission Regulation (EEC) No 1631/83 of 15 June 1983 imposing a provisional anti-dumping duty on imports of certain glass textile fibres (rovings) originating in Czechoslovakia, the German Democratic Republic and Japan, accepting a price undertaking from one Japanese exporter and terminating the proceeding in respect of imports of certain glass textile fibres (mats), originating in Czechoslovakia and the German Democratic Republic, *O.J.*, 18 June 1983, No L 160/18 ; Commission Regulation (EEC) No 2317/85 of 12 August 1985 imposing a provisional anti-dumping duty on imports of roller chains for cycles originating in the USSR and the People's Republic of China, *O.J.*, 14 August 1985, No L 217/7 ; Council Regulation (EEC) No 2512/87 of 18 August 1987 amending Regulation (EEC) No 2786/83 imposing a definitive anti-dumping duty on imports of copper sulphate originating in Czechoslovakia and the USSR, *O.J.*, 20 August 1987, No L 235/18 (corrigendum, *O.J.*, 9 September 1987, No L 259/7).

604 Commission Regulation (EEC) No 3296/92 of 12 November 1992 imposing a provisional anti-dumping duty on imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in Czechoslovakia, Hungary, Poland and the Republic of Croatia and terminating the anti-dumping proceeding with regard to the Republics of Serbia and of Montenegro, the former Yugoslav Republic of Macedonia, the Republic of Bosnia-Herzegovina and the Republic of Slovenia, *O.J.*, 14 November 1992, No L 328/15.

605 This will be the case if the notion «efficiency» refers to the ability to produce at lower costs. In European anti-dumping case law, though, the inefficiency of the producer in the reference country was held not to be relevant because, in the absence of profitable sales, normal value would be constructed on the basis of his production cost, plus an amount for general expenses and a reasonable profit margin (Council Regulation (EC) No 2674/94 of 31 October 1994 imposing a definitive anti-dumping duty on imports of furazolidone originating in the People's Republic of China and collecting definitively the provisional duty imposed, *O.J.*, 4 November 1994, No L 285/1). Clearly, if that producer was actually inefficient, the very use of his production costs would have caused more a problem than the use of his (unprofitable) domestic market prices.

of the reference country⁶⁰⁶. It likewise did not accept the appropriateness and the reasonableness of the selection of the reference country, when there were reasons to believe that the chosen reference country had a comparative disadvantage vis-à-vis the allegedly dumping NME country⁶⁰⁷. Criteria such as the lowest domestic market price and comparative advantages, though, are not a basis for an appropriate and reasonable selection of the reference country. For NME countries often will not be found dumping merely because they are less efficient than the selected reference country, whereas other NME countries may be found dumping merely because of their high efficiency. From a legal point of view, it might be argued that the dumping practices of the NME countries themselves should be investigated and that NME countries should not be punished for being more efficient.

2.3.4. Selection of the normal value standard⁶⁰⁸

Under EC anti-dumping law, the European anti-dumping authorities are entirely free in choosing between the various normal value standards. Under ECSC anti-dumping law, though, the normal value standard must be selected in an appropriate and not unreasonable manner (Article 2(5) basic ECSC Decision). In view of the vague notions «appropriate» and «not unreasonable», the ECSC anti-dumping authorities seem to enjoy a wide margin of discretion. They seem to be able to choose freely either the domestic market price, the export price or the constructed value as normal value standard. However, the Court of Justice has held that the domestic market price prevailing in the reference country must be taken in the first instance, since the constructed value is only a substitute to which recourse must be had when it would be unreasonable in the circumstances to use the domestic market price⁶⁰⁹.

⁶⁰⁶ C.J.E.C., joined cases C-305/86 and C-160/87, 11 July 1990, *Neotype Techmashexport GmbH v Commission and Council*, E.C.R., 1990, I, (2945), 3002. See also : C.J.E.C., case C-16/90, 22 October 1991, *Eugen Nölle v Hauptzollamt Bremen-Freihafen*, E.C.R., 1991, I, (5163), 5207, where the Court of Justice considered the choice of the reference country as not being appropriate and reasonable because its domestic market prices were higher than the prices charged by the Community producers.

⁶⁰⁷ C.J.E.C., case C-16/90, 22 October 1991, *Eugen Nölle v Hauptzollamt Bremen-Freihafen*, E.C.R., 1991, I, (5163), 5206.

⁶⁰⁸ With the exception of basic prices and normal value on the basis of the facts available.

⁶⁰⁹ C.J.E.C., joined cases 294/86 and 77/87, 5 October 1988, *Technointorg v Commission and Council*, E.C.R., 1988, (6077), 6113-6114; C.J.E.C., joined cases C-320/86 and C-188/87, 11 July 1990, *Stanko France v Commission and Council*, E.C.R., 1990, I, (3013), 3014. See also : C.J.E.C., case C-323/88, 11 July 1990, *SA Sermes v Directeur des services des douanes de Strasbourg*, E.C.R., 1990, I, (3027), 3051.

European anti-dumping case law is in conformity with the Court's judgements, as it reveals a clear preference for the domestic market price⁶¹⁰, which may result in the choice of another reference country if the initially proposed country has no «representative prices»⁶¹¹. European anti-dumping case law does not define the concept «representative prices», though, in several

⁶¹⁰ Council Regulation (EC) No 721/94 of 29 March 1994 imposing a definitive anti-dumping duty on isobutanol originating in the Russian Federation, *O.J.*, 31 March 1994, No L 87/3; BUHART, J., «Le régime communautaire de l'antidumping: vingt ans d'expérience», *Revue Trimestrielle de Droit Européen*, 1988, (253), 264; BRIET, L.A.E., «Antidumping in de EEG - De kinderschoenen ontgroeid?», *S.E.W.*, 1982, (145), 149; DENTON, R., «The Non-Market Economy Rules of the European Community's Anti-Dumping and Countervailing Duties Legislation», *International and Comparative Law Quarterly*, 1987, (198), 212; DIDIER, P., «Deux années d'application du nouveau règlement de la CEE», *Cahiers de Droit Européen*, 1982, (21), 33; FINE, F.L., «EEC Antidumping: The Problem of Imports from State-Trading Countries», *Law and Policy in International Business*, 1988, (91), 102; GJSLTRA, D.J., «Anti-Dumping Policy of the EEC in Practice», in *Protectionism and the European Community. Import Relief Measures taken by the European Economic Community and the Member States, and the Legal Remedies Available to Private Parties*, VÖLKER, E.L.M. (ed.), Deventer, Kluwer, 1983, (147), 158; VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 437.

⁶¹¹ Commission Decision 81/247/EEC of 15 April 1981 terminating the anti-dumping procedure concerning imports of hermetic compressors originating in Brazil, Spain, Hungary, Japan and Singapore, *O.J.*, 25 April 1981, No L 113/53. See also: Council Regulation (EEC) No 1306/89 of 11 May 1989 imposing a definitive anti-dumping duty on imports of light sodium carbonate originating in Bulgaria, the German Democratic Republic, Poland and Romania, *O.J.*, 13 May 1989, No L 131/4, where the choice of the reference country was *inter alia* supported by the fact that sales on the domestic market of the reference country were big enough to be used as reference basis. Indeed, the producers of the reference country sold virtually their entire output on their domestic market.

The same idea underlies the rejection of the proposed reference country because of the limited number of competitors and the protection of that country's domestic market by high import duties, as well as the acceptance of the proposed reference country because a sufficient number of competitors is present on that country's domestic market to ensure the existence of a competitive market (Commission Regulation (EEC) No 2720/93 of 28 September 1993 imposing a provisional anti-dumping duty on imports of isobutanol originating in the Russian Federation, *O.J.*, 2 October 1993, No L 246/12). Indeed, when there is sufficient competition on the reference country's domestic market, its domestic market prices will be applied as normal value standard and will, thus, be representative (*infra*, 227-228).

Similarly, a suggested reference country has been rejected because its domestic price of the main raw material for the production of the dumped product was governed by official regulations as a result of which the cost price of that raw material was significantly lower than the price of substitute raw materials on which the European producers and the dumping exporters relied (Commission Decision 83/248/EEC of 24 May 1983 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of polyethylene originating in the Soviet Union, the German Democratic Republic, Czechoslovakia and Poland and terminating that proceeding, *O.J.*, 27 May 1983, No L 138/65). Probably, because of the effect of those low prices of the raw material on the prices of the dumped product, the domestic market prices of the suggested reference country were considered not to be representative.

In explaining its choice of reference country, the Commission has also advanced the fact that for both proposed reference countries the constructed value had to be used (Commission Decision 90/154/EEC of 26 March 1990 terminating the anti-dumping proceeding concerning imports of ammonium paratungstate originating in the People's Republic of China and the Republic of Korea, *O.J.*, 30 March 1990, No L 83/117).

cases, the domestic market price has been used because it was «representative»⁶¹². Whereas domestic market prices have been retained as normal value standard because they were made in the ordinary course of trade⁶¹³, the notion «representativeness» probably also refers to sales made in the ordinary course of trade. Indeed, all the aspects of the concept «ordinary course of trade» have been relied upon, regarding the choice of the normal value standard :

- domestic market prices are used, if the quantity sold on the domestic market of the reference country is representative or represents the major part of the quantity produced⁶¹⁴. As for ME countries, the 5 %

612 Commission Regulation (EEC) No 451/80 of 22 February 1980 imposing a provisional anti-dumping duty on imports of standardized electric multi-phase motors having an output of more than 0.75 kW but not more than 75 kW, originating in the USSR, *O.J.*, 27 February 1980, No L 53/15 ; Commission Decision 80/252/EEC of 22 February 1980 accepting undertakings given by exporters in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and Romania in connection with the anti-dumping proceeding concerning imports of standardized electric multi-phase motors having an output of more than 0.75 kW but not more than 75 kW, originating in those countries, and terminating the procedure in respect of them, *O.J.*, 27 February 1980, No L 53/21 ; Commission Decision 80/410/EEC of 10 April 1980 accepting undertakings given in connection with the anti-dumping proceedings concerning certain filament lamps for lighting exceeding 28 volts, originating in Czechoslovakia, the German Democratic Republic, Hungary and Poland, and terminating those proceedings, *O.J.*, 15 April 1980, No L 97/59 ; Commission Decision 80/462/EEC of 29 April 1980 accepting undertakings given in connection with the anti-dumping proceedings concerning certain car tyres originating in Czechoslovakia, the German Democratic Republic, Romania and Yugoslavia and terminating those proceedings, *O.J.*, 1 May 1980, No L 113/70 ; Council Regulation (EEC) No 1560/80 of 20 June 1980 concerning the definitive collection of the provisional anti-dumping duty imposed on imports of standardized electric multi-phase motors having an output of more than 0.75 kW but not more than 75 kW, originating in the USSR, *O.J.*, 21 June 1980, No L 153/45 ; Commission Decision 80/599/EEC of 19 June 1980 accepting undertakings in connection with the anti-dumping proceeding concerning imports of standardized electric multi-phase motors having an output of more than 0.75 kW but not more than 75 kW, originating in the USSR and terminating that proceeding, *O.J.*, 21 June 1980, No L 153/48 ; Commission Decision 80/875/EEC of 17 September 1980 accepting undertakings given by Romanian exporters in connection with the anti-dumping proceeding concerning imports of certain tubes of iron or steel originating in that country, and terminating that proceeding, *O.J.*, 20 September 1980, No L 249/24 (corrigendum, *O.J.*, 7 October 1980, No L 263/8) ; Commission Regulation (EEC) No 724/82 of 30 March 1982 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0.75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Poland, Romania and the USSR, and terminating the proceeding in respect of imports of said products originating in Hungary, *O.J.*, 31 March 1982, No L 85/9 ; Commission Regulation (EEC) No 2568/82 of 17 September 1982 imposing a provisional anti-dumping duty on imports of polyvinyl chloride resins and compounds originating in Czechoslovakia, and accepting undertakings and terminating the proceeding in respect of imports of such products originating in Romania, the German Democratic Republic and Hungary, *O.J.*, 24 September 1982, No L 274/15.

613 Council Regulation (EC) No 721/94 of 29 March 1994 imposing a definitive anti-dumping duty on isobutanol originating in the Russian Federation, *O.J.*, 31 March 1994, No L 87/3.

614 In *certain angles, shapes and sections of iron or steel originating in Romania* (Commission Decision 84/182/EEC of 23 March 1984 accepting an undertaking offered in connection with an anti-dumping proceeding concerning imports of certain iron or steel angles, shapes and sections originating in Romania, and terminating that proceeding, *O.J.*, 27 March 1984, No L 83/9) and in *certain angles, shapes and sections of iron or steel originating in the German Democratic Republic* (Commission Regulation (EEC) No 1129/84 of 18 April 1984 imposing a provisional anti-dumping duty on imports of certain angles, shapes and sections, of iron or steel, originating in the German Democratic Republic, *O.J.*, 26 April 1984, No L 109/11) it was underscored that substantial quantities had been sold in the ordinary course of trade.

In *potassium permanganate from Czechoslovakia* it was noted that the sales on the market of the reference country were made to independent customers, at a comparable level of trade to export sales, at a profit and in substantial quantities (Council Regulation (EEC) No 385/90 of 12 February 1990 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in Czechoslovakia and definitively collecting the provisional anti-dumping duty imposed on those imports, *O.J.*, 16 February 1990, No L 42/1).

In *seamless pipes and tubes, of iron or non-alloy steel, from Hungary, Poland and the Republic of Croatia, calcium metal from the People's Republic of China and Russia and urea ammonium nitrate solution from Bulgaria*, sales activities on the domestic market of the reference country were said to be representative in relation to the exports concerned (Council Regulation (EEC) No 1189/93 of 14 May 1993 imposing definitive anti-dumping duties on imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in Hungary, Poland and the Republic of Croatia and definitively collecting provisional anti-dumping duties, *O.J.*, 15 May 1993, No L 120/34 ; Commission Regulation (EC) No 892/94 of 21 April 1994 imposing a provisional anti-dumping duty on imports of calcium metal originating in the People's Republic of China and Russia, *O.J.*, 23 April 1994, No L 104/5 ; Commission Regulation (EC) No 1506/94 of 27 June 1994 imposing provisional duties on imports of urea ammonium nitrate solution originating in Bulgaria and Poland, *O.J.*, 30 June 1994, No L 162/16).

threshold is used : if the transactions on the reference country's domestic market attain at least 5 % of the allegedly dumped exports, the domestic market price will be used⁶¹⁵. Conversely, if the quantity sold on the domestic market does not attain 5 % of the quantity exported to the Community, the constructed value will be used⁶¹⁶.

In *fluorspar from the People's Republic of China* it was noted that the sales were made in the ordinary course of trade for consumption in the domestic market of the reference country and that they were made to unrelated companies on a regular basis in bulk quantities (Commission Regulation (EEC) No 2463/93 of 1 September 1993 imposing a provisional anti-dumping duty on imports of fluorspar originating in the People's Republic of China, *O.J.*, 7 September 1993, No L 226/3).

See also : Commission Decision 80/564/EEC of 4 June 1980 accepting undertakings in connection with the anti-dumping proceedings concerning imports of fibre building board originating in Czechoslovakia, Finland, Norway, Poland, Romania, Spain, the Soviet Union and Sweden and determining those proceedings, *O.J.*, 11 June 1980, No L 145/39 ; Commission Regulation (EEC) No 2568/82 of 17 September 1982 imposing a provisional anti-dumping duty on imports of polyvinyl chloride resins and compounds originating in Czechoslovakia, and accepting undertakings and terminating the proceeding in respect of imports of such products originating in Romania, the German Democratic Republic and Hungary, *O.J.*, 24 September 1982, No L 274/15 ; Commission Decision 84/182/EEC of 23 March 1984 accepting an undertaking offered in connection with an anti-dumping proceeding concerning imports of certain iron or steel angles, shapes and sections originating in Romania, and terminating that proceeding, *O.J.*, 27 March 1984, No L 83/9 ; Commission Regulation (EEC) No 1129/84 of 18 April 1984 imposing a provisional anti-dumping duty on imports of certain angles, shapes and sections, of iron or steel, originating in the German Democratic Republic, *O.J.*, 26 April 1984, No L 109/11 ; Commission Regulation (EEC) No 2409/87 of 6 August 1987 imposing a provisional anti-dumping duty on imports of ferro-silicon originating in Brazil and accepting undertakings offered by Italmagnesio SA of Brazil and from Promsyrto-Import of the USSR, *O.J.*, 8 August 1987, No L 219/24 ; Council Regulation (EEC) No 176/89 of 23 January 1989 imposing a definitive anti-dumping duty on imports of copper sulphate originating in Bulgaria or the Soviet Union, *O.J.*, 27 January 1989, No L 23/1 ; Commission Decision 90/196/EEC of 10 April 1990 terminating the anti-dumping proceeding concerning imports of methenamine (hexamethylenetetramine) originating in Hungary and Yugoslavia and accepting undertakings offered in connection with the proceeding concerning imports of methenamine (hexamethylenetetramine) originating in Bulgaria, Czechoslovakia, Poland and Romania, *O.J.*, 24 April 1990, No L 104/14 ; Council Regulation (EEC) No 2474/93 of 8 September 1993 imposing a definitive anti-dumping duty on imports into the Community of bicycles originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 9 September 1993, No L 228/1 ; Council Regulation (EC) No 721/94 of 29 March 1994 imposing a definitive anti-dumping duty on isobutanol originating in the Russian Federation, *O.J.*, 31 March 1994, No L 87/3 ; Council Regulation (EC) No 821/94 of 12 April 1994 imposing a definitive anti-dumping duty on imports of silicon carbide, originating in the People's Republic of China, Poland, the Russian Federation and Ukraine, *O.J.*, 13 April 1994, No L 94/21.

⁶¹⁵ C.J.E.C., joined cases C-305/86 and C-160/87, 11 July 1990, *Neotype Techmasexport GmbH v Commission and Council*, E.C.R., 1990, I, (2945), 3001 ; C.J.E.C., case C-16/90, 22 October 1991, *Eugen Nölle v Hauptzollamt Bremen-Freihafen*, E.C.R., 1991, I, (5163), 5205.

⁶¹⁶ Commission Decision 86/497/EEC of 7 October 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of silicon carbide originating in the People's Republic of China, Norway, Poland and the USSR, and terminating the investigation regarding imports of that product originating in the People's Republic of China, Norway, Poland, Czechoslovakia, the USSR and Yugoslavia, *O.J.*, 10 October 1986, No L 287/25 ; Council Regulation (EEC) No 2347/87 of 23 July 1987 imposing a definitive anti-dumping duty on mechanical wrist-watches originating in the USSR, *O.J.*, 4 August 1987, No L 213/5 ; Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7 ; Council Regulation (EEC) No 3091/91 of 21 October 1991 imposing a definitive anti-dumping duty on imports of video tapes in cassettes originating in the People's Republic of China and definitively collecting the provisional duty, *O.J.*, 24 October 1991, No L 293/2 ; Commission Regulation (EEC) No 1808/92 of 30 June 1992 imposing a provisional anti-dumping duty on imports of ferro-silicon originating in Poland and Egypt, *O.J.*, 3 July 1992, No L 183/8.

Domestic market prices are used if all sales or a substantial part of them are made to unrelated buyers⁶¹⁷. Conversely, the constructed value will also be used if the majority of the sales take place between related companies⁶¹⁸.

If the major part of the production is exported, the export price will be used⁶¹⁹. The export price will also be used when the volume of sales on the domestic market of the reference country is too small to be representative and the reference country's domestic market and export market constitute one single highly competitive market⁶²⁰;

⁶¹⁷ Council Regulation (EEC) No 385/90 of 12 February 1990 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in Czechoslovakia and definitively collecting the provisional anti-dumping duty imposed on those imports, *O.J.*, 16 February 1990, No L 42/1; Commission Regulation (EEC) No 2463/93 of 1 September 1993 imposing a provisional anti-dumping duty on imports of fluorspar originating in the People's Republic of China, *O.J.*, 7 September 1993, No L 226/3; Council Regulation (EC) No 821/94 of 12 April 1994 imposing a definitive anti-dumping duty on imports of silicon carbide, originating in the People's Republic of China, Poland, the Russian Federation and Ukraine, *O.J.*, 13 April 1994, No L 94/21.

⁶¹⁸ Commission Regulation (EEC) No 2799/92 of 25 September 1992 imposing a provisional anti-dumping duty on imports of deadburned (sintered) magnesia originating in the People's Republic of China, *O.J.*, 26 September 1992, No L 282/15; Commission Regulation (EEC) No 2800/92 of 25 September 1992 imposing a provisional anti-dumping duty on imports of magnesium oxide originating in the People's Republic of China, *O.J.*, 26 September 1992, No L 282/23.

⁶¹⁹ Commission Regulation (EEC) No 871/82 of 14 April 1982 imposing a provisional anti-dumping duty on upright pianos originating in the USSR, *O.J.*, 16 April 1982, No L 101/30 (corrigendum, *O.J.*, 29 April 1982, No L 115/22); Council Decision 82/220/EEC of 14 April 1982 terminating an anti-dumping proceeding in respect of imports of upright pianos originating in Czechoslovakia, the German Democratic Republic and Poland, *O.J.*, 16 April 1982, No L 101/45; Commission Decision 84/129/EEC of 6 March 1984 terminating the anti-dumping proceeding concerning imports of caustic-burned natural magnesite originating in the People's Republic of China, *O.J.*, 8 March 1984, No L 66/32; Commission Decision 84/406/EEC of 10 August 1984 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of horticultural glass and certain drawn glass originating in Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania and the USSR, and terminating that proceeding, *O.J.*, 21 August 1984, No L 224/26.

On the other hand, the export price was not used in :

- *polyvinyl chloride resins and compounds from Czechoslovakia and Romania* because the major part of the production had been distributed on the domestic market (Commission Regulation (EEC) No 2568/82 of 17 September 1982 imposing a provisional anti-dumping duty on imports of polyvinyl chloride resins and compounds originating in Czechoslovakia, and accepting undertakings and terminating the proceeding in respect of imports of such products originating in Romania, the German Democratic Republic and Hungary, *O.J.*, 24 September 1982, No L 274/15);
- *woven polyolefin bags from the People's Republic of China* because the bags exported proved to be of little significance (Commission Regulation (EEC) No 2051/90 of 17 July 1990 imposing a temporary anti-dumping duty on imports of woven polyolefin bags originating in the People's Republic of China, *O.J.*, 19 July 1990, No L 187/36 (corrigendum, *O.J.*, 20 September 1990, No L 256/38));
- *espadrilles from the People's Republic of China* because the exports to third countries were negligible compared to total production (Commission Regulation (EEC) No 3798/90 of 21 December 1990 imposing a provisional anti-dumping duty on imports of espadrilles originating in the People's Republic of China, *O.J.*, 28 December 1990, No L 365/25).

⁶²⁰ Commission Regulation (EEC) No 1031/92 of 23 April 1992 imposing a provisional anti-dumping duty on imports of potassium chloride (potash) originating in Belarus, Russia or Ukraine, *O.J.*, 28 April 1992, No L 110/5.

- domestic market prices are used if they bear a proper proportion to production costs⁶²¹ and if the profits

⁶²¹ Commission Regulation (EEC) No 2599/79 of 22 November 1979 imposing a provisional anti-dumping duty on certain sodium carbonate originating in the Soviet Union, *O.J.*, 24 November 1979, No L 297/12; Council Regulation (EEC) No 407/80 of 18 February 1980 imposing a definitive anti-dumping duty on certain sodium carbonate originating in the Soviet Union, *O.J.*, 22 February 1980, No L 48/1; Commission Regulation (EEC) No 2667/82 of 4 October 1982 imposing a provisional anti-dumping duty on imports of certain sodium carbonate originating in Bulgaria, the German Democratic Republic, Poland, Romania and the Soviet Union, *O.J.*, 6 October 1982, No L 283/9; Commission Regulation (EEC) No 348/83 of 10 February 1983 imposing a provisional anti-dumping duty on imports of hexamethylenetetramine originating in the German Democratic Republic and the Soviet Union, and accepting undertakings and terminating the proceeding in respect of imports of hexamethylenetetramine originating in Czechoslovakia and Romania, *O.J.*, 12 February 1983, No L 40/24; Commission Regulation (EEC) No 985/83 of 26 April 1983 imposing a provisional anti-dumping duty on imports of barium chloride originating in the People's Republic of China and the German Democratic Republic, *O.J.*, 27 April 1983, No L 110/11; Commission Regulation (EEC) No 1631/83 of 15 June 1983 imposing a provisional anti-dumping duty on imports of certain glass textile fibres (rovings) originating in Czechoslovakia, the German Democratic Republic and Japan, accepting a price undertaking from one Japanese exporter and terminating the proceeding in respect of imports of certain glass textile fibres (mats), originating in Czechoslovakia and the German Democratic Republic, *O.J.*, 18 June 1983, No L 160/18; Commission Decision 83/360/EEC of 18 July 1983 terminating the anti-dumping proceeding in respect of imports of certain pears in syrup, originating in Australia, the People's Republic of China and the Republic of South Africa, *O.J.*, 20 July 1983, No L 196/22; Council Regulation (EEC) No 2978/83 of 24 October 1983 amending Regulation (EEC) No 191/80 imposing a definitive anti-dumping duty on lithium hydroxide originating in the United States of America and the Soviet Union, *O.J.*, 26 October 1983, No L 294/3; Commission Decision 83/522/EEC of 24 October 1983 accepting the undertaking given in connection with the anti-dumping proceeding in respect of imports of lithium hydroxide originating in the People's Republic of China and terminating that proceeding, *O.J.*, 26 October 1983, No L 294/29; Commission Regulation (EEC) No 3578/83 of 15 December 1983 imposing a provisional anti-dumping duty on imports of choline chloride originating in the German Democratic Republic and Romania, *O.J.*, 20 December 1983, No L 356/12; Commission Decision 84/182/EEC of 23 March 1984 accepting an undertaking offered in connection with an anti-dumping proceeding concerning imports of certain iron or steel angles, shapes and sections originating in Romania, and terminating that proceeding, *O.J.*, 27 March 1984, No L 83/9; Commission Regulation (EEC) No 1129/84 of 18 April 1984 imposing a provisional anti-dumping duty on imports of certain angles, shapes and sections, of iron or steel, originating in the German Democratic Republic, *O.J.*, 26 April 1984, No L 109/11; Commission Decision 84/408/EEC of 16 August 1984 accepting an undertaking given in connection with the anti-dumping review proceeding concerning imports of copper sulphate originating in Czechoslovakia and terminating that proceeding, *O.J.*, 22 August 1984, No L 225/22; Commission Regulation (EEC) No 2553/84 of 4 September 1984 imposing a provisional anti-dumping duty on imports of oxalic acid originating in Brazil, accepting an undertaking offered by the exporter in the German Democratic Republic of oxalic acid and terminating the proceeding regarding imports of oxalic acid from the German Democratic Republic and Spain, *O.J.*, 7 September 1984, No L 239/8; Commission Regulation (EEC) No 2908/84 of 15 October 1984 imposing a provisional anti-dumping duty on imports of copper sulphate originating in Poland, accepting undertakings given by the Bulgarian and Hungarian exporters of copper sulphate, terminating the investigation regarding exports of copper sulphate from Bulgaria and Hungary and terminating the proceeding regarding those from Spain, *O.J.*, 18 October 1984, No L 275/12; Commission Regulation (EEC) No 2495/86 of 1 August 1986 imposing a provisional anti-dumping duty on imports of potassium permanganate originating in Czechoslovakia, the German Democratic Republic and the People's Republic of China, *O.J.*, 5 August 1986, No L 217/12; Council Decision 86/468/EEC of 22 September 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain acrylic fibres originating in Israel, Mexico, Romania and Turkey and terminating the investigation, *O.J.*, 24 September 1986, No L 272/29; Council Decision 87/104/EEC of 9 February 1987 accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China, and terminating the investigation, *O.J.*, 14 February 1987, No L 46/45; Commission Decision 87/236/EEC of 10 April 1987 terminating the anti-dumping proceeding on imports of synthetic fibres of polyesters originating in the German Democratic Republic, Romania, Turkey and Yugoslavia, *O.J.*, 15 April 1987, No L 103/38; Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia, *O.J.*, 9 May 1987, No L 121/11; Commission Regulation (EEC) No 2409/87 of 6 August 1987 imposing a provisional anti-dumping duty on imports of ferro-silicon originating in Brazil and accepting undertakings offered by Italmagnesio SA of Brazil and from Promsyrrio-Import of the USSR, *O.J.*, 8 August 1987, No L 219/24; Commission Regulation (EEC) No 1696/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 June 1988, No L 151/47; Commission Regulation (EEC) No 2623/88 of 24 August 1988 imposing a provisional anti-dumping duty on imports of urea originating in Austria, Hungary, Malaysia, Romania, the USA and Venezuela, *O.J.*, 25 August 1988, No L 235/5; Council Regulation (EEC) No 3946/88 of 16 December 1988 imposing a definitive anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 December 1988, No L 348/49; Council Regulation (EEC) No 725/89 of 20 March 1989 imposing a definitive anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty on such imports, *O.J.*, 22 March 1989, No L 79/24; Commission Regulation (EEC) No 3074/89 of 11 October 1989 imposing a provisional anti-dumping duty on imports of welded tubes originating in Yugoslavia and Romania, *O.J.*, 13 October 1989, No L 294/10; Commission Regulation (EEC) No 1537/90 of 28 May 1990 imposing a provisional anti-dumping duty on imports of potassium permanganate originating in the USSR, *O.J.*, 8 June 1990, No L 145/9; Commission Regulation (EEC) No 3296/92 of 12 November 1992 imposing a provisional anti-dumping duty on imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in Czechoslovakia, Hungary, Poland and the Republic of Croatia and terminating the anti-dumping proceeding with regard to the Republics of Serbia and of Montenegro, the former Yugoslav Republic of Macedonia, the Republic of

realized are reasonable, though not excessive⁶²². Conversely, the constructed value is applied if sales on the domestic market of the reference country are made at a loss⁶²³ and if the production costs are in the ordinary

Bosnia-Herzegovina and the Republic of Slovenia, *O.J.*, 14 November 1992, No L 328/15 ; Commission Regulation (EEC) No 2720/93 of 28 September 1993 imposing a provisional anti-dumping duty on imports of isobutanol originating in the Russian Federation, *O.J.*, 2 October 1993, No L 246/12 ; Commission Decision 94/82/EC of 10 January 1994 terminating the anti-dumping proceeding concerning imports of gum rosin originating in the People's Republic of China, *O.J.*, 12 February 1994, No L 41/50 ; Commission Regulation (EC) No 1783/94 of 18 July 1994 imposing a provisional anti-dumping duty on imports of furfuraldehyde originating in the People's Republic of China, *O.J.*, 21 July 1994, No L 186/11 ; Council Regulation (EC) No 2819/94 of 17 November 1994 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in the People's Republic of China, *O.J.*, 19 November 1994, No L 298/32.

622 Commission Decision 86/464/EEC of 17 September 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of artificial corundum originating in Hungary, Poland and the USSR, and terminating the investigation, *O.J.*, 23 September 1986, No L 271/26 ; Council Regulation (EEC) No 1198/88 of 25 April 1988 imposing a definitive anti-dumping duty on imports of roller chains for cycles originating in the People's Republic of China and providing for the definitive collection of the provisional anti-dumping duty on the said imports, *O.J.*, 3 May 1988, No L 115/1 ; Council Regulation (EEC) No 1531/88 of 31 May 1988 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty imposed on those imports, *O.J.*, 3 June 1988, No L 138/1 ; Commission Regulation (EEC) No 1745/88 of 21 June 1988 imposing a provisional anti-dumping duty on imports of paracetamol originating in the People's Republic of China, *O.J.*, 22 June 1988, No L 155/29 ; Commission Regulation (EEC) No 707/89 of 17 March 1989 imposing a provisional anti-dumping duty on imports of calcium metal originating in the People's Republic of China or the Soviet Union, *O.J.*, 21 March 1989, No L 78/10 ; Council Regulation (EEC) No 725/89 of 20 March 1989 imposing a definitive anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty on such imports, *O.J.*, 22 March 1989, No L 79/24 ; Council Regulation (EEC) No 1306/89 of 11 May 1989 imposing a definitive anti-dumping duty on imports of light sodium carbonate originating in Bulgaria, the German Democratic Republic, Poland and Romania, *O.J.*, 13 May 1989, No L 131/4 ; Council Regulation (EEC) No 2808/89 of 18 September 1989 imposing a definitive anti-dumping duty on imports of calcium metal originating in the People's Republic of China and the Soviet Union and definitively collecting the provisional anti-dumping duty imposed on such imports, *O.J.*, 20 September 1989, No L 271/1 ; Council Regulation (EEC) No 385/90 of 12 February 1990 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in Czechoslovakia and definitively collecting the provisional anti-dumping duty imposed on those imports, *O.J.*, 16 February 1990, No L 42/1 ; Commission Decision 90/196/EEC of 10 April 1990 terminating the anti-dumping proceeding concerning imports of methenamine (hexamethylenetetramine) originating in Hungary and Yugoslavia and accepting undertakings offered in connection with the proceeding concerning imports of methenamine (hexamethylenetetramine) originating in Bulgaria, Czechoslovakia, Poland and Romania, *O.J.*, 24 April 1990, No L 104/14 ; Commission Regulation (EEC) No 1537/90 of 28 May 1990 imposing a provisional anti-dumping duty on imports of potassium permanganate originating in the USSR, *O.J.*, 8 June 1990, No L 145/9 ; Commission Regulation (EC) No 892/94 of 21 April 1994 imposing a provisional anti-dumping duty on imports of calcium metal originating in the People's Republic of China and Russia, *O.J.*, 23 April 1994, No L 104/5.

See also : *video tapes in cassettes from the People's Republic of China*, where the domestic market price allowing a «considerable profit margin» was used (Council Regulation (EEC) No 3091/91 of 21 October 1991 imposing a definitive anti-dumping duty on imports of video tapes in cassettes originating in the People's Republic of China and definitively collecting the provisional duty, *O.J.*, 24 October 1991, No L 293/2).

623 Commission Decision 82/881/EEC of 23 December 1982 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of perchlorethylene originating in Czechoslovakia, Romania, Spain and the United States of America and terminating that proceeding, *O.J.*, 30 December 1982, No L 371/47 ; Commission Regulation (EEC) No 1479/83 of 7 June 1983 imposing a provisional anti-dumping duty on imports of copper sulphate originating in Czechoslovakia and the USSR, *O.J.*, 9 June 1983, No L 151/24 ; Commission Regulation (EEC) No 1613/83 of 15 June 1983 imposing a provisional anti-dumping duty on imports of unwrought nickel, not alloyed, in the form of cathodes produced by electrolysis, either uncut or cut into squares, originating in the Soviet Union, *O.J.*, 17 June 1983, No L 159/43 ; Council Regulation (EEC) No 2907/83 of 17 October 1983 terminating the anti-dumping proceeding concerning imports of unwrought nickel, not alloyed, in the form of cathodes produced by electrolysis, either uncut or cut into squares, originating in the Soviet Union, *O.J.*, 19 October 1983, No L 286/29 ; Commission Decision 86/464/EEC of 17 September 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of artificial corundum originating in Hungary, Poland and the USSR, and terminating the investigation, *O.J.*, 23 September 1986, No L 271/26 ; Commission Regulation (EEC) No 2450/87 of 12 August 1987 imposing a provisional anti-dumping duty on imports of mercury originating in the Union of Soviet Socialist Republics, *O.J.*, 14 August 1987, No L 227/8 ; Commission Regulation (EEC) No 761/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten ores and concentrates originating in the People's Republic of China, and terminating the proceeding concerning imports originating in Hong Kong, *O.J.*, 30 March 1990, No L 83/23 ; Commission Regulation (EEC) No 2051/90 of 17 July 1990 imposing a temporary anti-dumping duty on imports of woven polyolefin bags originating in the People's Republic of China, *O.J.*, 19 July 1990, No L 187/36 (corrigendum, *O.J.*, 20 September 1990, No L 256/38) ; Council Regulation (EEC) No 3308/90 of 15 November 1990 imposing a definitive anti-dumping duty on imports of woven polyolefin sacks originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty on such imports, *O.J.*, 17 November 1990, No L 318/2 ; Commission

course of trade⁶²⁴. If the production costs, on the basis of which the constructed value has to be calculated, are not in the ordinary course of trade⁶²⁵ and, if profits are not reasonable⁶²⁶, they may be adjusted up to that level. Moreover, export prices to third countries are rejected when the European anti-dumping authorities

Regulation (EEC) No 2581/93 of 20 September 1993 imposing provisional anti-dumping duties on imports of ferro-silicon originating in South Africa and the People's Republic of China, *O.J.*, 22 September 1993, No L 237/2 ; Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries ; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24 ; Commission Regulation (EC) No 1506/94 of 27 June 1994 imposing provisional duties on imports of urea ammonium nitrate solution originating in Bulgaria and Poland, *O.J.*, 30 June 1994, No L 162/16 ; Commission Regulation (EC) No 1648/94 of 6 July 1994 imposing a provisional anti-dumping duty on imports of furazolidone originating in the People's Republic of China, *O.J.*, 8 July 1994, No L 174/4.

⁶²⁴ Commission Regulation (EEC) No 2799/92 of 25 September 1992 imposing a provisional anti-dumping duty on imports of deadburned (sintered) magnesite originating in the People's Republic of China, *O.J.*, 26 September 1992, No L 282/15 ; Commission Regulation (EEC) No 2800/92 of 25 September 1992 imposing a provisional anti-dumping duty on imports of magnesium oxide originating in the People's Republic of China, *O.J.*, 26 September 1992, No L 282/23 ; Council Regulation (EEC) No 1473/93 of 14 June 1993 imposing a definitive anti-dumping duty on imports of magnesium oxide originating in the People's Republic of China, *O.J.*, 17 June 1993, No L 145/1 ; Council Regulation (EC) No 3386/93 of 6 December 1993 imposing a definitive anti-dumping duty on imports of dead-burned (sintered) magnesite originating in the People's Republic of China, *O.J.*, 11 December 1993, No L 306/16.

⁶²⁵ If the prices of the inputs which the producers in the reference country import from the NME country subject to the anti-dumping proceeding, are considered as being too low, they will be adjusted (Commission Regulation (EEC) No 2054/91 of 11 July 1991 imposing a provisional anti-dumping duty on imports of dihydrostreptomycin originating in the People's Republic of China, *O.J.*, 13 July 1991, No L 187/23 ; Council Regulation (EEC) No 3836/91 of 19 December 1991 imposing a definitive anti-dumping duty on imports of dihydrostreptomycin originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty, *O.J.*, 31 December 1991, No 362/1). Compare with the problem of input dumping in respect of ME countries, in respect of which input dumping is not sanctioned (*supra*, 167-169). This difference is perhaps due to the fact that the input dumping was practised by the NME country subject to the anti-dumping proceeding.

Temporary and exceptional costs incurred during the start-up phase of the producer in the reference country will be deducted from the domestic market price (Commission Regulation (EEC) No 1031/92 of 23 April 1992 imposing a provisional anti-dumping duty on imports of potassium chloride (potash) originating in Belarus, Russia or Ukraine, *O.J.*, 28 April 1992, No L 110/5 ; Council Regulation (EEC) No 3068/92 of 23 October 1992 imposing a definitive anti-dumping duty on imports of potassium chloride originating in Belarus, Russia or Ukraine, *O.J.*, 24 October 1992, No L 308/41). The same holds in respect of exceptional costs resulting from a change of ownership of the company established in the reference country (Council Regulation (EC) No 643/94 of 21 March 1994 amending Regulation (EEC) No 3068/92 in respect of definitive anti-dumping duties on imports of potassium chloride originating in Belarus, Russia and Ukraine, *O.J.*, 24 March 1994, No L 80/1).

In *magnesium oxide from the People's Republic of China and dead-burned (sintered) magnesite from the People's Republic of China*, an adjustment was made «to reflect the higher cost of the fuel oil» used by the producer established in the reference country (Council Regulation (EEC) No 1473/93 of 14 June 1993 imposing a definitive anti-dumping duty on imports of magnesium oxide originating in the People's Republic of China, *O.J.*, 17 June 1993, No L 145/1 ; Council Regulation (EC) No 3386/93 of 6 December 1993 imposing a definitive anti-dumping duty on imports of dead-burned (sintered) magnesite originating in the People's Republic of China, *O.J.*, 11 December 1993, No L 306/16). It was not made clear whether those higher costs were considered not to have been incurred in the ordinary course of trade. However, this should be the case. Otherwise, this adjustment would imply that account is being taken of the production costs in a NME country, but this would go against European anti-dumping case law which consistently rejects to take account of NME production costs (*see : supra*, 61-64).

⁶²⁶ When the ME producer has a monopoly position on his domestic market, his profits may be considered exceptional and, therefore, it may be appropriate to apply a lower profit margin (Commission Regulation (EEC) No 2054/91 of 11 July 1991 imposing a provisional anti-dumping duty on imports of dihydrostreptomycin originating in the People's Republic of China, *O.J.*, 13 July 1991, No L 187/23 ; Council Regulation (EEC) No 3836/91 of 19 December 1991 imposing a definitive anti-dumping duty on imports of dihydrostreptomycin originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty, *O.J.*, 31 December 1991, No 362/1). Compare with the interpretation of reasonableness in respect of the profit margin for producers established in ME countries (*supra*, 176-180).

are not given the guarantee that these are not dumping prices⁶²⁷. Conversely, if it is established that the export prices to third countries are not being dumped, they may be used as normal value standard⁶²⁸.

A sufficient degree of competition⁶²⁹, either between domestic producers⁶³⁰ or between domestic producers

627 Commission Regulation (EEC) No 2568/82 of 17 September 1982 imposing a provisional anti-dumping duty on imports of polyvinyl chloride resins and compounds originating in Czechoslovakia, and accepting undertakings and terminating the proceeding in respect of imports of such products originating in Romania, the German Democratic Republic and Hungary, *O.J.*, 24 September 1982, No L 274/15; Council Decision 83/9/EEC of 17 January 1983 terminating the anti-dumping proceeding concerning imports of codeine and its salts originating in Czechoslovakia, Hungary, Poland and Yugoslavia, *O.J.*, 20 January 1983, No L 16/30; Commission Regulation (EEC) No 2908/84 of 15 October 1984 imposing a provisional anti-dumping duty on imports of copper sulphate originating in Poland, accepting undertakings given by the Bulgarian and Hungarian exporters of copper sulphate, terminating the investigation regarding exports of copper sulphate from Bulgaria and Hungary and terminating the proceeding regarding those from Spain, *O.J.*, 18 October 1984, No L 275/12; Commission Decision 88/623/EEC of 12 December 1988 accepting undertakings given in connection with the anti-dumping review concerning imports of oxalic acid originating in China or Czechoslovakia and terminating the review, *O.J.*, 13 December 1988, No L 343/34; Commission Regulation (EEC) No 1386/91 of 23 May 1991 imposing a provisional anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in Japan, the People's Republic of China, the Republic of Korea and Thailand, *O.J.*, 28 May 1991, No L 133/20.

628 Commission Decision 80/600/EEC of 19 June 1980 accepting undertakings offered by the Chinese and Czechoslovak exporters in connection with the anti-dumping proceeding concerning imports of mechanical alarm clocks (other than travel alarms) originating in China, Czechoslovakia, the German Democratic Republic, Hong Kong and the USSR, terminating the proceeding in respect of China, Czechoslovakia and Hong Kong, and withdrawing acceptance of undertakings previously accepted by the United Kingdom Government from the exporters in the German Democratic Republic, *O.J.*, 25 June 1980, No L 158/18.

629 C.J.E.C., case C-16/90, 22 October 1991, *Eugen Nölle v Hauptzollamt Bremen-Freihafen*, *E.C.R.*, 1991, I, (5163), 5207; Commission Regulation (EEC) No 724/82 of 30 March 1982 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0.75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Poland, Romania and the USSR, and terminating the proceeding in respect of imports of said products originating in Hungary, *O.J.*, 31 March 1982, No L 85/9; Commission Regulation (EEC) No 2568/82 of 17 September 1982 imposing a provisional anti-dumping duty on imports of polyvinyl chloride resins and compounds originating in Czechoslovakia, and accepting undertakings and terminating the proceeding in respect of imports of such products originating in Romania, the German Democratic Republic and Hungary, *O.J.*, 24 September 1982, No L 274/15; Council Regulation (EEC) No 1198/88 of 25 April 1988 imposing a definitive anti-dumping duty on imports of roller chains for cycles originating in the People's Republic of China and providing for the definitive collection of the provisional anti-dumping duty on the said imports, *O.J.*, 3 May 1988, No L 115/1; Council Regulation (EEC) No 725/89 of 20 March 1989 imposing a definitive anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty on such imports, *O.J.*, 22 March 1989, No L 79/24; Council Regulation (EC) No 721/94 of 29 March 1994 imposing a definitive anti-dumping duty on isobutanol originating in the Russian Federation, *O.J.*, 31 March 1994, No L 87/3.

630 C.J.E.C., joined cases C-305/86 and C-160/87, 11 July 1990, *Neotype Techmaslexport GmbH v Commission and Council*, *E.C.R.*, 1990, I, (2945), 3001-3002; C.J.E.C., joined cases C-320/86 and C-188/87, 11 July 1990, *Stanko France v Commission and Council*, *E.C.R.*, 1990, I, (3013), 3014; Commission Regulation (EEC) No 348/83 of 10 February 1983 imposing a provisional anti-dumping duty on imports of hexamethylenetetramine originating in the German Democratic Republic and the Soviet Union, and accepting undertakings and terminating the proceeding in respect of imports of hexamethylenetetramine originating in Czechoslovakia and Romania, *O.J.*, 12 February 1983, No L 40/24; Commission Regulation (EEC) No 1631/83 of 15 June 1983 imposing a provisional anti-dumping duty on imports of certain glass textile fibres (rovings) originating in Czechoslovakia, the German Democratic Republic and Japan, accepting a price undertaking from one Japanese exporter and terminating the proceeding in respect of imports of certain glass textile fibres (mats), originating in Czechoslovakia and the German Democratic Republic, *O.J.*, 18 June 1983, No L 160/18; Commission Decision 83/360/EEC of 18 July 1983 terminating the anti-dumping proceeding in respect of imports of certain pears in syrup, originating in Australia, the People's Republic of China and the Republic of South Africa, *O.J.*, 20 July 1983, No L 196/22; Council Regulation (EEC) No 2978/83 of 24 October 1983 amending Regulation (EEC) No 191/80 imposing a definitive anti-dumping duty on lithium hydroxide originating in the United States of America and the Soviet Union, *O.J.*, 26 October 1983, No L 294/3; Commission Decision 83/522/EEC of 24 October 1983 accepting the undertaking given in connection with the anti-dumping proceeding in respect of imports of lithium hydroxide originating in the People's Republic of China and terminating that proceeding, *O.J.*, 26 October 1983, No L 294/29; Commission Regulation (EEC) No 3578/83 of 15 December 1983 imposing a provisional anti-dumping duty on imports of choline chloride originating in the German Democratic Republic and Romania, *O.J.*, 20 December 1983, No L 356/12; Commission Regulation (EEC) No 2908/84 of 15 October 1984 imposing a provisional anti-dumping duty on imports of copper sulphate originating in Poland, accepting undertakings given by the Bulgarian and Hungarian exporters of copper sulphate, terminating the investigation regarding exports of copper sulphate from Bulgaria and Hungary and terminating the proceeding regarding those from Spain, *O.J.*, 18 October 1984, No L 275/12; Council Decision 86/468/EEC of 22 September 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain acrylic fibres originating in Israel, Mexico, Romania and Turkey and terminating the investigation, *O.J.*, 24 September 1986, No L 272/29; Council Decision 87/104/EEC of 9 February 1987 accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of paint, distemper, varnish and similar

and imports⁶³¹, or the exercise of governmental price controls⁶³² are mentioned as a guarantee of such

brushes originating in the People's Republic of China, and terminating the investigation, *O.J.*, 14 February 1987, No L 46/45 ; Commission Regulation (EEC) No 2409/87 of 6 August 1987 imposing a provisional anti-dumping duty on imports of ferro-silicon originating in Brazil and accepting undertakings offered by Italmagnesio SA of Brazil and from Promsyrio-Import of the USSR, *O.J.*, 8 August 1987, No L 219/24.

631 Commission Regulation (EEC) No 451/80 of 22 February 1980 imposing a provisional anti-dumping duty on imports of standardized electric multi-phase motors having an output of more than 0.75 kW but not more than 75 kW, originating in the USSR, *O.J.*, 27 February 1980, No L 53/15 ; Commission Decision 80/252/EEC of 22 February 1980 accepting undertakings given by exporters in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and Romania in connection with the anti-dumping proceeding concerning imports of standardized electric multi-phase motors having an output of more than 0.75 kW but not more than 75 kW, originating in those countries, and terminating the procedure in respect of them, *O.J.*, 27 February 1980, No L 53/21 ; Council Regulation (EEC) No 1560/80 of 20 June 1980 concerning the definitive collection of the provisional anti-dumping duty imposed on imports of standardized electric multi-phase motors having an output of more than 0.75 kW but not more than 75 kW, originating in the USSR, *O.J.*, 21 June 1980, No L 153/45 ; Commission Decision 80/599/EEC of 19 June 1980 accepting undertakings in connection with the anti-dumping proceeding concerning imports of standardized electric multi-phase motors having an output of more than 0.75 kW but not more than 75 kW, originating in the USSR and terminating that proceeding, *O.J.*, 21 June 1980, No L 153/48 ; Commission Decision 80/875/EEC of 17 September 1980 accepting undertakings given by Romanian exporters in connection with the anti-dumping proceeding concerning imports of certain tubes of iron or steel originating in that country, and terminating that proceeding, *O.J.*, 20 September 1980, No L 249/24 (corrigendum, *O.J.*, 7 October 1980, No L 263/8) ; Commission Regulation (EEC) No 985/83 of 26 April 1983 imposing a provisional anti-dumping duty on imports of barium chloride originating in the People's Republic of China and the German Democratic Republic, *O.J.*, 27 April 1983, No L 110/11 ; Commission Decision 83/248/EEC of 24 May 1983 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of polyethylene originating in the Soviet Union, the German Democratic Republic, Czechoslovakia and Poland and terminating that proceeding, *O.J.*, 27 May 1983, No L 138/65 ; Commission Regulation (EEC) No 2495/86 of 1 August 1986 imposing a provisional anti-dumping duty on imports of potassium permanganate originating in Czechoslovakia, the German Democratic Republic and the People's Republic of China, *O.J.*, 5 August 1986, No L 217/12 ; Commission Regulation (EEC) No 3019/86 of 30 September 1986 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0.75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania and the USSR, *O.J.*, 1 October 1986, No L 280/68 ; Council Regulation (EEC) No 1531/88 of 31 May 1988 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty imposed on those imports, *O.J.*, 3 June 1988, No L 138/1 ; Commission Regulation (EEC) No 1745/88 of 21 June 1988 imposing a provisional anti-dumping duty on imports of paracetamol originating in the People's Republic of China, *O.J.*, 22 June 1988, No L 155/29 ; Commission Regulation (EEC) No 2623/88 of 24 August 1988 imposing a provisional anti-dumping duty on imports of urea originating in Austria, Hungary, Malaysia, Romania, the USA and Venezuela, *O.J.*, 25 August 1988, No L 235/5 ; Council Regulation (EEC) No 1306/89 of 11 May 1989 imposing a definitive anti-dumping duty on imports of light sodium carbonate originating in Bulgaria, the German Democratic Republic, Poland and Romania, *O.J.*, 13 May 1989, No L 131/4 ; Council Regulation (EEC) No 385/90 of 12 February 1990 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in Czechoslovakia and definitively collecting the provisional anti-dumping duty imposed on those imports, *O.J.*, 16 February 1990, No L 42/1 ; Commission Regulation (EEC) No 1537/90 of 28 May 1990 imposing a provisional anti-dumping duty on imports of potassium permanganate originating in the USSR, *O.J.*, 8 June 1990, No L 145/9 ; Commission Regulation (EC) No 892/94 of 21 April 1994 imposing a provisional anti-dumping duty on imports of calcium metal originating in the People's Republic of China and Russia, *O.J.*, 23 April 1994, No L 104/5 ; Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries ; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24 ; Commission Decision 94/389/EC of 6 June 1994 terminating the anti-dumping proceeding regarding imports of refined antimony trioxide originating in the People's Republic of China, *O.J.*, 9 July 1994, No L 176/41 ; Council Regulation (EC) No 2819/94 of 17 November 1994 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in the People's Republic of China, *O.J.*, 19 November 1994, No L 298/32.

proper proportion between domestic market prices and production costs⁶³³. When the domestic market is not

⁶³² Commission Regulation (EEC) No 2599/79 of 22 November 1979 imposing a provisional anti-dumping duty on certain sodium carbonate originating in the Soviet Union, *O.J.*, 24 November 1979, No L 297/12; Council Regulation (EEC) No 407/80 of 18 February 1980 imposing a definitive anti-dumping duty on certain sodium carbonate originating in the Soviet Union, *O.J.*, 22 February 1980, No L 48/1; Commission Regulation (EEC) No 451/80 of 22 February 1980 imposing a provisional anti-dumping duty on imports of standardized electric multi-phase motors having an output of more than 0.75 kW but not more than 75 kW, originating in the USSR, *O.J.*, 27 February 1980, No L 53/15; Commission Decision 80/252/EEC of 22 February 1980 accepting undertakings given by exporters in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and Romania in connection with the anti-dumping proceeding concerning imports of standardized electric multi-phase motors having an output of more than 0.75 kW but not more than 75 kW, originating in those countries, and terminating the procedure in respect of them, *O.J.*, 27 February 1980, No L 53/21; Council Regulation (EEC) No 1560/80 of 20 June 1980 concerning the definitive collection of the provisional anti-dumping duty imposed on imports of standardized electric multi-phase motors having an output of more than 0.75 kW but not more than 75 kW, originating in the USSR, *O.J.*, 21 June 1980, No L 153/45; Commission Decision 80/599/EEC of 19 June 1980 accepting undertakings in connection with the anti-dumping proceeding concerning imports of standardized electric multi-phase motors having an output of more than 0.75 kW but not more than 75 kW, originating in the USSR and terminating that proceeding, *O.J.*, 21 June 1980, No L 153/48; Commission Decision 80/875/EEC of 17 September 1980 accepting undertakings given by Romanian exporters in connection with the anti-dumping proceeding concerning imports of certain tubes of iron or steel originating in that country, and terminating that proceeding, *O.J.*, 20 September 1980, No L 249/24 (corrigendum, *O.J.*, 7 October 1980, No L 263/8); Commission Regulation (EEC) No 2667/82 of 4 October 1982 imposing a provisional anti-dumping duty on imports of certain sodium carbonate originating in Bulgaria, the German Democratic Republic, Poland, Romania and the Soviet Union, *O.J.*, 6 October 1982, No L 283/9; Commission Decision 84/182/EEC of 23 March 1984 accepting an undertaking offered in connection with an anti-dumping proceeding concerning imports of certain iron or steel angles, shapes and sections originating in Romania, and terminating that proceeding, *O.J.*, 27 March 1984, No L 83/9; Commission Regulation (EEC) No 1129/84 of 18 April 1984 imposing a provisional anti-dumping duty on imports of certain angles, shapes and sections, of iron or steel, originating in the German Democratic Republic, *O.J.*, 26 April 1984, No L 109/11.

Contra: potassium permanganate from the USSR, where the absence of a governmental price control was put forward for motivating the use of the domestic market price (Commission Regulation (EEC) No 1537/90 of 28 May 1990 imposing a provisional anti-dumping duty on imports of potassium permanganate originating in the USSR, *O.J.*, 8 June 1990, No L 145/9).

⁶³³ In many anti-dumping cases it was pointed out that governmental price controls together with substantial imports and, thus, a certain degree of competition, guaranteed a reasonable pricing level (Commission Regulation (EEC) No 451/80 of 22 February 1980 imposing a provisional anti-dumping duty on imports of standardized electric multi-phase motors having an output of more than 0.75 kW but not more than 75 kW, originating in the USSR, *O.J.*, 27 February 1980, No L 53/15; Commission Decision 80/252/EEC of 22 February 1980 accepting undertakings given by exporters in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and Romania in connection with the anti-dumping proceeding concerning imports of standardized electric multi-phase motors having an output of more than 0.75 kW but not more than 75 kW, originating in those countries, and terminating the procedure in respect of them, *O.J.*, 27 February 1980, No L 53/21; Council Regulation (EEC) No 1560/80 of 20 June 1980 concerning the definitive collection of the provisional anti-dumping duty imposed on imports of standardized electric multi-phase motors having an output of more than 0.75 kW but not more than 75 kW, originating in the USSR, *O.J.*, 21 June 1980, No L 153/45; Commission Decision 80/599/EEC of 19 June 1980 accepting undertakings in connection with the anti-dumping proceeding concerning imports of standardized electric multi-phase motors having an output of more than 0.75 kW but not more than 75 kW, originating in the USSR and terminating that proceeding, *O.J.*, 21 June 1980, No L 153/48; Commission Decision 80/875/EEC of 17 September 1980 accepting undertakings given by Romanian exporters in connection with the anti-dumping proceeding concerning imports of certain tubes of iron or steel originating in that country, and terminating that proceeding, *O.J.*, 20 September 1980, No L 249/24 (corrigendum, *O.J.*, 7 October 1980, No L 263/8)).

Referring to governmental price controls may seem quite peculiar: normal value can not be determined on the basis of the NME country itself, because the interference of the government in economic life is contrary to the concept «ordinary course of trade», whereas in selecting the normal value standard in the reference country governmental price controls are a reason to use the domestic market price.

It may be deduced from European anti-dumping case law that price controls are considered as a device to guarantee a proper proportion between prices and production costs if a sufficient degree of competition is lacking. Indeed, in *potassium permanganate from Czechoslovakia, the German Democratic Republic and the People's Republic of China*, the absence of price controls was one of the reasons for using the domestic market price of the reference country. In this anti-dumping case the use of the domestic market price was motivated by the existence of a sufficient degree of competition between the domestic monopolist and imports (Commission Regulation (EEC) No 2495/86 of 1 August 1986 imposing a provisional anti-dumping duty on imports of potassium permanganate originating in Czechoslovakia, the German Democratic Republic and the People's Republic of China, *O.J.*, 5 August 1986, No L 217/12). On the other hand, in *certain angles, shapes and sections of iron or steel originating in Romania* and in *certain angles, shapes and sections of iron or steel originating in the German Democratic Republic*, the exercise of governmental price controls in the reference country did not prevent domestic market prices from being applied, though the domestic producer had made an important part of selling transactions in the ordinary course of trade (Commission Decision 84/182/EEC of 23 March 1984 accepting an undertaking offered in connection with an anti-dumping proceeding concerning imports of certain iron or steel angles, shapes and sections originating in Romania, and terminating that proceeding, *O.J.*, 27 March 1984, No L 83/9; Commission

protected against imports, domestic production is faced with stiffened international competition⁶³⁴. When there is no sufficient degree of competition⁶³⁵ or a high degree of market protection⁶³⁶, the constructed value replaces the domestic market price.

Regulation (EEC) No 1129/84 of 18 April 1984 imposing a provisional anti-dumping duty on imports of certain angles, shapes and sections, of iron or steel, originating in the German Democratic Republic, *O.J.*, 26 April 1984, No L 109/11). The fact that in these two anti-dumping cases just one domestic producer is mentioned, which implies that there is a monopoly on the domestic market, can reconcile these two cases with the case concerning *potassium permanganate from Czechoslovakia, the German Democratic Republic and the People's Republic of China*.

It, thus, seems that the nature of governmental price controls is taken into consideration whether or not such controls reflects competitive conditions (VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 436; VERMULST, E.A., and GRAAFSMA, F., «A Decade of European Community Anti-Dumping Law and Practice Applicable to Imports from China», *Journal of World Trade*, 1992/3, (5), 19).

⁶³⁴ Commission Decision 83/248/EEC of 24 May 1983 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of polyethylene originating in the Soviet Union, the German Democratic Republic, Czechoslovakia and Poland and terminating that proceeding, *O.J.*, 27 May 1983, No L 138/65; Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia, *O.J.*, 9 May 1987, No L 121/11; Commission Decision 90/196/EEC of 10 April 1990 terminating the anti-dumping proceeding concerning imports of methenamine (hexamethylenetetramine) originating in Hungary and Yugoslavia and accepting undertakings offered in connection with the proceeding concerning imports of methenamine (hexamethylenetetramine) originating in Bulgaria, Czechoslovakia, Poland and Romania, *O.J.*, 24 April 1990, No L 104/14.

⁶³⁵ Commission Regulation (EEC) No 171/82 of 25 January 1982 imposing a provisional anti-dumping duty on imports of oxalic acid originating in China and Czechoslovakia, *O.J.*, 27 January 1982, No L 19/26 (corrigendum, *O.J.*, 9 February 1982, No L 34/11); Commission Decision 84/465/EEC of 26 September 1984 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of asbestos-cement corrugated sheets originating in Czechoslovakia and the German Democratic Republic and terminating that proceeding, *O.J.*, 28 September 1984, No L 259/48; Commission Regulation (EEC) No 2054/91 of 11 July 1991 imposing a provisional anti-dumping duty on imports of dihydrostreptomycin originating in the People's Republic of China, *O.J.*, 13 July 1991, No L 187/23; Council Regulation (EEC) No 3433/91 of 25 November 1991 imposing a definitive anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in Japan, the People's Republic of China, the Republic of Korea and Thailand and definitively collecting the provisional anti-dumping duty, *O.J.*, 28 November 1991, No L 326/1.

See also : *gas-fuelled, non-refillable pocket flint lighters from the People's Republic of China*, where it was pointed out that the use of the constructed value eliminated the risk of comparing Chinese export prices with prices, the high level of which might be due to there being monopolies in the reference country (Commission Regulation (EEC) No 1386/91 of 23 May 1991 imposing a provisional anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in Japan, the People's Republic of China, the Republic of Korea and Thailand, *O.J.*, 28 May 1991, No L 133/20).

⁶³⁶ Commission Regulation (EEC) No 171/82 of 25 January 1982 imposing a provisional anti-dumping duty on imports of oxalic acid originating in China and Czechoslovakia, *O.J.*, 27 January 1982, No L 19/26 (corrigendum, *O.J.*, 9 February 1982, No L 34/11); Commission Regulation (EEC) No 1633/82 of 23 June 1982 imposing a provisional anti-dumping duty on imports of fibre building board (hardboard) originating in Romania, repealing Commission Decision No 80/564/EEC of 4 June 1980 and accepting undertakings in connection with the proceeding in respect of imports of fibre building board from Czechoslovakia, Finland, Hungary, Norway, Poland, Spain, Sweden and the Soviet Union and terminating the proceeding with regard to those countries and Bulgaria, *O.J.*, 25 June 1982, No L 181/19; Council Regulation (EEC) No 1825/84 of 28 June 1984 imposing a definitive anti-dumping duty on imports of hardboard originating in the Soviet Union, *O.J.*, 29 June 1984, No L 170/68; Commission Regulation (EEC) No 3798/90 of 21 December 1990 imposing a provisional anti-dumping duty on imports of espadrilles originating in the People's Republic of China, *O.J.*, 28 December 1990, No L 365/25; Commission Regulation (EEC) No 2799/92 of 25 September 1992 imposing a provisional anti-dumping duty on imports of deadburned (sintered) magnesia originating in the People's Republic of China, *O.J.*, 26 September 1992, No L 282/15; Commission Regulation (EEC) No 2800/92 of 25 September 1992 imposing a provisional anti-dumping duty on imports of magnesium oxide originating in the People's Republic of China, *O.J.*, 26 September 1992, No L 282/23.

See also : *gas-fuelled, non-refillable pocket flint lighters from the People's Republic of China*, where it was noted that the use of the constructed value eliminated the risk of comparing Chinese export prices with prices which might be high because of the existence of import duties in the reference country (Commission Regulation (EEC) No 1386/91 of 23 May 1991 imposing a provisional anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in Japan, the People's Republic of China, the Republic of Korea and Thailand, *O.J.*, 28 May 1991, No L 133/20).

However, there are some deviations which do not equate the notion «comparable sales made in the ordinary course of trade» with the notion of an appropriate and not unreasonable normal value standard. Indeed, the European anti-dumping authorities have considered the domestic market price to be relevant, even when no comparable domestic sales were made in the ordinary course of trade :

- the small or medium size of the domestic market does not preclude the use of the domestic market price if prices bear a proper proportion to production costs⁶³⁷ or if there are sufficient domestic competition and imports⁶³⁸ ;
- the domestic market price is still used if the absence of domestic competition (there being a domestic monopoly with large scale production) is counterbalanced by prices bearing a proper proportion to production costs⁶³⁹ ;
- even the fact that the market of the reference country is protected, does not exclude the use of the domestic market price, if it is established that all domestic markets are being protected⁶⁴⁰.

On the other hand, even if comparable sales are made in the ordinary course of trade, domestic market prices will not necessarily be used :

- the constructed value has been used merely because the producer is one of the most efficient in the world⁶⁴¹ ;

⁶³⁷ Council Regulation (EEC) No 2512/87 of 18 August 1987 amending Regulation (EEC) No 2786/83 imposing a definitive anti-dumping duty on imports of copper sulphate originating in Czechoslovakia and the USSR, *O.J.*, 20 August 1987, No L 235/18 (corrigendum, *O.J.*, 9 September 1987, No L 259/7) ; Commission Decision 87/443/EEC of 30 July 1987 amending an undertaking and accepting an undertaking given in connection with the anti-dumping review investigation concerning imports of copper sulphate originating in Poland and the USSR respectively, and terminating the investigation as it concerns these countries, *O.J.*, 20 August 1987, No L 235/22.

⁶³⁸ Commission Regulation (EEC) No 3019/86 of 30 September 1986 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania and the USSR, *O.J.*, 1 October 1986, No L 280/68.

⁶³⁹ Commission Regulation (EEC) No 3541/82 of 22 December 1982 imposing a provisional anti-dumping duty on imports of natural magnesite, caustic-burned, originating in the People's Republic of China, *O.J.*, 30 December 1982, No L 371/21 ; Commission Regulation (EEC) No 3542/82 of 22 December 1982 imposing a provisional anti-dumping duty on imports of natural magnesite, dead-burned (sintered), originating in the People's Republic of China and in North Korea, *O.J.*, 30 December 1982, No L 371/25.

⁶⁴⁰ Council Decision 83/9/EEC of 17 January 1983 terminating the anti-dumping proceeding concerning imports of codeine and its salts originating in Czechoslovakia, Hungary, Poland and Yugoslavia, *O.J.*, 20 January 1983, No L 16/30.

⁶⁴¹ Commission Regulation (EEC) No 1633/82 of 23 June 1982 imposing a provisional anti-dumping duty on imports of fibre building board (hardboard) originating in Romania, repealing Commission Decision No 80/564/EEC of 4 June 1980 and accepting undertakings in connection with the proceeding in respect of imports of fibre building board from Czechoslovakia, Finland, Hungary, Norway, Poland, Spain, Sweden and the Soviet Union and terminating the proceeding with regard to those countries and Bulgaria, *O.J.*, 25 June 1982, No L 181/19 ; Commission Regulation (EEC) No 1613/83 of 15 June 1983 imposing a provisional anti-dumping duty on imports of unwrought nickel, not alloyed, in the form of cathodes produced by electrolysis, either uncut or cut into squares, originating in the Soviet Union, *O.J.*, 17 June 1983, No L 159/43 ; Council Regulation (EEC) No 2907/83 of 17 October 1983 terminating the anti-dumping proceeding concerning imports of unwrought nickel, not alloyed, in the form of cathodes produced by electrolysis, either uncut or cut into squares, originating in the Soviet Union, *O.J.*, 19 October 1983, No L 286/29 ; Commission Decision 84/103/EEC of 23 February 1984 terminating the anti-dumping proceeding concerning imports of non-alloyed unwrought aluminium originating in Norway, Surinam, the Soviet Union and Yugoslavia, *O.J.*, 28 February 1984, No L 57/19 ; Council Regulation (EEC) No 1825/84 of 28 June 1984 imposing a definitive anti-dumping duty on imports of hardboard originating in the Soviet Union, *O.J.*, 29 June 1984, No L 170/68.

See also : *tungsten ores and concentrates from the People's Republic of China*, where the efficiency of the producer in the reference country was an additional reason, besides the fact that sales were made at a loss, for using the constructed value (Commission Regulation (EEC) No 761/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten ores and concentrates originating in the People's Republic of China, and terminating the proceeding concerning imports originating in Hong Kong, *O.J.*, 30 March 1990, No L 83/23).

- the constructed value has been used because the product is not a homogenous product⁶⁴² ;
- the constructed value has been used because it was the only practical method to determine normal value, in view of the many additional features of the product of the reference country compared to the dumped product⁶⁴³.

It remains to be seen whether the Court of Justice will agree with those cases. The first series of them, implying a broadened application of the domestic market price, might hold before the Court, as the Court has not held that reasonableness is fully identical to comparable sales in the ordinary course of trade. The second series, however, is likely to go against the Court's judgements which impose the use of the domestic market price in the first instance. However, European anti-dumping law does not provide such a strict preference for the domestic market price as the Court. Under EC anti-dumping law, the European anti-dumping authorities are free in choosing between the different normal value standards. ECSC anti-dumping law only requires that normal value is determined in an appropriate and not unreasonable way and, therefore, allows that reasons other than those related to the existence of comparable sales in the ordinary course of trade, be taken into account insofar as they justify another normal value standard⁶⁴⁴.

Another characteristic of European anti-dumping case law is the use of the same normal value standard for the NME country and the reference country if both countries are subject to the same anti-dumping proceeding⁶⁴⁵. According to the European anti-dumping authorities, there is no

⁶⁴² Commission Regulation (EEC) No 84/82 of 14 January 1982 imposing a provisional anti-dumping duty on mechanical wrist-watches originating in the USSR, *O.J.*, 16 January 1982, No L 11/14.

⁶⁴³ Commission Regulation (EEC) No 2477/93 of 6 September 1993 imposing a provisional anti-dumping duty on imports of certain photo albums originating in the People's Republic of China, *O.J.*, 9 September 1993, No L 228/16.

⁶⁴⁴ *Supra*, 192-193.

⁶⁴⁵ C.J.E.C., joined cases C-305/86 and C-160/87, 11 July 1990, *Neotype Techmasheexport GmbH v Commission and Council*, *E.C.R.*, 1990, I, (2945), 3004 ; Commission Regulation (EEC) No 2391/79 of 26 October 1979 imposing a provisional anti-dumping duty on lithium hydroxide originating in the United States of America and the Soviet Union, *O.J.*, 31 October 1979, No L 274/26 ; Council Regulation (EEC) No 191/80 of 29 January 1980 imposing a definitive anti-dumping duty on lithium hydroxide originating in the United States of America and the Soviet Union, *O.J.*, 30 January 1980, No L 23/19 (corrigendum, *O.J.*, 8 February 1980, No L 31/23) ; Commission Decision 80/564/EEC of 4 June 1980 accepting undertakings in connection with the anti-dumping proceedings concerning imports of fibre building board originating in Czechoslovakia, Finland, Norway, Poland, Romania, Spain, the Soviet Union and Sweden and determining those proceedings, *O.J.*, 11 June 1980, No L 145/39 ; Commission Decision 80/1116/EEC of 4 December 1980 accepting undertakings offered by the exporters of saccharin and its salts originating in China and the United States of America and terminating the proceedings concerning imports of saccharin and its salts from China, Japan and the United States of America, *O.J.*, 9 December 1980, No L 331/41 ; Commission Decision 81/247/EEC of 15 April 1981 terminating the anti-dumping procedure concerning imports of hermetic compressors originating in Brazil, Spain, Hungary, Japan and Singapore, *O.J.*, 25 April 1981, No L 113/53 ; Commission Regulation (EEC) No 1633/82 of 23 June 1982 imposing a provisional anti-dumping duty on imports of fibre building board (hardboard) originating in Romania, repealing Commission Decision No 80/564/EEC of 4 June 1980 and accepting undertakings in connection with the proceeding in respect of imports of fibre building board from Czechoslovakia, Finland, Hungary, Norway, Poland, Spain, Sweden and the Soviet Union and terminating the proceeding with regard to those countries and Bulgaria, *O.J.*, 25 June 1982, No L 181/19 ; Council Decision 82/423/EEC of 21 June 1982 terminating the anti-dumping proceeding concerning imports of certain refrigerators originating in Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania, the Soviet Union and Yugoslavia, *O.J.*, 29 June 1982, No L 184/23 ; Commission Regulation (EEC) No 2127/82 of 28 July 1982 imposing a provisional anti-dumping duty on trichloroethylene originating in the German Democratic Republic and Poland and terminating the anti-dumping proceeding in respect of trichloroethylene originating in Czechoslovakia, Romania, Spain and the United States of America, *O.J.*, 31 July 1982, No L 223/76 ; Commission Decision 82/881/EEC of 23 December 1982 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of perchlorethylene originating in Czechoslovakia, Romania, Spain and the United States

reason to discriminate between the NME country and the reference country⁶⁴⁶. They consider

of America and terminating that proceeding, *O.J.*, 30 December 1982, No L 371/47; Council Decision 83/9/EEC of 17 January 1983 terminating the anti-dumping proceeding concerning imports of codeine and its salts originating in Czechoslovakia, Hungary, Poland and Yugoslavia, *O.J.*, 20 January 1983, No L 16/30; Council Regulation (EEC) No 551/83 of 8 March 1983 imposing a definitive anti-dumping duty on kraftliner paper and board originating in the United States of America and accepting undertakings given in connection with the review of the anti-dumping proceeding on kraftliner paper and board originating in Austria, Canada, Finland, Portugal, the Soviet Union and Sweden, *O.J.*, 10 March 1983, No L 64/25; Council Regulation (EEC) No 2978/83 of 24 October 1983 amending Regulation (EEC) No 191/80 imposing a definitive anti-dumping duty on lithium hydroxide originating in the United States of America and the Soviet Union, *O.J.*, 26 October 1983, No L 294/3; Commission Decision 83/522/EEC of 24 October 1983 accepting the undertaking given in connection with the anti-dumping proceeding in respect of imports of lithium hydroxide originating in the People's Republic of China and terminating that proceeding, *O.J.*, 26 October 1983, No L 294/29; Commission Decision 84/103/EEC of 23 February 1984 terminating the anti-dumping proceeding concerning imports of non-alloyed unwrought aluminium originating in Norway, Surinam, the Soviet Union and Yugoslavia, *O.J.*, 28 February 1984, No L 57/19; Commission Decision 84/408/EEC of 16 August 1984 accepting an undertaking given in connection with the anti-dumping review proceeding concerning imports of copper sulphate originating in Czechoslovakia and terminating that proceeding, *O.J.*, 22 August 1984, No L 225/22; Commission Regulation (EEC) No 2553/84 of 4 September 1984 imposing a provisional anti-dumping duty on imports of oxalic acid originating in Brazil, accepting an undertaking offered by the exporter in the German Democratic Republic of oxalic acid and terminating the proceeding regarding imports of oxalic acid from the German Democratic Republic and Spain, *O.J.*, 7 September 1984, No L 239/8; Commission Regulation (EEC) No 2908/84 of 15 October 1984 imposing a provisional anti-dumping duty on imports of copper sulphate originating in Poland, accepting undertakings given by the Bulgarian and Hungarian exporters of copper sulphate, terminating the investigation regarding exports of copper sulphate from Bulgaria and Hungary and terminating the proceeding regarding those from Spain, *O.J.*, 18 October 1984, No L 275/12; Commission Decision 85/143/EEC of 18 February 1985 terminating the anti-dumping proceeding concerning imports of certain boots with fitted ice skates originating in Czechoslovakia, Yugoslavia, Romania and Hungary, *O.J.*, 22 February 1985, No L 52/48; Commission Decision 86/36/EEC of 26 February 1986 accepting undertakings entered into in connection with the anti-dumping proceeding concerning imports into Greece of certain categories of glass originating in Turkey, Yugoslavia, Romania, Bulgaria, Hungary and Czechoslovakia and terminating the investigation, *O.J.*, 28 February 1986, No L 51/73; Commission Decision 86/344/EEC of 17 July 1986 terminating the anti-dumping proceeding concerning imports of Portland cement originating in the German Democratic Republic, Poland and Yugoslavia, *O.J.*, 25 July 1986, No L 202/43; Commission Regulation (EEC) No 2800/86 of 9 September 1986 imposing a provisional anti-dumping duty on imports of certain deep freezers originating in the USSR, accepting the undertakings in connection with the investigation of imports of certain deep freezers originating in Yugoslavia or in the German Democratic Republic and terminating the investigation, and terminating the proceeding concerning imports of certain deep freezers, *O.J.*, 11 September 1986, No L 259/14; Council Decision 86/468/EEC of 22 September 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain acrylic fibres originating in Israel, Mexico, Romania and Turkey and terminating the investigation, *O.J.*, 24 September 1986, No L 272/29; Commission Decision 86/497/EEC of 7 October 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of silicon carbide originating in the People's Republic of China, Norway, Poland and the USSR, and terminating the investigation regarding imports of that product originating in the People's Republic of China, Norway, Poland, Czechoslovakia, the USSR and Yugoslavia, *O.J.*, 10 October 1986, No L 287/25; Council Regulation (EEC) No 864/87 of 23 March 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union, and definitively collecting the amounts secured as provisional duties, *O.J.*, 27 March 1987, No L 83/1; Commission Regulation (EEC) No 2623/88 of 24 August 1988 imposing a provisional anti-dumping duty on imports of urea originating in Austria, Hungary, Malaysia, Romania, the USA and Venezuela, *O.J.*, 25 August 1988, No L 235/5; Commission Decision 89/143/EEC of 21 February 1989 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of urea originating in Austria, Hungary, Malaysia or Romania, confirming the undertakings accepted pursuant to Council Regulation (EEC) No 3339/87 and terminating the investigations, *O.J.*, 24 February 1989, No L 52/37; Commission Regulation (EEC) No 3074/89 of 11 October 1989 imposing a provisional anti-dumping duty on imports of welded tubes originating in Yugoslavia and Romania, *O.J.*, 13 October 1989, No L 294/10; Council Regulation (EC) No 3359/93 of 2 December 1993 imposing amended anti-dumping measures on imports of ferro-silicon originating in Russia, Kazakhstan, Ukraine, Iceland, Norway, Sweden, Venezuela and Brazil, *O.J.*, 9 December 1993, No L 302/1; Commission Decision No 67/94/ECSC of 12 January 1994 imposing a provisional anti-dumping duty on imports into the Community of hematite pig iron, originating in Brazil, Poland, Russia and Ukraine, *O.J.*, 15 January 1994, No L 12/5; Commission Regulation (EC) No 3119/94 of 19 December 1994 imposing a provisional anti-dumping duty on imports of ferro-silico-manganese originating in Russia, Ukraine, Brazil and South Africa, *O.J.*, 21 December 1994, No L 330/15.

⁶⁴⁶ Council Decision 83/9/EEC of 17 January 1983 terminating the anti-dumping proceeding concerning imports of codeine and its salts originating in Czechoslovakia, Hungary, Poland and Yugoslavia, *O.J.*, 20 January 1983, No L 16/30.

it equitable⁶⁴⁷ as well as appropriate and not unreasonable⁶⁴⁸ to use the same standard. However, exceptions may also be found in European anti-dumping case law :

In *synthetic polyester fibres from the German Democratic Republic, Romania and Turkey*⁶⁴⁹ and in *urea from the German Democratic Republic, Saudi-Arabia, the Soviet Union and Czechoslovakia*⁶⁵⁰, the normal value standard of the reference country was determined on the basis of the domestic market prices charged to independent customers, whereas the normal value standard of the NME country was established by referring to the domestic market prices as such of the reference country. Because the price to independent customers is considered to represent the domestic market price (Article 2(1)(b) basic EC Regulation ; Article 2(3)(a) basic ECSC Decision) in connection with ME countries, this lack of nuance can be seen as an oblivion. Another explanation might be that the sales to associated buyers have been left aside. Indeed, not all domestic sales of the reference country must be taken into account for determining the normal value of NME countries⁶⁵¹. This seems to be the case in *canned pears from the People's*

⁶⁴⁷ Commission Decision 82/881/EEC of 23 December 1982 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of perchlorethylene originating in Czechoslovakia, Romania, Spain and the United States of America and terminating that proceeding, *O.J.*, 30 December 1982, No L 371/47.

⁶⁴⁸ Commission Regulation (EEC) No 2127/82 of 28 July 1982 imposing a provisional anti-dumping duty on trichloroethylene originating in the German Democratic Republic and Poland and terminating the anti-dumping proceeding in respect of trichloroethylene originating in Czechoslovakia, Romania, Spain and the United States of America, *O.J.*, 31 July 1982, No L 223/76 ; Commission Regulation (EEC) No 3074/89 of 11 October 1989 imposing a provisional anti-dumping duty on imports of welded tubes originating in Yugoslavia and Romania, *O.J.*, 13 October 1989, No L 294/10.

⁶⁴⁹ Commission Decision 87/236/EEC of 10 April 1987 terminating the anti-dumping proceeding on imports of synthetic fibres of polyesters originating in the German Democratic Republic, Romania, Turkey and Yugoslavia, *O.J.*, 15 April 1987, No L 103/38.

⁶⁵⁰ Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia, *O.J.*, 9 May 1987, No L 121/11 ; Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1.

⁶⁵¹ Commission Regulation (EEC) No 724/82 of 30 March 1982 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0.75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Poland, Romania and the USSR, and terminating the proceeding in respect of imports of said products originating in Hungary, *O.J.*, 31 March 1982, No L 85/9 ; Commission Regulation (EEC) No 1958/82 of 16 July 1982 imposing a provisional anti-dumping duty on imports of photographic enlargers originating in Poland and the USSR, accepting an undertaking and terminating the proceeding in respect of imports of photographic enlargers originating in Czechoslovakia, *O.J.*, 21 July 1982, No L 212/32 ; Commission Regulation (EEC) No 1631/83 of 15 June 1983 imposing a provisional anti-dumping duty on imports of certain glass textile fibres (rovings) originating in Czechoslovakia, the German Democratic Republic and Japan, accepting a price undertaking from one Japanese exporter and terminating the proceeding in respect of imports of certain glass textile fibres (mats), originating in Czechoslovakia and the German Democratic Republic, *O.J.*, 18 June 1983, No L 160/18 ; Commission Regulation (EEC) No 3019/86 of 30 September 1986 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania and the USSR, *O.J.*, 1 October 1986, No L 280/68 ; Council Regulation (EEC) No 864/87 of 23 March 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union, and definitively collecting the amounts secured as provisional duties, *O.J.*, 27 March 1987, No L 83/1 ; Commission Decision 87/236/EEC of 10 April 1987 terminating the anti-dumping proceeding on imports of synthetic fibres of polyesters originating in the German Democratic Republic, Romania, Turkey and Yugoslavia, *O.J.*, 15 April 1987, No L 103/38 ; Commission Decision 88/47/EEC of 26 January 1988 accepting an undertaking given in connection with the anti-dumping review proceeding concerning imports of a herbicide originating in Romania, *O.J.*, 30 January 1988, No L 26/107 ; Commission Regulation (EEC) No 1696/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 June 1988, No L 151/47 ; Commission Regulation (EEC) No 1745/88 of 21 June 1988 imposing a provisional anti-dumping duty on imports of paracetamol originating in the People's Republic of China, *O.J.*, 22 June 1988, No L 155/29.

*Republic of China and the Republic South-Africa*⁶⁵² and in *synthetic polyester fibres from Romania and Turkey*⁶⁵³, where the normal value of the reference country was based on the domestic market price, except for one exporter whose normal value was based on the constructed value because sales had been made at a loss; for the NME country, however, reference was only made to the domestic market price of the reference country. The sales at a loss had been left aside. This follows from the consideration in *synthetic polyester fibres from Romania and Turkey* that the domestic market price of the reference country had been used because of its proper proportion to production costs.

No explanation can be found for the different treatment of the reference country and the NME country in *artificial corundum from the People's Republic of China, Czechoslovakia and Yugoslavia*⁶⁵⁴. White artificial corundum had been sold at a loss in the reference country and, therefore, normal value was determined by the constructed value. However, normal value of white artificial corundum for the NME countries was based on the domestic market price of the reference country. In another anti-dumping case concerning the same product but involving other NME countries⁶⁵⁵, the same reference country was used. This time, however, the normal value of the NME countries was based on the domestic market price of the reference country, except in respect of white artificial corundum for which the constructed value was used.

In *bicycles from Taiwan and the People's Republic of China*⁶⁵⁶ it is impossible to find a reason explaining why the domestic market price of Taiwan was used as normal value standard for the People's Republic of China, whereas the constructed value was used for Taiwan. The case is all the more peculiar as the constructed value was used for Taiwan on an illegal basis, since there were comparable sales made in the ordinary course of trade and, in such circumstances, the domestic market price must be used in respect of ME countries. On the other hand, there is no hierarchy between domestic market price and constructed value in respect of NME countries. Moreover, according to the European anti-dumping authorities, this different treatment did not discriminate against the People's Republic of China because the domestic market prices of Taiwan were not higher than the constructed value⁶⁵⁷. The consequent discrimination against Taiwan, though, seemingly did not matter, probably because Taiwan was found not to practise dumping⁶⁵⁸.

⁶⁵² Commission Decision 83/360/EEC of 18 July 1983 terminating the anti-dumping proceeding in respect of imports of certain pears in syrup, originating in Australia, the People's Republic of China and the Republic of South Africa, *O.J.*, 20 July 1983, No L 196/22.

⁶⁵³ Commission Regulation (EEC) No 1696/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 June 1988, No L 151/47; Council Regulation (EEC) No 3946/88 of 16 December 1988 imposing a definitive anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 December 1988, No L 348/49.

⁶⁵⁴ Commission Regulation (EEC) No 2690/84 of 21 September 1984 imposing a provisional anti-dumping duty on imports of artificial corundum originating in the People's Republic of China and Czechoslovakia and terminating the proceeding in respect of imports of artificial corundum originating in Spain and Yugoslavia, *O.J.*, 25 September 1984, No L 255/9.

⁶⁵⁵ Commission Decision 86/464/EEC of 17 September 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of artificial corundum originating in Hungary, Poland and the USSR, and terminating the investigation, *O.J.*, 23 September 1986, No L 271/26.

⁶⁵⁶ Commission Regulation (EEC) No 550/93 of 5 March 1993 imposing a provisional anti-dumping duty on imports of bicycles originating in the People's Republic of China, *O.J.*, 11 March 1993, No L 58/12.

⁶⁵⁷ Council Regulation (EEC) No 2474/93 of 8 September 1993 imposing a definitive anti-dumping duty on imports into the Community of bicycles originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 9 September 1993, No L 228/1.

⁶⁵⁸ Commission Regulation (EEC) No 550/93 of 5 March 1993 imposing a provisional anti-dumping duty on imports of bicycles originating in the People's Republic of China, *O.J.*, 11 March 1993, No L 58/12; Commission Decision 93/485/EEC of 6 September 1993 terminating the anti-dumping proceeding concerning imports of bicycles originating in Taiwan, *O.J.*, 8 September 1993, No L 227/21.

A different treatment has also been applied in *mechanical alarm clocks from China, Czechoslovakia, the German Democratic Republic, Hong-Kong and the Soviet Union*⁶⁵⁹. In this anti-dumping case, no dumping had been established in respect of the reference country by using the export price to third countries as well as the constructed value as normal value standard. With regard to the NME countries, the export price of the reference country to the Community was used as normal value standard, because this country had not been involved in dumping. As a consequence, the highest price possible was used as normal value standard for the NME countries.

The anti-dumping cases concerning *saccharine from China and Japan*⁶⁶⁰ and *ball bearings and tapered roller bearings from Japan, Poland, Romania and the Soviet Union*⁶⁶¹ are harder to understand. In respect of the reference country the domestic market price was used. Though it had been established that this country had been practising dumping, its export price was used as normal value standard for the NME countries. It is more difficult to grasp not only because it is a deviation of the principle of non-discrimination, but also because usually the export price of the reference country is rejected as normal value standard for NME countries, as dumping is probable or possible⁶⁶². Whereas in *saccharine from China and Japan*, any motivation is lacking, the only argument used in *ball bearings and tapered roller bearings from Japan, Poland, Romania and the Soviet Union*, was the competition among the exports to the Community of the reference country and the NME countries. However, in *polyvinylchloride from Czechoslovakia, Romania, the German Democratic Republic and Hungary*⁶⁶³, the export price of the reference country was not considered, because this price had possibly been influenced by the competition of low-priced exports of other countries.

Only in *dihydrostreptomycin from the People's Republic of China*, it was explained why a different normal value standard was used for the NME country than for the reference country. In particular, the domestic market price was used for the reference country. That price was regarded as not being the right basis for the NME country. The sole producer of the reference country had a monopoly on his domestic market and could, thus, charge very high prices. It was found unreasonable for the NME country to have to bear the consequences of the monopoly on the domestic

659 Commission Regulation (EEC) No 1579/80 of 19 June 1980 imposing a provisional anti-dumping duty on mechanical alarm clocks originating in the German Democratic Republic and the Soviet Union, and withdrawing the national anti-dumping duty on mechanical alarm clocks originating in China, *O.J.*, 25 June 1980, No L 158/5 ; Commission Decision 80/600/EEC of 19 June 1980 accepting the undertakings given by Chinese and Czechoslovakian exporters in connection with the anti-dumping proceeding in respect of imports of mechanical alarm clocks originating in China, Czechoslovakia, the German Democratic Republic, Hong-Kong and the USSR, terminating the proceeding in connection with China, Czechoslovakia and Hong-Kong and withdrawing the undertakings accepted by the Government of the United Kingdom and given by the exporters of the German Democratic Republic and the USSR, *O.J.*, 25 June 1980, No L 158/18.

660 Commission Regulation (EEC) No 3171/80 of 4 December 1980 repealing a national anti-dumping duty on saccharin and its salts originating in the Republic of Korea imposed under the transitional provisions of the Act of Accession, *O.J.*, 9 December 1980, No L 331/25 ; Commission Decision 80/1116/EEC of 4 December 1980 accepting undertakings offered by the exporters of saccharin and its salts originating in China and the United States of America and terminating the proceedings concerning imports of saccharin and its salts from China, Japan and the United States of America, *O.J.*, 9 December 1980, No L 331/41.

661 Commission Decision 81/406/EEC of 4 June 1981 accepting undertakings in connection with the anti-dumping proceeding concerning imports of ball and tapered roller bearings, originating in Japan, Poland, Romania and the Soviet Union and terminating that proceeding, *O.J.*, 11 June 1981, No L 152/44.

662 Council Decision 83/9/EEC of 17 January 1983 terminating the anti-dumping proceeding concerning imports of codeine and its salts originating in Czechoslovakia, Hungary, Poland and Yugoslavia, *O.J.*, 20 January 1983, No L 16/30 ; Commission Regulation (EEC) No 2908/84 of 15 October 1984 imposing a provisional anti-dumping duty on imports of copper sulphate originating in Poland, accepting undertakings given by the Bulgarian and Hungarian exporters of copper sulphate, terminating the investigation regarding exports of copper sulphate from Bulgaria and Hungary and terminating the proceeding regarding those from Spain, *O.J.*, 18 October 1984, No L 275/12 ; Commission Decision 88/623/EEC of 12 December 1988 accepting undertakings given in connection with the anti-dumping review concerning imports of oxalic acid originating in China or Czechoslovakia and terminating the review, *O.J.*, 13 December 1988, No L 343/34 ; Commission Regulation (EEC) No 1386/91 of 23 May 1991 imposing a provisional anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in Japan, the People's Republic of China, the Republic of Korea and Thailand, *O.J.*, 28 May 1991, No L 133/20.

663 Commission Regulation (EEC) No 2568/82 of 17 September 1982 imposing a provisional anti-dumping duty on imports of polyvinyl chloride resins and compounds originating in Czechoslovakia, and accepting undertakings and terminating the proceeding in respect of imports of such products originating in Romania, the German Democratic Republic and Hungary, *O.J.*, 24 September 1982, No L 274/15.

market of the reference country. Therefore, the constructed value was used as normal value standard for the NME country⁶⁶⁴.

The discretionary power to select the normal value standard is, thus, vested in the European anti-dumping authorities. Under ECSC anti-dumping law, they have only to prove that normal value is determined in an appropriate and not unreasonable manner. In principle, normal value is selected with reference to the concept of «comparable sales in the ordinary course of trade» and the principle of non-discrimination. However, many exceptions may be found in European anti-dumping case law, for which seldom an explicit motivation is provided. This does not enhance legal certainty. It is impossible to know which normal value standard will be used. Moreover, the «appropriate and not unreasonable» normal value standard used in ECSC anti-dumping law is so vague that the dumping margin may be manipulated either for the benefit or to the detriment of the NME country⁶⁶⁵.

3. EXPORT PRICE STANDARDS

3.1. INTRODUCTION

Section 3 examines which are the export price standards and whether there is a hierarchy among them. It also looks into the ways of determining them.

When applied to export price determination, «one-way flexibility» would imply that the European anti-dumping authorities try to determine an export price which is as low as possible. For the lower the export price, the more probable it would be for dumping to be found. Section 3 shows that «one-way flexibility» is applied, even if, therefore GATT and European anti-dumping law must be violated. Moreover, for associated parties, it shows that «one-way flexibility» does not require any violation of GATT and European anti-dumping law, as they impose an export price

⁶⁶⁴ Commission Regulation (EEC) No 2054/91 of 11 July 1991 imposing a provisional anti-dumping duty on imports of dihydrostreptomycin originating in the People's Republic of China, *O.J.*, 13 July 1991, No L 187/23.

⁶⁶⁵ THARAKAN, P.K.M., and WELBROECK, J., «Antidumping and countervailing duty decisions in the E.C. and in the U.S. An experiment in comparative political economy», *European Economic Review*, 1994, (171), 174-175 and 183.

See also : MESSERLIN, P., «Anti-Dumping Regulations or Pro-Cartel Law ? The EC Chemical Cases», *World Economy*, 1990, (465), 479-480, where evidence is provided that, in the two anti-dumping cases investigated by the author, the reasons given by the European anti-dumping authorities as to the choice of the normal value standard (*i.e.*, the domestic market price is used because of the degree of competition on the domestic market of the reference country), are not borne out by the facts.

standard for associated parties which leaves aside economic reality and will most likely result in too high an export price.

In connection with the export price determination, no distinction is being made between ME countries and NME countries⁶⁶⁶. Like exports of ME countries, exports of NME countries to the Community are presumed to be subject to the laws of supply and demand⁶⁶⁷. There is but one exception : in principle, countrywide export prices for NME countries are being determined. Contrary to exporters established in ME countries, no individual export prices are being determined for companies established in a NME country, unless those companies operate independently from the State and will continue to do so in the future⁶⁶⁸. As companies will only request individual treatment when their export prices exceed those of the other companies, a countrywide treatment will result in lower export prices, and consequently, higher dumping margins for the companies requesting individual treatment⁶⁶⁹.

3.2. HIERARCHY

In principle, the export price must be determined on the basis of the actual price. The actual export price, however, cannot be a relevant basis so that other standards have to be applied. GATT and European anti-dumping law introduce a strict hierarchy of export price standards (Note No 1 *ad* Article VI(1) GATT ; Articles 2.1. and 2.3. GATT Anti-dumping Code ; Article 2(8) and (9) basic EC Regulation ; Article 2(8) basic ECSC Decision) :

- (i) the price actually paid or payable for the product sold from the exporting country to the Community, hereinafter called the actual export price ;
- (ii) the export price constructed on the basis of the price at which the imported product is first resold to an independent buyer, hereinafter called the constructed export price ;
- (iii) the export price determined on any reasonable basis ;

⁶⁶⁶ FINE, F.L., «EEC Antidumping : The Problem of Imports from State-Trading Countries», *Law and Policy in International Business*, 1988, (91), 92-93.

⁶⁶⁷ BESELER, J.-F., *Die Abwehr von Dumping und Subventionen durch die Europäische Gemeinschaften*, Baden-Baden, Nomos, 1980, 53.

⁶⁶⁸ Commission Regulation (EEC) No 550/93 of 5 March 1993 imposing a provisional anti-dumping duty on imports of bicycles originating in the People's Republic of China, *O.J.*, 11 March 1993, No L 58/12 ; Council Regulation (EEC) No 2474/93 of 8 September 1993 imposing a definitive anti-dumping duty on imports into the Community of bicycles originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 9 September 1993, No L 228/1 ; Commission Regulation (EEC) No 2477/93 of 6 September 1993 imposing a provisional anti-dumping duty on imports of certain photo albums originating in the People's Republic of China, *O.J.*, 9 September 1993, No L 228/16.

⁶⁶⁹ See e.g., in photo albums from the People's Republic of China, only the exporter requesting individual treatment, cooperated during the anti-dumping investigation. His lowest export price was used as best information available in order to establish the export price of the remaining Chinese exports to the Community. Consequently, the countrywide export price was below his individual prices, but was still applied to his exports (Commission Regulation (EEC) No 2477/93 of 6 September 1993 imposing a provisional anti-dumping duty on imports of certain photo albums originating in the People's Republic of China, *O.J.*, 9 September 1993, No L 228/16).

- (iv) when necessary and just information is lacking, the normal value on the basis of the facts available (Article 6.8. GATT Anti-dumping Code ; Article 18 basic EC Regulation ; Article 7(7)(b) basic ECSC Decision).

Therefore, the constructed export price must be used, if there is no actual export price, if this actual export price is unreliable, because of an association or a compensatory arrangement between the exporter and the importer or a third party (e.g., a company which performs the functions of an export department⁶⁷⁰), or if the actual export price is unreliable for other reasons⁶⁷¹. The constructed export price, in its turn, must be disregarded and the export price must be determined on any reasonable basis, if the product is not resold to an independent buyer, or if the product is not resold in the condition it was in when imported.

3.3. ALTERNATIVE EXPORT PRICE STANDARDS

3.3.1. Actual export price

The actual export price is the price paid or payable for the product sold from the exporting country to the Community (Article 2(8) basic EC Regulation ; Article 2(8)(a) basic ECSC

⁶⁷⁰ C.J.E.C., case C-156/87, 14 March 1990, *Gestetner Holdings plc v Council and Commission*, E.C.R., 1990, I (781), 835-837 ; C.J.E.C., case C-171/87, 10 March 1992, *Canon Inc. v Council*, E.C.R., 1992, I, (1237), 1291 ; C.J.E.C., case C-172/87, 10 March 1992, *Mita Industrial Co. Ltd v Council*, E.C.R., 1992, I, (1301), 1332-1333 ; Commission Decision No 2247/87/ECSC of 28 July 1987 imposing a provisional anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Mexico, *O.J.*, 29 July 1987, No L 207/21 ; Commission Regulation (EEC) No 3617/90 of 11 December 1990 imposing a provisional anti-dumping duty on imports of certain welded tubes of iron or non-alloy steel, originating in Turkey or in Venezuela and accepting undertakings offered in connection with such imports, *O.J.*, 15 December 1990, No L 351/17.

⁶⁷¹ GATT anti-dumping law does not refer to those «other reasons» as a ground for disregarding the actual export price. Nevertheless, Advocate-General J.-P. WARNER has held that there is no violation of GATT anti-dumping law. He considers Note No 1 *ad* Article VI(1) GATT, but also Article 2.3. of the GATT Anti-dumping Code, which treat only of associated parties, as mere interpretations of Article VI of GATT. According to him, these interpretations are conceivable, but not restrictive (C.J.E.C., joined cases 113 and 118-121/77, March 29, 1979, *NTN Toyo Bearing Company Ltd a.o. v Council*, E.C.R., 1979, 1254. See also : BESELER, J.-F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 86 ; STANBROOK, C., *Dumping. A manual on the EEC Anti-Dumping Law and Procedure*, Chequers, European Business Publications, 1980, 36, note 23. *Contra* : VAN BAEL, I., and BELLIS, J.-F., *Anti-Dumping and other Trade Protection Laws of the EEC*, Bicester, CCH Editions, 1990, 78).

The «other reasons» argument has never been used or, at most, but very rarely :

- in *chemical fertilizers from the United States of America* and *ball bearings and tapered roller bearings from Japan*, the constructed export price was used, as there was no information about the actual export price (Council Regulation (EEC) No 101/83 of 17 January 1983 imposing a definitive anti-dumping duty on certain chemical fertilizer originating in the United States of America, *O.J.*, 19 January 1983, No L 15/1 ; Council Regulation (EEC) No 1739/85 of 24 June 1985 imposing a definitive anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan, *O.J.*, 27 June 1985, No L 167/3). It is, however, possible that the constructed export price was used not on the «other reasons» ground, but best information available (Article 18 basic EC Regulation ; Article 7(7)(b) basic ECSC Decision). Indeed, the absence of information is a sufficient condition for using the best information available ;
- in *hand knitting yarns from Turkey*, the constructed export price was used because the price paid by the trading firm to the exporter could not be considered as having been made in the ordinary course of trade. No explanation was offered as to the meaning of the reference to the concept of «ordinary course of trade» (Commission Decision 84/131/EEC of 5 March 1984 accepting an undertaking in connection with the anti-dumping proceeding concerning imports of certain synthetic fibre hand-knitting yarn originating in Turkey and terminating that proceeding, *O.J.*, 9 March 1984, No L 67/60).

Decision). Only prices charged in connection with actual export transactions, as shown in the invoices or other accounting documents of the exporter⁶⁷², may be taken into account. Nevertheless, offers and irrevocable tenders⁶⁷³, as well as prices that the exporters will charge as soon as they start to export to the Community⁶⁷⁴, seem also to fit in with the concept «payable export price».

Under ECSC anti-dumping law, the export price is the price paid for the product «sold for export» (Article 2(8)(a) basic ECSC Decision). The wording «sold for export» indicates that the export price and not the import price must be used as export price standard⁶⁷⁵. EC anti-dumping law does not use such an accurate wording. It treats of the product «when sold from the exporting country to the Community» (Article 2(8) basic EC Regulation). It seems, though, that, under EC anti-dumping law, the export price should be used too since it always treats of «the export price» and there is no indication that the wording «export price» should be interpreted as meaning the import price. Another interpretation would be at variance with GATT anti-dumping law, under

⁶⁷² Commission Recommendation No 2975/82/ECSC of 8 November 1982 imposing a definitive anti-dumping duty on certain sheets and plates, of iron or steel, originating in Brazil, *O.J.*, 9 November 1982, No L 312/10; Commission Regulation (EEC) No 163/83 of 21 January 1983 imposing a provisional anti-dumping duty on 4,4'-Isopropylidenediphenol originating in the United States of America, *O.J.*, 26 January 1983, No L 23/9; Council Decision 83/162/EEC of 18 April 1983 terminating the anti-dumping proceeding in respect of imports of acrylonitrile originating in the United States of America, *O.J.*, 20 April 1983, No L 101/29; Commission Regulation (EEC) No 2690/84 of 21 September 1984 imposing a provisional anti-dumping duty on imports of artificial corundum originating in the People's Republic of China and Czechoslovakia and terminating the proceeding in respect of imports of artificial corundum originating in Spain and Yugoslavia, *O.J.*, 25 September 1984, No L 255/9; Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia, *O.J.*, 9 May 1987, No L 121/11; Commission Decision No 3692/91/ECSC of 12 December 1991 repealing Decision No 2132/88/ECSC imposing definitive anti-dumping duties on imports of certain iron or steel coils, originating in Algeria, Mexico and Yugoslavia, *O.J.*, 19 December 1991, No L 350/11.

⁶⁷³ In *herbicide from Romania* the Commission found no export transaction during the investigation period. However, an offer had been made during that period to deliver a considerable quantity at a certain price. This price was used as export price standard (Commission Decision 88/47/EEC of 26 January 1988 accepting an undertaking given in connection with the anti-dumping review proceeding concerning imports of a herbicide originating in Romania, *O.J.*, 30 January 1988, No L 26/107). See also: VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 471, note 100.

⁶⁷⁴ Council Regulation (EC) No 1828/94 of 25 July 1994 amending Regulation (EEC) No 738/92 imposing a definitive anti-dumping duty on imports of cotton yarn, originating in Brazil and Turkey, *O.J.*, 27 July 1994, No L 191/3.

⁶⁷⁵ C.J.E.C., case C-178/87, 10 March 1992, *Minolta Camera Co. Ltd v Council*, E.C.R., 1992, I, (1577), 1607 (Opinion of Advocate General MISCHO); C.J.E.C., case C-216/91, 7 December 1993, *Rima Electrometalurgia SA v Council*, recital 82 (Opinion of Advocate General LENZ) (not yet reported).

In *cotton yarns from Turkey*, the use of the export price instead of the import price was explained on the basis of Article 2(10) basic EC Regulation (and Article 2(9) basic ECSC Decision) (Commission Decision 85/515/EEC of 22 November 1985 concerning applications submitted by Nellen & Quack GmbH & Co KG, Gronau, for refund of anti-dumping duties collected on certain imports of cotton yarn originating in Turkey, *O.J.*, 27 November 1985, No L 316/54). In accordance with that Article, normal value and export price must be compared at the same level of trade. If the price sold for export to the Community must be the import price, it would comprise costs and profits of merchants in third countries. This would be contrary to Article 2(10) basic EC Regulation (and Article 2(9) basic ECSC Decision). Such a price would not be comparable to normal value because normal value was established on the level «*for Turkey*» and, therefore, did not comprise similar costs and profits. The reasoning in *cotton yarns from Turkey* is not convincing. Indeed, a clear distinction has to be made between the determination of the export price and the comparison between the export price and normal value. See: *infra*, 280-281).

which a strict preference for the export price prevails, notwithstanding the unclear wording of GATT on this point⁶⁷⁶.

The actual export price is the price which the producer/exporter receives, not only when he sells directly to the Community importer, but also when he sells via trading houses, merchants or brokers. In that case, the export price is the price paid by trading houses, merchants or brokers to the producer/exporter⁶⁷⁷. Price manipulation by the importer (*i.e.*, when the importer sells

⁶⁷⁶ GATT (Article VI(1) GATT) is not clear on this point. It refers to the price of the product exported, but also to the price at which products are introduced into the commerce of another country (BESELER, J.-F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 81; BOUDANT, J., *L'anti-dumping communautaire*, Paris, Economica, 1991, 106; LESGUILLONS, H., «Le régime anti-dumping de la Communauté européenne», *Droit et pratique du commerce international*, 1978, (459), 484; LESGUILLONS, H., *Le régime communautaire de protection contre le dumping et les subventions*, Paris, F.E.D.U.C.I., 1983, 77-78). In 1959 the GATT Group of Experts cut the knot: in their opinion, normal value had to be compared with «the price at which the like product left [the exporting] country, not the price at which it entered the importing country» (*B.I.S.D., Eight Supplement*, Geneva, GATT, 1960, 146, consideration 5). The GATT Anti-dumping Code confirms their opinion by stressing that the export price is the price of the «product exported from one country to another» (Article 2.1. GATT Anti-dumping Code).

⁶⁷⁷ Commission Regulation (EEC) No 1411/81 of 25 May 1981 imposing a provisional anti-dumping duty on orthoxylene (o-Xylene) originating in Puerto Rico and the United States of America, *O.J.*, 27 May 1981, No L 141/29; Commission Regulation (EEC) No 1591/81 of 10 June 1981 imposing a provisional anti-dumping duty on paraxylene (p-xylene) originating in Puerto Rico, the United States of America and the US Virgin Islands, *O.J.*, 16 June 1981, No L 158/7; Commission Regulation (EEC) No 2017/81 of 15 July 1981 imposing a provisional anti-dumping duty on phenol originating in the United States of America, *O.J.*, 18 July 1981, No L 195/22; Council Regulation (EEC) No 90/82 of 18 January 1982 imposing a definitive anti-dumping duty on phenol originating in the United States of America, *O.J.*, 18 January 1982, No L 12/1; Council Regulation (EEC) No 551/83 of 8 March 1983 imposing a definitive anti-dumping duty on kraftliner paper and board originating in the United States of America and accepting undertakings given in connection with the review of the anti-dumping proceeding on kraftliner paper and board originating in Austria, Canada, Finland, Portugal, the Soviet Union and Sweden, *O.J.*, 10 March 1983, No L 64/25; Council Regulation (EEC) No 1739/85 of 24 June 1985 imposing a definitive anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan, *O.J.*, 27 June 1985, No L 167/3; Commission Decision 85/515/EEC of 22 November 1985 concerning applications submitted by Nellen & Quack GmbH & Co KG, Gronau, for refund of anti-dumping duties collected on certain imports of cotton yarn originating in Turkey, *O.J.*, 27 November 1985, No L 316/54; Commission Regulation (EEC) No 3421/90 of 26 November 1990 imposing a provisional anti-dumping duty on imports of aspartame originating in Japan and the United States of America, *O.J.*, 29 November 1990, No L 330/16; Commission Regulation (EEC) No 129/91 of 11 January 1991 imposing a provisional anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China, *O.J.*, 19 January 1991, No L 14/31; Council Regulation (EEC) No 577/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as EPROMs (erasable programmable read only memories) originating in Japan, *O.J.*, 12 March 1991, No L 65/1; Commission Regulation (EEC) No 2805/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports into the Community of certain thermal paper originating in Japan, *O.J.*, 26 September 1991, No L 270/15; Commission Regulation (EC) No 1506/94 of 27 June 1994 imposing provisional duties on imports of urea ammonium nitrate solution originating in Bulgaria and Poland, *O.J.*, 30 June 1994, No L 162/16.

Contra: colour television receivers from the People's Republic of China, where the export price was based on the last transaction for which the exporters were responsible, because, in certain cases where they had sold products to an independent intermediary, the exporters were unable to report the price finally charged to the Community importer (Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50).

See also: saccharine from Japan, chemical fertilizer from the United States of America, electronic weighing scales originating in Japan and bicycles from the People's Republic of China, where the price paid to the independent trading firm, instead of the price paid by this firm to the manufacturer/exporter, was used as export price. In *chemical fertilizer from the United States of America*, it was explained that the price paid by the trading house to the exporter was used because of lack of information and, in *bicycles from the People's Republic of China*, the price invoiced by the trading firm was used as there was no invoice price between the producer and the trading firm (Commission Decision 80/1116/EEC of 4 December 1980 accepting undertakings offered by the exporters of saccharin and its salts originating in China and the United States of America and terminating the proceedings concerning imports of saccharin and its salts from China, Japan and the United States of America, *O.J.*, 9 December 1980, No L 331/41; Council Regulation (EEC) No 101/83 of 17 January 1983 imposing a definitive anti-dumping duty on certain chemical fertilizer originating in the United States of America, *O.J.*, 19 January 1983, No L 15/1; Commission Regulation (EEC) No 757/84 of 22 March 1984 imposing a provisional anti-dumping duty on imports of certain electronic scales originating in Japan, *O.J.*, 24 March 1984, No L 80/9 (corrigendum, *O.J.*, 17 April 1984, No L 104/26); Commission Regulation (EEC) No 550/93 of 5 March 1993 imposing a

the imported products at a price lower than the export price paid to the exporter) is irrelevant when there is no association or compensatory agreement between him and the exporter⁶⁷⁸.

In view of the wording «sold from the exporting country to the Community» (Article 2(8) basic EC Regulation) or «sold for export to the European Community» (Article 2(8)(a) basic ECSC Decision) (emphasis added), the producer/exporter should know that the destination of his products is the Community. In some European anti-dumping cases, the price paid to the producer/exporter by a trading firm was irrelevant when the producer/exporter did not know the destination⁶⁷⁹. The correctness of other European anti-dumping cases in which no knowledge of dumping on account of the producer/exporter was required⁶⁸⁰, may be doubted. A producer/exporter should be held liable for dumping, only if he has the opportunity of knowing in

provisional anti-dumping duty on imports of bicycles originating in the People's Republic of China, *O.J.*, 11 March 1993, No L 58/12).

⁶⁷⁸ KRETSCHMER, H., *Das Antidumping- und Antisubventionsrecht der Europäischen Gemeinschaften*, Frankfurt/Main, VWW-Verlag, 1980, 38.

⁶⁷⁹ Council Regulation (EEC) No 1739/85 of 24 June 1985 imposing a definitive anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan, *O.J.*, 27 June 1985, No L 167/3.

See also : *orthoxylylene from the United States of America*, where no dumping margin was established for a producer because his export took place via international brokers and he therefore could not control his sales to the Community (Council Regulation (EEC) No 906/83 of 18 April 1983 amending Regulation (EEC) No 2761/81 imposing a definitive anti-dumping duty on o-xylene (orthoxylylene) originating in Puerto Rico and the United States of America, *O.J.*, 20 April 1983, No L 101/4).

⁶⁸⁰ It seems that the manufacturer in *mercury from the Soviet Union* must have known the destination of his products for it was stressed that he sold his products «cif harbour of the Community». Thus, everything seems in order, was it not that the Council added that only the consequences of the behaviour of the exporter and not his motives are decisive for the application of European anti-dumping law. This rather strange pronouncement can very well mean that it is of no importance whether the exporter knew the destination or not (Council Regulation (EEC) No 3687/87 of 8 December 1987 imposing a definitive anti-dumping duty on imports of mercury originating in the Soviet Union and definitively collecting the provisional anti-dumping duty imposed on such imports, *O.J.*, 10 December 1987, No L 346/27).

See also :

- *non-alloyed unwrought aluminium from the Soviet Union*, where the exports originating in the Soviet Union sold to international traders were taken into account (Commission Decision 84/103/EEC of 23 February 1984 terminating the anti-dumping proceeding concerning imports of non-alloyed unwrought aluminium originating in Norway, Surinam, the Soviet Union and Yugoslavia, *O.J.*, 28 February 1984, No L 57/19) ;
- *chemical fertilizer from the United States of America and dicumyl peroxide from Japan*, where no inquiry is made into the knowledge of dumping (Council Regulation (EEC) No 101/83 of 17 January 1983 imposing a definitive anti-dumping duty on certain chemical fertilizer originating in the United States of America, *O.J.*, 19 January 1983, No L 15/1 ; Commission Regulation (EEC) No 2079/83 of 25 July 1983 imposing a provisional anti-dumping duty on imports of dicumyl peroxide originating in Japan, *O.J.*, 27 July 1983, No L 203/13).

advance that he is dumping⁶⁸¹. Moreover, these anti-dumping cases are illegal, unless the price paid to the producer/exporter was the best information available⁶⁸².

Not all export transactions are relevant. According to European anti-dumping law, an anti-dumping duty may be applied only «to any dumped product whose *release for free circulation in the Community* causes injury» (Article 1(1) basic EC Regulation ; Article 2(1) basic ECSC Decision) (emphasis added). Hence, if exports are only released for free circulation when they have been the subject of a firm offer from an independent customer in the Community, the dumping calculation will only be based on the products released into free circulation. Similarly, products imported under the inward processing regime are not released for free circulation and should, therefore, not be taken into account⁶⁸³. However, the European anti-dumping authorities have used inward processing operations as basis for determining the export price⁶⁸⁴. According to them, there is no breach of European anti-dumping law, because the requirement of release for free circulation only applies to the levying of anti-dumping duties⁶⁸⁵. The result of their interpretation seems rather peculiar : inward processing arrangements may be used in establishing the dumping margin and, therefore, determine the maximum height of the anti-dumping duty (see : Articles 7(2) and 9(4) basic EC Regulation ; Article 13(3) basic ECSC Decision), but the anti-dumping duty can only be levied on the other export transactions. It may

681 See also : VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 440-441.

682 In *styrene monomere from the United States of America*, it was recognized that the manufacturer did not know the destination of his products. Nevertheless, the price paid to him by merchants was used as export price, but this was done only by lack of other data. Thus, it could be an application of Article 17 basic EC Regulation (or Article 7(7)(b) basic ECSC Decision), according to which the export price may be determined on the best facts available when the producer/exporter does not cooperate in good faith (Commission Regulation (EEC) No 1321/81 of 15 May 1981 amending Regulation (EEC) No 384/81 imposing a provisional anti-dumping duty on styrene monomer originating in the United States of America, *O.J.*, 19 May 1981, No L 132/17).

683 BELLSTEDT, C., «Antidumping-Zoll auf Einführen im aktiven Veredelungsverkehr ?» *Recht der Internationalen Wirtschaft*, 1983, (670), 671 and 672-673.

684 Council Decision 83/162/EEC of 18 April 1983 terminating the anti-dumping proceeding in respect of imports of acrylonitrile originating in the United States of America, *O.J.*, 20 April 1983, No L 101/29 ; Commission Decision 84/229/EEC of 13 April 1984 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of propan-1-ol (propyl alcohol) originating in the United States of America, and terminating that proceeding, *O.J.*, 19 April 1984, No L 106/55 ; Council Regulation (EEC) No 1306/89 of 11 May 1989 imposing a definitive anti-dumping duty on imports of light sodium carbonate originating in Bulgaria, the German Democratic Republic, Poland and Romania, *O.J.*, 13 May 1989, No L 131/4 ; Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79 ; corrigendum, *O.J.*, 10 February 1990, No L 38/44). In one case the inward processing arrangements were taken into account merely for practical reasons. Indeed, in this case European anti-dumping authorities were confronted with the practical difficulty that the products were sold to subsidiaries in the European Community who processed the imported product and did not resell it to independent customers in the European Community. See : Council Regulation (EEC) No 2702/87 of 4 September 1987 repealing a definitive anti-dumping duty on styrene monomer originating in the United States of America and terminating the investigation, *O.J.*, 8 September 1987, No L 258/20.

685 Council Decision 83/162/EEC of 18 April 1983 terminating the anti-dumping proceeding in respect of imports of acrylonitrile originating in the United States of America, *O.J.*, 20 April 1983, No L 101/29.

be questioned, even though the European anti-dumping authorities may be right in arguing that inward processing arrangements may injure the Community industry and that it is difficult to control whether or not the inward processed products are re-exported. Indeed, their case law on inward processing arrangements contradicts that in respect of exports which are only released into free circulation after a firm offer is made by an independent customer in the Community. For the argument that it is difficult to determine when exactly exports imported under the inward processing regime are released for free circulation, probably applies also to exports which are only released for free circulation after a firm offer is made. Furthermore, the European anti-dumping case law includes another contradiction: it treats inward processing arrangements differently in respect of the normal value calculation than in respect of the export price determination⁶⁸⁶. Probably, «one-way flexibility» explains this strange interpretation advocated by the European anti-dumping authorities. The price charged for processing operations is undoubtedly lower than the price charged for sales transactions. By taking into account the lower price to establish the export price and by disregarding it to determine normal value, the dumping margin is artificially increased.

3.3.2. *Constructed export price*

3.3.2.1. Definition

The constructed export price is the price «constructed *on the basis of* the price at which the imported product is first resold to an independent buyer», allowance being made for «all costs incurred between importation and resale» (Article 2(9) basic EC Regulation ; Article 2(8)(b) basic ECSC Decision) (emphasis added)⁶⁸⁷. In view of the wording «on the basis of» the constructed export price does not have to equal exactly the price actually paid by the first independent buyer minus all costs between importation and resale. For instance, the criterion «all costs incurred between importation and resale» is not interpreted literally. Allowance has to be made not only for costs incurred from the moment on the product enters the Community, but also for all costs incurred, as well as profits realized, from the moment on the product leaves the country of origin

⁶⁸⁶ *Supra*, 143-145.

⁶⁸⁷ GATT anti-dumping law does not provide allowances for the costs incurred between imports and resale and for a reasonable profit margin. Nevertheless, as to the definition of the constructed export price, European anti-dumping law does not violate GATT anti-dumping law. Indeed, GATT anti-dumping law provides that the constructed export price is calculated «*on the basis of* the price at which the goods are resold by the importer» (Note No 1 *ad* Article VI(1) GATT ; Article 2.3. GATT Anti-dumping Code) (emphasis added). In European anti-dumping law the price at which the product is resold by the importer is, indeed, the basis for the constructed export price. There may, however, be a problem on the level of comparison between normal value, which includes all costs between sale (by the associated party) and resale, and the export price, which does not (see : *infra*, 279-283).

or the exporting country⁶⁸⁸. In general, allowance has to be made for all costs and profits which relate to import activities⁶⁸⁹. Conversely, the export price must include all costs and profits which relate to export activities. This general rule is quite logical since it is the price at which the product is sold for export that must be constructed⁶⁹⁰. This rule even seems simple to apply. However, the European anti-dumping authorities, with the consent of the Court of Justice, do not apply it consistently with regard to companies which are associated with the exporter and which perform the functions of an export department. In principle, no allowance should be made for their costs and profits. This is the case as long as they are established in the exporting country⁶⁹¹ or in a third country⁶⁹². Then the price actually paid to them by the

⁶⁸⁸ Therefore, allowance should be made for the costs and profits of all trading firms and importers, even if they are established outside the Community (Council Regulation (EEC) No 101/83 of 17 January 1983 imposing a definitive anti-dumping duty on certain chemical fertilizer originating in the United States of America, *O.J.*, 19 January 1983, No L 15/1; Commission Regulation (EEC) No 2681/84 of 18 September 1984 imposing a provisional anti-dumping duty on imports of pentaerythritol originating in Canada and accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of pentaerythritol originating in Sweden and terminating that proceeding, *O.J.*, 22 September 1984, No L 254/5; Council Regulation (EEC) No 96/85 of 14 January 1985 imposing a definitive anti-dumping duty on imports of pentaerythritol originating in Canada, *O.J.*, 16 January 1985, No L 13/1 (corrigendum, *O.J.*, 24 January 1985, No L 20/46); Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12; Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 24 November 1988, No L 317/33; Commission Regulation (EEC) No 2172/93 of 30 July 1993 imposing provisional anti-dumping duties on imports of ethanolamine originating in the United States of America, *O.J.*, 4 August 1993, No L 195/5; Commission Regulation (EEC) No 3029/93 of 29 October 1993 imposing provisional antidumping duties on imports of television camera systems originating in Japan, *O.J.*, 30 October 1993, No L 271/1). In these anti-dumping cases allowance has been made for all costs and for a profit margin of associated importers or non-associated trading houses not residing in the Community. See also: DIDIER, P., «EEC Antidumping Rules and Practices», *Common Market Law Review*, 1980, (349), 356, who contends that deduction has to be made not only of the freight between the exporting country and the European Community, but also of the inland freight in the exporting country. This contention is the consequence of the fact that the export price is to be determined on an *ex factory* basis, see: BELLIS, J.-F., VERMULST, E.A., and WAER, P., «Further Changes in the EEC Anti-Dumping Regulation: A Codification of Controversial Methodologies», *Journal of World Trade*, 1989, (21), 23. *Contra*: VAN BAEL, I., and BELLIS, J.-F., *Anti-Dumping and other Trade Protection Laws of the EEC*, Bicester, CCH Editions, 1990, 83).

However, in one anti-dumping case, no allowance was made for costs and profits of an associated sales company. The allowance was not made because it did not have any decisive effect on the rate of the anti-dumping duty (Commission Decision No 2247/87/ECSC of 28 July 1987 imposing a provisional anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Mexico, *O.J.*, 29 July 1987, No L 207/21).

In a number of cases allowance has been made for costs and profits of the associated company established in a third country, but is was not made clear whether this company performed the functions of an import department (Council Regulation (EEC) No 2474/93 of 8 September 1993 imposing a definitive anti-dumping duty on imports into the Community of bicycles originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 9 September 1993, No L 228/1; Commission Regulation (EEC) No 2477/93 of 6 September 1993 imposing a provisional anti-dumping duty on imports of certain photo albums originating in the People's Republic of China, *O.J.*, 9 September 1993, No L 228/16).

⁶⁸⁹ Import activities are, for example, processing orders, performing marketing functions, invoicing the customers in the Community and receiving payment (Council Regulation (EEC) No 2887/93 of 20 October 1993 imposing a definitive anti-dumping duty on imports of certain electronic weighing scales originating in Singapore and the Republic of Korea, *O.J.*, 22 October 1993, No L 263/1).

⁶⁹⁰ C.J.E.C., case C-172/87, 10 March 1992, *Mita Industrial Co. Ltd v Council*, E.C.R., 1992, I, (1301), 1324 (Opinion of Advocate General MISCHO).

⁶⁹¹ C.J.E.C., case C-171/87, 10 March 1992, *Canon Inc. v Council*, E.C.R., 1992, I, (1237), 1289; C.J.E.C., case C-178/87, 10 March 1992, *Minolta Camera Co. Ltd v Council*, E.C.R., 1992, I, (1577), 1591 (Report for the Hearing: conclusions of the Council) and 1625; Council Regulation (EC) No 2199/94 of 9 September 1994 imposing a definitive anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, and collecting definitively the provisional duty imposed, *O.J.*, 10 September 1994, No L 236/2.

first independent buyer is used as actual export price⁶⁹³. However, when the same companies are established in the Community, their costs and profits are subtracted from the price paid by the first independent buyer in order to construct the export price⁶⁹⁴ because their costs and profits reduce the amount received by the exporter⁶⁹⁵. The costs of associated companies established outside the Community though also reduce the amount received by the exporter. It has been argued, in respect of associated companies established in the Community and performing the functions of an export department, that their costs and profits must be deducted because, in the case of an independent importer, all the costs incurred after the products cross the Community frontier are normally borne by the importer⁶⁹⁶. This argument is rather peculiar when the associated company is said to perform the functions of an *export* department, which are by definition different from the functions of an import department⁶⁹⁷.

⁶⁹² Commission Decision No 2247/87/ECSC of 28 July 1987 imposing a provisional anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Mexico, *O.J.*, 29 July 1987, No L 207/21 ; Commission Regulation (EEC) No 3617/90 of 11 December 1990 imposing a provisional anti-dumping duty on imports of certain welded tubes of iron or non-alloy steel, originating in Turkey or in Venezuela and accepting undertakings offered in connection with such imports, *O.J.*, 15 December 1990, No L 351/17 ; Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5.

In a number of cases allowance has been made for costs and profits of the associated company established in a third country, but it has not been made clear whether this company performed the functions of an import department or of an export department (Council Regulation (EEC) No 2474/93 of 8 September 1993 imposing a definitive anti-dumping duty on imports into the Community of bicycles originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 9 September 1993, No L 228/1 ; Commission Regulation (EEC) No 2477/93 of 6 September 1993 imposing a provisional anti-dumping duty on imports of certain photo albums originating in the People's Republic of China, *O.J.*, 9 September 1993, No L 228/16).

⁶⁹³ *I.e.*, the actual export price as defined in Article 2(8) basic EC Regulation and Article 2(8)(a) basic ECSC Decision.

⁶⁹⁴ *I.e.*, the constructed export price as defined in Article 2(9) basic EC Regulation and Article 2(8)(b) basic ECSC Decision.

⁶⁹⁵ In *plain paper photocopiers from Japan*, the subsidiary of the Japanese exporter established in the Community only handled customers' orders, send them the invoices and received the relevant payments. After having made these payments, the purchaser took care of the importation of the dumped products. As a result, the products were not imported by the related subsidiary and could, therefore, not have been resold to an independent buyer. Moreover, the activities of the related subsidiary were pursued prior to the importation so that the related subsidiary could not have incurred any costs *between* importation and resale. As a consequence, the constructed export price could not be used as export price standard. Moreover, the price paid by the independent purchaser-importer to the related subsidiary was found to be unreliable because it was not the same as the price invoiced by the exporter to his related subsidiary. Therefore, the export price was constructed on the basis of the price invoiced by the related subsidiary to the independent purchaser-importer by making allowances for overheads and profits of the related subsidiary. For these costs were considered to reduce the amount received by the exporter inasmuch as they are normally borne by the importer (C.J.E.C., case 156/87, 14 March 1990, *Gestemer Holdings plc v Council and Commission*, *E.C.R.*, 1990, I, (781), 835-837 ; C.J.E.C., case C-171/87, 10 March 1992, *Canon Inc. v Council*, *E.C.R.*, 1992, I, (1237), 1291 ; C.J.E.C., case C-172/87, 10 March 1992, *Mita Industrial Co. Ltd v Council*, *E.C.R.*, 1992, I, (1301), 1332-1333).

⁶⁹⁶ C.J.E.C., case 156/87, 14 March 1990, *Gestemer Holdings plc v Council and Commission*, *E.C.R.*, 1990, I, (781), 836 ; C.J.E.C., case C-171/87, 10 March 1992, *Canon Inc. v Council*, *E.C.R.*, 1992, I, (1237), 1251 (Report for the Hearing : conclusions of the Council) ; C.J.E.C., case C-172/87, 10 March 1992, *Mita Industrial Co. Ltd v Council*, *E.C.R.*, 1992, I, (1301), 1312-1313 (Report for the Hearing : conclusions of the Council).

⁶⁹⁷ See, however : C.J.E.C., case C-172/87, 10 March 1992, *Mita Industrial Co. Ltd v Council*, *E.C.R.*, 1992, I, (1301), 1324-1325 (Opinion of Advocate General MISCH), where, according to Advocate General MISCHO, the associated company was performing the functions of an import department.

European anti-dumping law wants to preclude any manipulation of cost and profit allocation between exporter and importer which pushes up the height of the constructed export price by keeping down artificially the costs and profits of the importer⁶⁹⁸. The purpose of the construction of the export price is to arrive at the price as if it had been charged by the exporter to an independent importer⁶⁹⁹. Therefore, allowance should be made for «a reasonable margin for selling, general and administrative costs and profit» and for all costs⁷⁰⁰, including «those

698 Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5; Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12; Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12; Commission Regulation (EEC) No 2684/88 of 26 August 1988 imposing a provisional anti-dumping duty on certain imports of video cassette recorders originating in Japan and the Republic of Korea, *O.J.*, 31 August 1988, No L 240/5; Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 24 November 1988, No L 317/33; Commission Regulation (EEC) No 4062/88 of 23 December 1988 imposing a provisional anti-dumping duty on imports of video cassettes and video tape reels originating in the Republic of Korea and Hong Kong, *O.J.*, 24 December 1988, No L 356/47; Council Regulation (EEC) No 1768/89 of 19 June 1989 imposing a definitive anti-dumping duty on imports of video cassettes originating in the Republic of Korea and Hong Kong, collecting definitively the provisional duty and terminating the anti-dumping proceeding with regard to the imports of video tape reels originating in the Republic of Korea, *O.J.*, 22 June 1989, No L 174/1; BELLIS, J.-F., VERMULST, E.A., and WAER, P., «Further Changes in the EEC Anti-Dumping Regulation: A Codification of Controversial Methodologies», *Journal of World Trade*, 1989, (21), 23-24; VERMULST, E.A., and WAER, P., «De nieuwe EEG Anti-dumping Verordening 2423/88: Een stille revolutie», *S.E.W.*, 1989, (151), 154.

This provision may also be to the benefit of the allegedly dumping exporter. Indeed, in *electronic typewriters from Japan*, certain costs borne directly by the exporter were excluded because they were found to relate to personnel seconded by the exporter in order to obtain market and product information, which did not relate to the product in question (Commission Regulation (EEC) No 3643/84 of 20 December 1984 imposing a provisional anti-dumping duty on imports of electronic typewriters originating in Japan and terminating the anti-dumping proceeding with regard to Nakajima All Co. Ltd, *O.J.*, 22 December 1984, No L 335/43).

699 C.J.E.C., case C-172/87, 10 March 1992, *Mita Industrial Co. Ltd v Council*, *E.C.R.*, 1992, I, (1301), 1313 (Report for the Hearing: conclusions of the Council).

700 According to European anti-dumping law (Article 2(9)(b) basic EC Regulation; Article 2(8)(b), basic ECSC Decision), the items for which an adjustment must be made, include:

- (i) usual transport, insurance, handling, loading and ancillary costs;
- (ii) customs duties, any anti-dumping duty and other taxes payable in the importing country by reason of the importation or sale of the goods;
- (iii) any commission usually paid or agreed.

This list of allowances is not exhaustive (BUHART, J., «Le régime communautaire de l'antidumping: vingt ans d'expérience», *Revue Trimestrielle de Droit Européen*, 1988, (253), 268). European anti-dumping case law has made allowances for:

- assembly and processing costs (Commission Regulation (EEC) No 1337/81 of 18 May 1981 imposing a provisional anti-dumping duty on imports of certain textured polyester fabrics originating in the United States of America, *O.J.*, 20 May 1981, No L 133/17; Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79; corrigendum, *O.J.*, 10 February 1990, No L 38/44); Council Regulation (EEC) No 577/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as EPROMs (erasable programmable read only memories) originating in Japan, *O.J.*, 12 March 1991, No L 65/1);
- operating costs (Council Regulation (EEC) No 112/90 of 16 January 1990 imposing a definitive anti-dumping duty on imports of certain compact disc players originating in Japan and the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 17 January 1990, No L 13/21);
- market research costs (Council Regulation (EEC) No 112/90 of 16 January 1990 imposing a definitive anti-dumping duty on imports of certain compact disc players originating in Japan and the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 17 January 1990, No L 13/21);
- start-up costs (Council Regulation (EEC) No 1048/90 of 25 April 1990 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 27 April 1990, No L 107/56 (corrigendum, *O.J.*, 24 May 1990, No L 133/92));

- payment terms (Commission Regulation (EEC) No 1613/90 of 13 June 1990 imposing a provisional anti-dumping duty on imports of ball bearings with a greatest external diameter not exceeding 30 mm originating in Thailand, *O.J.*, 16 June 1990, No L 152/24);
- financing costs in connection with credits given to customers in the Community (Commission Decision 82/397/EEC of 14 June 1982 accepting undertakings in connection with the anti-dumping procedure concerning imports of certain polypropylene film for capacitors originating in Japan and terminating that procedure, *O.J.*, 18 June 1982, No L 172/44; Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1);
- interest charges paid to third parties in respect of exports to an associated importer (Council Regulation (EEC) No 1048/90 of 25 April 1990 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 27 April 1990, No L 107/56 (corrigendum, *O.J.*, 24 May 1990, No L 133/92));
- costs resulting from foreign currency exchange operations (Council Regulation (EEC) No 611/93 of 15 March 1993 imposing a definitive anti-dumping duty on imports into the Community of certain electronic microcircuits known as DRAMs originating in the Republic of Korea and exported by companies not exempted from this duty, and collecting definitively the provisional anti-dumping duty, *O.J.*, 18 March 1993, No L 66/1);
- free gifts and sales incentives in kind (Commission Regulation (EEC) No 3643/84 of 20 December 1984 imposing a provisional anti-dumping duty on imports of electronic typewriters originating in Japan and terminating the anti-dumping proceeding with regard to Nakajima All Co. Ltd, *O.J.*, 22 December 1984, No L 335/43; Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1; Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5; Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12; Commission Regulation (EEC) No 2005/88 of 5 July 1988 imposing a provisional anti-dumping duty on imports of serial impact fully formed character printers originating in Japan, *O.J.*, 8 July 1988, No L 177/1; Commission Regulation (EEC) No 2684/88 of 26 August 1988 imposing a provisional anti-dumping duty on certain imports of video cassette recorders originating in Japan and the Republic of Korea, *O.J.*, 31 August 1988, No L 240/5; Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 24 November 1988, No L 317/33; Commission Regulation (EEC) No 4062/88 of 23 December 1988 imposing a provisional anti-dumping duty on imports of video cassettes and video tape reels originating in the Republic of Korea and Hong Kong, *O.J.*, 24 December 1988, No L 356/47; Council Regulation (EEC) No 34/89 of 5 January 1989 imposing a definitive anti-dumping duty on imports of serial impact fully formed (SIFF) character printers originating in Japan, *O.J.*, 7 January 1989, No L 5/23; Council Regulation (EEC) No 1768/89 of 19 June 1989 imposing a definitive anti-dumping duty on imports of video cassettes originating in the Republic of Korea and Hong Kong, collecting definitively the provisional duty and terminating the anti-dumping proceeding with regard to the imports of video tape reels originating in the Republic of Korea, *O.J.*, 22 June 1989, No L 174/1; Council Regulation (EEC) No 112/90 of 16 January 1990 imposing a definitive anti-dumping duty on imports of certain compact disc players originating in Japan and the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 17 January 1990, No L 13/21);
- discounts and rebates (Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5; Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12; Commission Regulation (EEC) No 2005/88 of 5 July 1988 imposing a provisional anti-dumping duty on imports of serial impact fully formed character printers originating in Japan, *O.J.*, 8 July 1988, No L 177/1; Commission Regulation (EEC) No 2684/88 of 26 August 1988 imposing a provisional anti-dumping duty on certain imports of video cassette recorders originating in Japan and the Republic of Korea, *O.J.*, 31 August 1988, No L 240/5; Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 24 November 1988, No L 317/33; Commission Regulation (EEC) No 4062/88 of 23 December 1988 imposing a provisional anti-dumping duty on imports of video cassettes and video tape reels originating in the Republic of Korea and Hong Kong, *O.J.*, 24 December 1988, No L 356/47; Council Regulation (EEC) No 34/89 of 5 January 1989 imposing a definitive anti-dumping duty on imports of serial impact fully formed (SIFF) character printers originating in Japan, *O.J.*, 7 January 1989, No L 5/23; Council Regulation (EEC) No 1768/89 of 19 June 1989 imposing a definitive anti-dumping duty on imports of video cassettes originating in the Republic of Korea and Hong Kong, collecting definitively the provisional duty and terminating the anti-dumping proceeding with regard to the imports of video tape reels originating in the Republic of Korea, *O.J.*, 22 June 1989, No L 174/1; Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27); Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1; Council Regulation (EEC) No 112/90 of 16 January 1990 imposing a definitive anti-dumping duty on imports of certain compact disc players originating in Japan and the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 17 January 1990, No L 13/21; Council Regulation (EEC) No 490/90 of 26 February 1990 repealing Regulations (EEC) No 1826/84 and (EEC) No 1282/81 imposing definitive anti-dumping duties on imports of vinyl acetate monomer originating in Canada and the United States of America respectively, *O.J.*, 1 March 1990, No L 53/1; Commission Regulation (EEC) No 3262/90 of 5 November 1990 imposing a provisional anti-dumping duty on imports of audio tapes in cassettes originating in Japan, the Republic of Korea and Hong Kong, *O.J.*, 13 November 1990, No L 313/5 (corrigendum, *O.J.*, 12 January 1991, No L 9/36); Commission Regulation (EEC) No 129/91 of 11 January 1991 imposing a provisional anti-dumping duty on imports of small-screen colour television receivers

normally borne by an importer but paid by any party either in or outside the Community which appears to be associated or to have a compensatory arrangement with the importer or exporter» (Article 2(9)(b) basic EC Regulation ; Article 2(8)(b) basic ECSC Decision) (emphasis added). To that end, it grants a broad margin of discretion to the European anti-dumping authorities. They only have to show that the margin for general expenses and profit is «reasonable» and that the allowed costs are «normally» borne by the importer. European anti-dumping case law provides but one indication as to the interpretation of the concept «normally», namely that all general expenses related to the export sales are considered to be normally borne by the importer⁷⁰¹. Thus, an associated importer ignores whether he is dumping and to what extent. The risk of «one-way flexibility» resulting in low export prices is clearly present.

In principle, all cost calculations must be based on available accounting data (Article 2(5) basic EC Regulation ; Article 2(11) basic ECSC Decision). When associated parties try to manipulate

originating in Hong Kong and the People's Republic of China, *O.J.*, 19 January 1991, No L 14/31 ; Commission Regulation (EEC) No 1386/91 of 23 May 1991 imposing a provisional anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in Japan, the People's Republic of China, the Republic of Korea and Thailand, *O.J.*, 28 May 1991, No L 133/20 ; Commission Regulation (EEC) No 2805/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports into the Community of certain thermal paper originating in Japan, *O.J.*, 26 September 1991, No L 270/15 ; Commission Regulation (EEC) No 313/92 of 4 February 1992 imposing a provisional anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in South Korea, *O.J.*, 11 February 1992, No L 34/8 ; Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50 ;

- advertising costs (Commission Regulation (EEC) No 3643/84 of 20 December 1984 imposing a provisional anti-dumping duty on imports of electronic typewriters originating in Japan and terminating the anti-dumping proceeding with regard to Nakajima All Co. Ltd, *O.J.*, 22 December 1984, No L 335/43 ; Commission Regulation (EEC) No 2684/88 of 26 August 1988 imposing a provisional anti-dumping duty on certain imports of video cassette recorders originating in Japan and the Republic of Korea, *O.J.*, 31 August 1988, No L 240/5 ; Commission Regulation (EEC) No 4062/88 of 23 December 1988 imposing a provisional anti-dumping duty on imports of video cassettes and video tape reels originating in the Republic of Korea and Hong Kong, *O.J.*, 24 December 1988, No L 356/47 ; Council Regulation (EEC) No 1768/89 of 19 June 1989 imposing a definitive anti-dumping duty on imports of video cassettes originating in the Republic of Korea and Hong Kong, collecting definitively the provisional duty and terminating the anti-dumping proceeding with regard to the imports of video tape reels originating in the Republic of Korea, *O.J.*, 22 June 1989, No L 174/1 ; Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1 ; Council Regulation (EEC) No 112/90 of 16 January 1990 imposing a definitive anti-dumping duty on imports of certain compact disc players originating in Japan and the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 17 January 1990, No L 13/21 ; Council Regulation (EEC) No 1048/90 of 25 April 1990 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 27 April 1990, No L 107/66 (corrigendum, *O.J.*, 24 May 1990, No L 133/92) ; Commission Regulation (EEC) No 3262/90 of 5 November 1990 imposing a provisional anti-dumping duty on imports of audio tapes in cassettes originating in Japan, the Republic of Korea and Hong Kong, *O.J.*, 13 November 1990, No L 313/5 (corrigendum, *O.J.*, 12 January 1991, No L 9/36) ; Council Regulation (EEC) No 611/93 of 15 March 1993 imposing a definitive anti-dumping duty on imports into the Community of certain electronic microcircuits known as DRAMs originating in the Republic of Korea and exported by companies not exempted from this duty, and collecting definitively the provisional anti-dumping duty, *O.J.*, 18 March 1993, No L 66/1 ; Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50 ;

- sponsorship costs (Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50).

⁷⁰¹ Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50.

cost and profit allocation by means of incorrect accounting records, those records may be ignored, especially when the associated parties do not cooperate or do not act in good faith (Article 18 basic EC Regulation ; Article 7(7)(b) basic ECSC Decision). In several anti-dumping cases, the accounting profit and costs of the associated importer being affected by the association, are not taken into account⁷⁰². Profits, instead, are determined on the basis of the profits realized by independent importers⁷⁰³ and costs are calculated on the basis of the customary costs in the

⁷⁰² Council Regulation (EEC) No 96/85 of 14 January 1985 imposing a definitive anti-dumping duty on imports of pentaerythritol originating in Canada, *O.J.*, 16 January 1985, No L 13/1 (corrigendum, *O.J.*, 24 January 1985, No L 20/46); Commission Regulation (EEC) No 2800/86 of 9 September 1986 imposing a provisional anti-dumping duty on imports of certain deep freezers originating in the USSR, accepting the undertakings in connection with the investigation of imports of certain deep freezers originating in Yugoslavia or in the German Democratic Republic and terminating the investigation, and terminating the proceeding concerning imports of certain deep freezers, *O.J.*, 11 September 1986, No L 259/14; Council Regulation (EEC) No 374/87 of 5 February 1987 definitively collecting the provisional anti-dumping duty and imposing a definitive anti-dumping duty on imports of housed bearing units originating in Japan, *O.J.*, 6 February 1987, No L 35/32; Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79; corrigendum, *O.J.*, 10 February 1990, No L 38/44); Council Regulation (EEC) No 577/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as EPROMs (erasable programmable read only memories) originating in Japan, *O.J.*, 12 March 1991, No L 65/1; Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50.

⁷⁰³ Commission Regulation (EEC) No 744/84 of 19 March 1984 imposing a provisional anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 23 March 1984, No L 79/8 (corrigendum, *O.J.*, 29 March 1984, No L 86/31); Commission Regulation (EEC) No 2690/84 of 21 September 1984 imposing a provisional anti-dumping duty on imports of artificial corundum originating in the People's Republic of China and Czechoslovakia and terminating the proceeding in respect of imports of artificial corundum originating in Spain and Yugoslavia, *O.J.*, 25 September 1984, No L 255/9; Commission Regulation (EEC) No 3669/84 of 21 December 1984 imposing a provisional anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan, *O.J.*, 28 December 1984, No L 340/37; Commission Regulation (EEC) No 328/85 of 6 February 1985 imposing a provisional anti-dumping duty on imports of certain glass mirrors originating in South Africa, *O.J.*, 8 February 1985, No L 36/10; Commission Decision 86/151/EEC of 29 April 1986 terminating the anti-dumping proceeding concerning imports of certain ball bearings originating in Thailand, *O.J.*, 30 April 1986, No L 113/61; Commission Regulation (EEC) No 2005/88 of 5 July 1988 imposing a provisional anti-dumping duty on imports of serial impact fully formed character printers originating in Japan, *O.J.*, 8 July 1988, No L 177/1; Commission Regulation (EEC) No 4062/88 of 23 December 1988 imposing a provisional anti-dumping duty on imports of video cassettes and video tape reels originating in the Republic of Korea and Hong Kong, *O.J.*, 24 December 1988, No L 356/47; Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1; Commission Decision 90/507/EEC of 7 September 1990 terminating the review of the anti-dumping measures concerning dense sodium carbonate originating in the United States of America, *O.J.*, 16 October 1990, No L 283/38; Commission Regulation (EEC) No 3262/90 of 5 November 1990 imposing a provisional anti-dumping duty on imports of audio tapes in cassettes originating in Japan, the Republic of Korea and Hong Kong, *O.J.*, 13 November 1990, No L 313/5 (corrigendum, *O.J.*, 12 January 1991, No L 9/36); Council Regulation (EEC) No 577/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as EPROMs (erasable programmable read only memories) originating in Japan, *O.J.*, 12 March 1991, No L 65/1; Commission Regulation (EEC) No 1386/91 of 23 May 1991 imposing a provisional anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in Japan, the People's Republic of China, the Republic of Korea and Thailand, *O.J.*, 28 May 1991, No L 133/20; Council Regulation (EEC) No 2093/91 of 15 July 1991 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China and collecting definitively the provisional duty, *O.J.*, 18 July 1991, No L 195/1; BESELER, J.-F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 84-85; BUHART, J., «Le régime communautaire de l'antidumping : vingt ans d'expérience», *Revue Trimestrielle de Droit Européen*, 1988, (253), 269; See also : VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 443.

industry concerned⁷⁰⁴ or of the costs actually incurred as verified by the European anti-dumping authorities⁷⁰⁵. Costs are allocated, in accordance with European anti-dumping law (Article 2(5)(a) basic EC Regulation ; Article 2(11) basic ECSC Decision), in proportion to the turnover for each product and each market under consideration, unless an alternative method would reflect more appropriately the incidence of the costs⁷⁰⁶. Financial transactions between the associated exporter and importer are not taken into consideration for determining the turnover⁷⁰⁷. The best standards are, of course, the costs actually incurred and the profits (including losses) actually realized, as other importers may incur higher costs or make higher profits⁷⁰⁸. However, if the importer is making losses, allowance has to be made for a

⁷⁰⁴ Commission Regulation (EEC) No 328/85 of 6 February 1985 imposing a provisional anti-dumping duty on imports of certain glass mirrors originating in South Africa, *O.J.*, 8 February 1985, No L 36/10 ; Council Regulation (EEC) No 55/93 of 8 January 1993 imposing a definitive anti-dumping duty on imports of outer rings of tapered roller bearings originating in Japan, *O.J.*, 15 January 1993, No L 9/7.

⁷⁰⁵ Commission Regulation (EEC) No 2017/81 of 15 July 1981 imposing a provisional anti-dumping duty on phenol originating in the United States of America, *O.J.*, 18 July 1981, No L 195/22 ; Council Regulation (EEC) No 1877/85 of 4 July 1985 imposing a definitive anti-dumping duty on imports of certain hydraulic excavators originating in Japan, *O.J.*, 6 July 1985, No L 176/1 ; Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27).

⁷⁰⁶ Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1 ; Commission Regulation (EEC) No 3029/93 of 29 October 1993 imposing provisional antidumping duties on imports of television camera systems originating in Japan, *O.J.*, 30 October 1993, No L 271/1 ; Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50.

⁷⁰⁷ Commission Regulation (EEC) No 4062/88 of 23 December 1988 imposing a provisional anti-dumping duty on imports of video cassettes and video tape reels originating in the Republic of Korea and Hong Kong, *O.J.*, 24 December 1988, No L 356/47.

See, however : Council Regulation (EEC) No 2685/90 of 17 September 1990 amending Regulation (EEC) No 2089/84 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 20 September 1990, No L 256/1 (corrigendum, *O.J.*, 10 January 1991, No L 7/38).

⁷⁰⁸ Only exceptionally the costs and profits of other, independent importers are adjusted to the situation of the associated importer. Indeed, only in *phenol from the United States of America*, the characteristics of the associated importer were taken into account for determining the profit margin. The amount of the profit margin was found to depend on different special circumstances. In determining the profit margin for the associated importer, the following elements, therefore, were taken into account : the proportion and the structure of the transactions of the exporter in the Community, the proportion of investments in fixed assets, and the services performed by him. The comparison between those elements and the organisation of other traders, shows that the average of the various profit margins registered during the investigation, had to be used as reasonable minimum profit margin. Since these different profit margins fluctuated between 1 % and 10 %, a profit margin of 5 % was used (Council Regulation (EEC) No 90/82 of 18 January 1982 imposing a definitive anti-dumping duty on phenol originating in the United States of America, *O.J.*, 18 January 1982, No L 12/1).

reasonable profit margin⁷⁰⁹. In that case, the export price, thus calculated, will be lower than it should actually be.

3.3.2.2. Efficiency in respect of associated parties

The associated exporter and importer are presumed to manipulate their transfer prices as well as their cost and profit allocation in order to avoid the application of European anti-dumping law. The constructed export price may be used if the exporter is associated with the importer. The constructed export price is meant to reflect the export price not being affected by the endeavours made by the associated exporter's and the importer's to evade European anti-dumping law⁷¹⁰. The price at which the imported product is first resold to an independent buyer, after deducting all costs incurred between importation and resale as well as a reasonable profit margin, is used as constructed export price. It is, however, not clear whether the constructed export price corresponds to the price the exporter would have charged to his associated importer if he did not intend to avoid the application of European anti-dumping law. It is not clear either whether the constructed export price neutralizes all possible manipulation by the associated exporter and importer aimed at evading European anti-dumping law. Both questions will be examined hereinafter.

As was the case for the topic concerning an association between an exporter and his domestic sales company⁷¹¹, the Copithorne model will here also be used in order to analyse the pricing policy between an exporter and his associated importer. As for the analysis of the association between an exporter and his domestic sales company, the basic Copithorne model should be used as starting point to analyse the effects of the association between an exporter and an importer on their pricing policy.

709 See :

- *plain paper photocopiers from Japan*, where it was established that independent importers realized either losses or profits of more than 10 % (Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5). If this is true for independent importers, it may also be true for associated importers ;
- *small-screen colour television receivers from the Republic of Korea*, where the Commission, in determining the profit margin, refused to take account of the start-up situation of an associated importer because the very purpose of the reconstruction of an export price is to create a perfect situation comparable with that of an independent importer. Such an independent importer has to make, on average, a reasonable level of profit in order to stay in business (Council Regulation (EEC) No 1048/90 of 25 April 1990 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 27 April 1990, No L 107/56 (corrigendum, *O.J.*, 24 May 1990, No L 133/92)).

710 Commission Regulation (EEC) No 2865/85 of 14 October 1985 imposing a provisional anti-dumping duty on imports of certain electronic scales originating in Japan and accepting undertakings and terminating the proceeding in respect of certain imports of such products originating in Japan, *O.J.*, 16 October 1985, No L 275/5 ; Council Regulation (EEC) No 1058/86 of 8 April 1986 imposing a definitive anti-dumping duty on imports of certain electronic scales originating in Japan, *O.J.*, 12 April 1986, No L 97/1 ; Commission Regulation (EEC) No 2800/86 of 9 September 1986 imposing a provisional anti-dumping duty on imports of certain deep freezers originating in the USSR, accepting the undertakings in connection with the investigation of imports of certain deep freezers originating in Yugoslavia or in the German Democratic Republic and terminating the investigation, and terminating the proceeding concerning imports of certain deep freezers, *O.J.*, 11 September 1986, No L 259/14 ; Council Regulation (EEC) No 374/87 of 5 February 1987 definitively collecting the provisional anti-dumping duty and imposing a definitive anti-dumping duty on imports of housed bearing units originating in Japan, *O.J.*, 6 February 1987, No L 35/32.

711 *Supra*, 149-153.

In the basic Copithorne model⁷¹², no taxes or tariffs are presumed. The manufacturing company is established in the exporting country which is also the country of origin. It is associated with the importer who is established in the Community. The manufacturing company produces a quantity Y of the product concerned, of which it sells a quantity Y_1 on its domestic market at a price P_1 . It is assumed that P_1 declines as Y_1 goes up, therefore :

$$\frac{\delta P_1}{\delta Y_1} < 0 \quad (1)$$

The remaining manufactured quantity, represented as Y_2 , is exported to the associated importer at a transfer price R . The associated importer resells this quantity Y_2 on the domestic market of the Community at a price P_2 . The manufacturing company and the importing company each have a cost function $C_i = C_i(Y_i)$ where $i = 1, 2$.

The respective profit functions of each company are :

$$\pi_1 = P_1 Y_1 - C_1(Y) + R Y_2 \quad (2)$$

$$\pi_2 = P_2 Y_2 - C_2(Y_2) - R Y_2 \quad (3)$$

Quite clearly, this situation is identical to the one treated in connection with the determination of the normal value when the products of the manufacturing company are sold on its domestic market through an associated sales company. So here too, the transfer price is indeterminate⁷¹³.

In international trade, however, tariffs are not uncommon. If a tariff σ is levied, the profit function of the importer, π_2 , becomes :

$$\pi_2 = P_2 Y_2 - (1 + \sigma) R Y_2 - C_2(Y_2) \quad (4)$$

Combining equations (2) and (4) gives the total profit function :

$$\pi = \pi_1 + \pi_2 = P_1 Y_1 + P_2 Y_2 - C_1(Y) - C_2(Y_2) - \sigma R Y_2 \quad (5)$$

It follows from the last term of equation (5) that the corner solution is optimal to maximize total profits ; by choosing the lowest transfer price, the multinational enterprise (MNE) minimizes its tariff payments. So, in theory, the transfer price would be set at $-\infty$. However, the MNE will, in fact, charge a transfer price equal to zero, as customs authorities will not accept a negative transfer price.

For the purpose of comparison, the first order conditions in this case would be :

⁷¹² See : COPITHORNE, L.W., «International Corporate Transfer Prices and Government Policy», *Canadian Journal of Economics*, 1971, (324), 324-341 ; COPITHORNE, L.W., «La théorie des prix de transfert internes des grandes sociétés», *L'actualité économique*, 1976, (324), 324-352 ; EDEN, L., «The Microeconomics of Transfer Pricing», in *Multinationals and Transfer Pricing*, RUGMAN, A.M., and EDEN, L. (eds.), London, Croom Helm, 1985, (13), 20-22.

⁷¹³ *Supra*, p. ...

$$\frac{\delta \pi}{\delta Y_1} = MR_1 - MC_1 = 0 \quad (6)$$

$$\frac{\delta \pi}{\delta Y_2} = MR_2 - [MC_2 + \sigma R] - MC_1 = 0 \quad (7)$$

This is shown in figure 7. When no tariffs are levied, the equilibrium point is a. Point a is the locus where MR_1 and $NMR_2 (= MR_2 - MC_2)$ are equal to MC_1 . In this equilibrium point, the MNE sells a quantity OY_1 at the price OP_1 on its domestic market; it exports OY_2 to its related importer who resells this quantity at a price OP_2 on the internal market of the importing country. If a tariff σ is imposed, the equilibrium point shifts from a to b because the MC_2 curve shifts to $MC_2' (= MC_2 + \sigma R)$, which causes a drop in the NMR_2 curve to $NMR_2' (= MR_2 - MC_2')$. The consequences of the imposition of a tariff σ are clear from figure 7: the MNE will sell more on its domestic market at a lower price, whereas its importer will import a lower quantity which he resells at a higher price. If the tariff σ is in fact an anti-dumping duty, according to European anti-dumping law, it will be equal to:

$$\sigma = \frac{NV - P_x}{P_x} \quad (8)$$

NV and P_x represent respectively normal value and export price, as defined by European anti-dumping law.

If the anti-dumping duty σ is already imposed, there is no more room for influencing the height of σ . As in the case of a tariff, the optimal strategy for the enterprise is the corner solution by charging the lowest possible transfer price. Contrary to the case of a tariff, the MNE may influence the height of a possible, but not yet imposed anti-dumping duty; it may even avoid that an anti-dumping duty will be imposed. Indeed, according to European anti-dumping law, an anti-dumping duty cannot exceed the dumping margin, *i.e.*, the difference between the normal value NV and the export price P_x . So, if $P_x \geq NV$, no anti-dumping duty can be imposed.

Because it is presumed that the sales in the exporting country are made in the ordinary course of trade, NV may be assumed to equal P_1 . For the moment, abstraction is made of the possibility to use the constructed export price (Article 2(9) basic EC Regulation; Article 2(8)(b) basic ECSC Decision). Therefore, P_x may be assumed to equal R . So equation (8) can be rewritten:

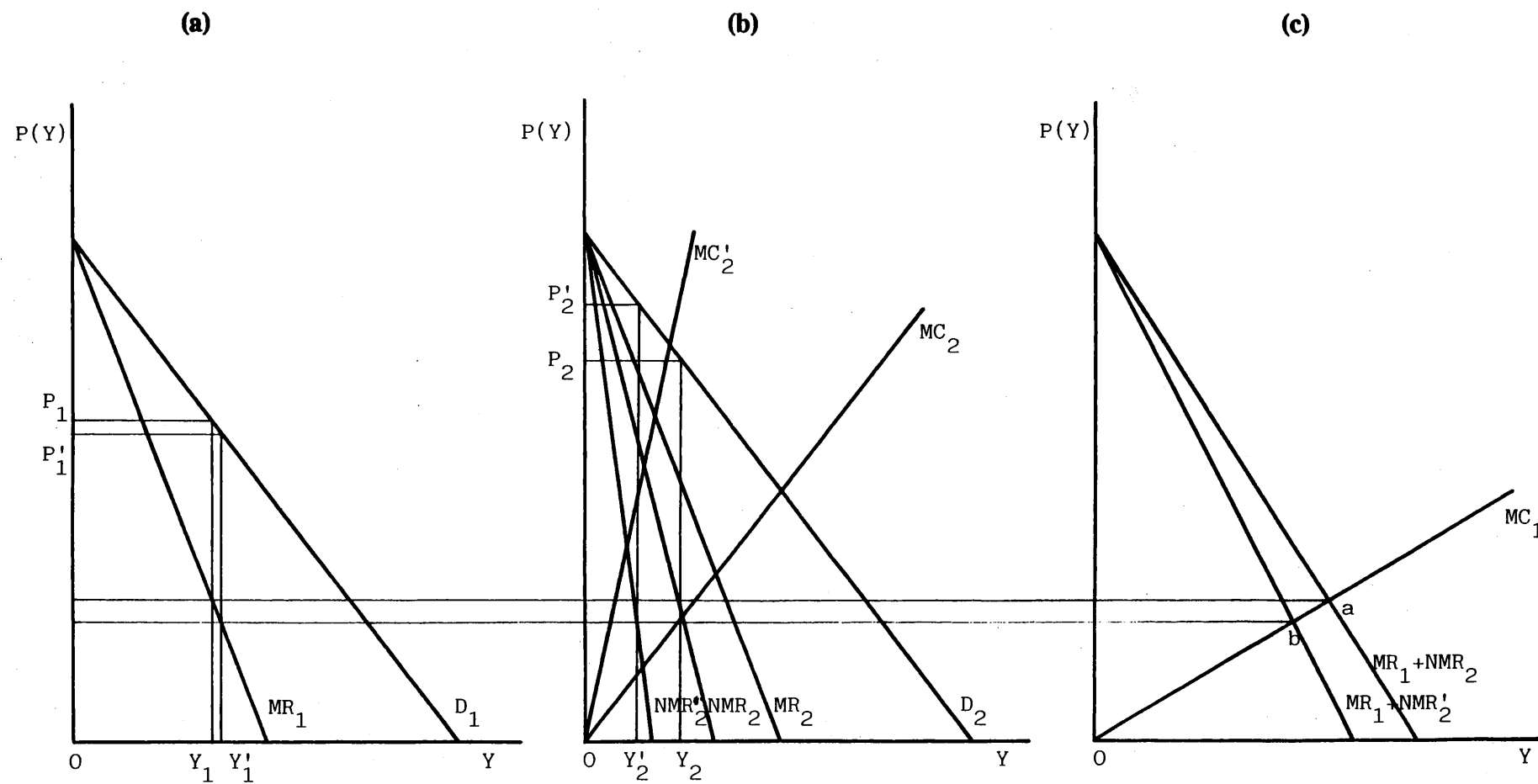
$$\sigma = \frac{P_1 - R}{R} \quad (9)$$

The MNE may manipulate the transfer price R . If it has some market power, *i.e.*, if there is no perfect competition on its domestic market, it may also manipulate its domestic market price P_1 . If the enterprise wants to avoid the imposition of an anti-dumping duty, it must manipulate P_1 and R in order for $P_1 \leq R$ ⁷¹⁴. Indeed, only if $P_1 \leq R$, an anti-dumping duty cannot be imposed.

Combining equation (9) with equation (5) results in the profit function of the importer, in which the tariff assumes the form of an anti-dumping duty:

⁷¹⁴ The examination of the possible manipulation of P_1 and P_2 is based on: SAMUELSON, L., "The Multinational Firm with Arm's Length Transfer Price Limits", *Journal of International Economics*, 1982/12, (365), 365-374.

Figure 7



$$\pi_2 = P_2 Y_2 - \left[1 + \frac{P_1 - R}{R}\right] R Y_2 - C_2(Y_2) \quad (10)$$

The total profit function from equations (2) and (10) :

$$\pi = P_1 Y_1 + P_2 Y_2 - C_1(Y) - C_2(Y_2) - \frac{P_1 - R}{R} R Y_2 \quad (11)$$

The first order conditions are :

$$\frac{\delta \pi}{\delta Y_1} = MR_1 - [MC_1 + \frac{\delta P_1}{\delta Y_1} Y_2] = 0 \quad (12)$$

$$\frac{\delta \pi}{\delta Y_2} = MR_2 - [MC_2 - \frac{P_1 - R}{R} R] - MC_1 = 0 \quad (13)$$

Because $\sigma = (P_1 - R)/R$, equation (13) is identical to equation (7). The ability of the MNE to manipulate σ , has no effect on its exports. However, equation (12) shows that the MNE will sell more on its domestic market at a lower price. Indeed, in view of the assumption made at (1), $(\delta P_1 / \delta Y_1) Y_2 < 0$ prevails, which implies that the marginal revenue MR_1 will be lower because of the anti-dumping duty. Finally, as may be deduced from the last term of equation (11), the corner solution, *i.e.*, a transfer price R equal to to the domestic market price P_1 , is optimal. But, because P_1 will decrease - which is always advantageous if eventually an anti-dumping duty would be imposed -, the transfer price R will also be lower.

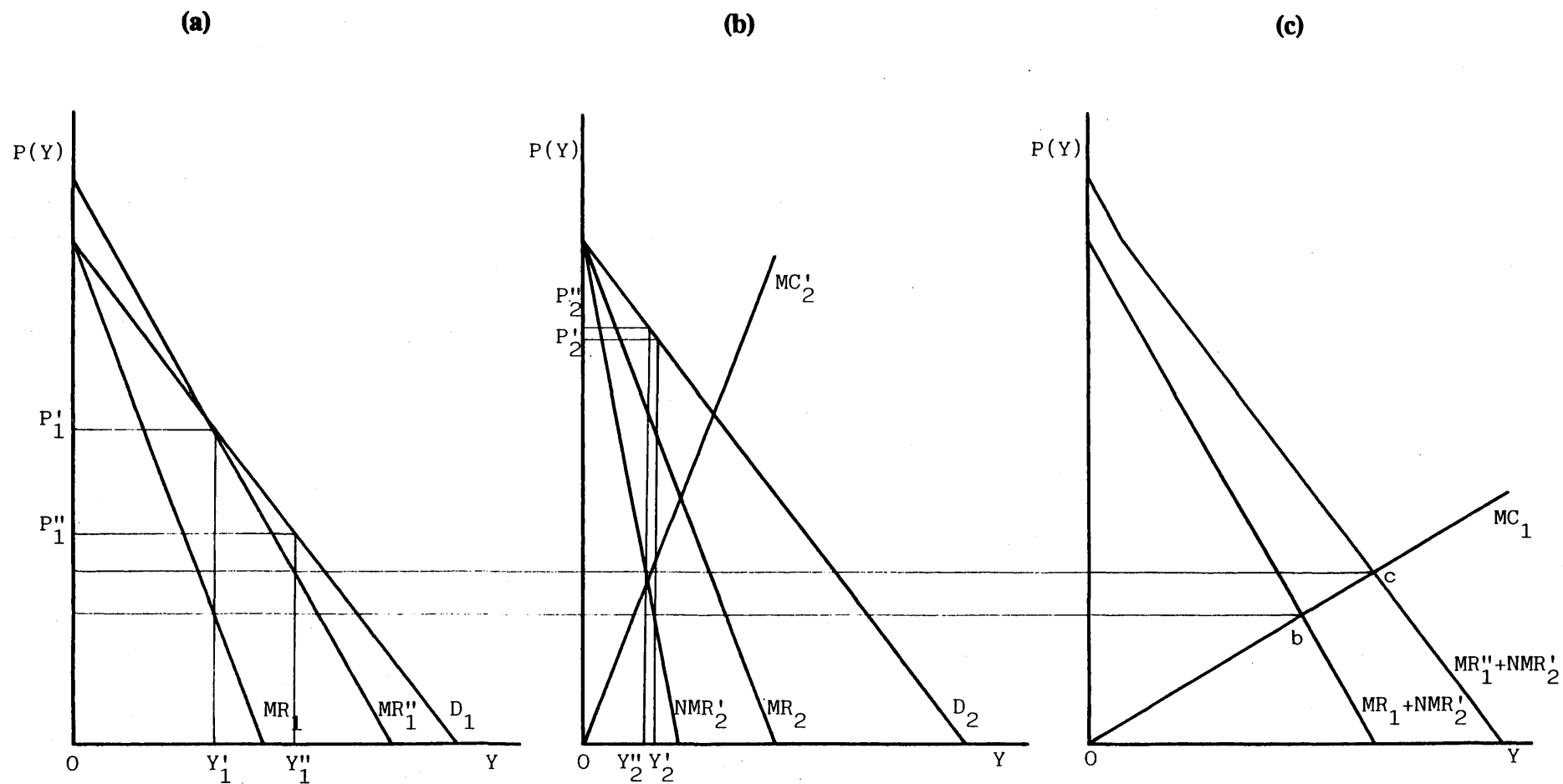
In figure 8 these conclusions are visualised. The equilibrium point *b*, as described in connection with figure 7, is the starting point. The only difference with figure 7 is that the tariff is now identified as an anti-dumping duty. The identification of the tariff as an anti-dumping duty shifts the equilibrium point *b* to *c*. This is, of course, only true if the MNE has some market power on its domestic market, which it being monopolist, clearly has in figure 8. Under this condition and in view of the equations (12) and (13), the equilibrium point is defined as :

$$MR_1 - \frac{\delta P_1}{\delta Y_1} Y_2 = MC_1 = MR_2 - [MC_2 + \frac{P_1 - R}{R} R] \quad (14)$$

In figure 8, the first term and the last term of equation (14) are provided, respectively, by MR_1'' and NMR_2' . Starting from point *c*, we see that the MNE uses its monopoly power on its domestic market to manipulate the imposition of an anti-dumping duty : it charges a lower price OP_1'' while it sells a higher quantity OY_1'' . This reaction of the MNE to an anti-dumping duty simultaneously causes the exported quantity to drop to OY_2'' and the price the related importer charges when he resells the quantity OY_2'' to rise to OP_2'' .

Thus, in order to avoid the application of anti-dumping law, the NME will manipulate not only its internal transfer prices, but also the price on its domestic market as well as the price at which the product is resold on the market of the importing country. European anti-dumping law does not provide the possible manipulation, by an MNE, of the domestic market price and the price at which the product is first resold to an independent buyer in the Community in order to avoid the imposition of an anti-dumping duty. Only the possible manipulation of the transfer price between related parties is taken into consideration. According to European antidumping law, the export price must be

Figure 8



determined on the basis of the price which the importer charges when he resells the imported product to independent buyers in the Community ; allowance must be made for all the costs the importer bears between importation and resale (Article 2(9)(b) basic EC Regulation ; Article 2(8)(b) basic ECSC Decision).

Equating the export price P_x with the price at which the product is resold to independent buyers in the Community, allowance being made for all costs between importation and resale, yields :

$$P_x = P_2 - \frac{C_2(Y_2)}{Y_2} \quad (15)$$

The total profit function of the MNE is :

$$\pi = P_1 Y_1 + P_2 Y_2 - C_1(Y) - C_2(Y_2) - \left[\frac{P_1 Y_2}{P_2 Y_2 - C_2(Y_2)} - 1 \right] R Y_2 \quad (16)$$

The first order conditions are :

$$\frac{\delta \pi}{\delta Y_1} = MR_1 - [MC_1 + \frac{Y_2^2}{P_2 Y_2 - C_2(Y_2)} \cdot \frac{\delta P_1}{\delta Y_1} \cdot R] = 0 \quad (17)$$

$$\frac{\delta \pi}{\delta Y_2} = MR_2 - [MC_2 + TR] - MC_1 = 0 \quad (18)$$

where :
$$T = \frac{2[P_2 Y_2 - C_2(Y_2)]P_1 Y_2 - [MR_2 - MC_2]P_1 Y_2^2}{[P_2 Y_2 - C_2(Y_2)]^2} - 1$$

Because $[P_2 Y_2 - C_2(Y_2)]$ is, by definition, positive and because it is assumed that $(\delta P_1 / \delta Y_1) < 0$, the last term in equation (17) is positive ; this implies that, in this case too, the MNE will sell more on its domestic market, which will cause P_1 to decrease. It is, however, ambiguous whether the term T is either positive or negative. This is quite logical : at first sight, one would expect the MNE to increase P_2 and, as a consequence, to sell less Y_2 . This, however, is, except for constant marginal and, thus, average costs, affects the average cost term, $C_2(Y_2)/Y_2$, of equation (15). When there are increasing returns to scale, a drop in the quantity Y_2 will cause the average cost term to increase ; the contrary prevails when there decreasing returns to scale. If the decline of Y_2 causes $C_2(Y_2)/Y_2$ to increase, the net effect on the export price standard, $[P_2 - C_2(Y_2)/Y_2]$, is ambiguous. Although the net effect on this export price standard is ambiguous, it is should be clear that it may be to the benefit of the MNE to manipulate P_2 .

By equating the export price with the price at which the product is being resold to the first independent buyer, European anti-dumping law manages to preclude the manipulation of the transfer prices within an MNE. However, the constructed export price is no waterproof solution to rule out all price and even cost manipulation by the MNE. It offers the MNE another opportunity to manipulate the dumping margin and, thus, the height of the anti-dumping duty. First, it does not preclude the manipulation of the price on the domestic market of the MNE nor

of the price at which the product is being resold to the first independent buyer. Second, it offers the MNE the opportunity to manipulate its internal cost allocation. In view of the export price standard as defined in equation (15), the NME can increase P_x not only by increasing P_2 , but also by decreasing $C_2(Y_2)$, and, thus, by shifting some costs (including profits) from the importer to the exporter. The manipulation of total costs ($C_2(Y_2)$) is quite realistic in an MNE : profits may be shifted within an MNE by manipulating not only transfer prices, but also the allocation of costs between the different components of the NME. Within an MNE, there are general costs concerning each component of the NME ; moreover, various intra-group services, loans, transfers of technology and trade-mark occur. The MNE may try to manipulate the allocation as well as the valuation of those various elements and, thereby, manipulate the costs of each of its different components⁷¹⁵. In European anti-dumping law, the manipulation of cost allocation is prevented by the practice that the accounting data are not used, if there are reasons to believe that the cost allocation is influenced by the association. Thus, only the manipulation of the price on the domestic market of the NME and of the price at which the product is first resold to an independent buyer on the Community market is not precluded. However, an exporter not associated with his importer will also manipulate his domestic market prices, as well as his export prices in view of a possible application of anti-dumping law⁷¹⁶. Therefore, the constructed

⁷¹⁵ See : O.E.C.D., *Transfer Pricing and Multinational Enterprises. Report of the OECD Committee on Fiscal Affairs*, Paris, O.E.C.D., 1979, 45-94 ; O.E.C.D., *Transfer Pricing and Multinational Enterprises. Three Taxation issues. Reports of the OECD Committee on Fiscal Affairs*, Paris, O.E.C.D., 1984, 71-91.

⁷¹⁶ Assume a firm producing at a cost $C(Y)$ a quantity Y of the product in question. The product is either sold on the firm's domestic market or exported to the Community. A quantity Y_1 is sold at a price P_1 on his domestic market and a quantity Y_2 is exported at a price P_2 to the Community. If there is no European anti-dumping law, the firm's total profit function is :

$$\pi = P_1 Y_1 + P_2 Y_2 - C(Y) \quad (\text{A})$$

Its first order conditions are :

$$\frac{\delta \pi}{\delta Y_1} = MR_1 - MC = 0 \quad (\text{B})$$

$$\frac{\delta \pi}{\delta Y_2} = MR_2 - MC = 0 \quad (\text{C})$$

However, because the Community actively applies its anti-dumping law, the firm knows that, if P_2 is lower than P_1 , it will be subjected to an anti-dumping duty σ :

$$\sigma = \frac{P_1 - P_2}{P_2} \quad (\text{D})$$

Therefore, the firm's total profit function is :

export price may be accepted as the best possible export price standard. Nevertheless, in practice, the constructed export price will pose some problems at the disadvantage of the MNEs. It leaves the anti-dumping authorities much discretionary powers, which, in view of the «one-way flexibility» of anti-dumping law, may very well lead to findings of dumping in cases where no dumping is being practised.

Until now, attention was only paid to the effects of anti-dumping law on transfer prices. However, transfer prices are affected by many other motives, such as corporate profit taxes, tariffs, exchange risks, repatriation of profits and capital, supporting a newly established subsidiary, helping a subsidiary in penetrating a new market. Those various motives will have a conflicting impact on transfer pricing: some of them imply high transfer prices, while low transfer prices are wanted to realize the other motives⁷¹⁷. When establishing the export price for the application of the anti-dumping law, it is necessary to take in consideration all the relevant motives. When this is done, it will be clear that, under certain circumstances, over-invoicing is practised not (merely) to avoid the imposition of an anti-dumping duty.

The manufacturing company of the MNE must pay a corporate tax τ_1 on its profits π_1 in its home country⁷¹⁸. The Community levies a corporate tax τ_2 on the profits π_2 of the importer, as well as a tariff Θ on the imports of the

$$\pi = P_1 Y_1 + \frac{P_1 - P_2}{P_2} P_2 Y_2 - C(Y) \quad (\text{E})$$

For profit maximization the first order conditions are :

$$\frac{\delta \pi}{\delta Y_1} = MR_1 - [MC + \frac{\delta P_1}{\delta Y_1} Y_2] = 0 \quad (\text{F})$$

$$\frac{\delta \pi}{\delta Y_2} = MR_2 - [MC + (P_1 - MR_2)] = 0 \quad (\text{G})$$

Equation (F) is identical to equation (12). As a consequence, the non-associated firm will also sell more on its domestic market at a lower price. Thereby, it will influence the dumping margin precisely the same way as the MNE does.

⁷¹⁷ See : PLASSCHAERT, S., «Transfer pricing problems in developing countries», in *Multinationals and Transfer Pricing*, RUGMAN, A.M., and EDEN, L. (eds.), London, Croom Helm, 1985, (247), 265.

⁷¹⁸ The model is inspired by : KANT, C., «Endogenous Transfer Pricing and the Effects of Uncertain Regulation», *Journal of International Economics*, 1988, (147), 147-157. The penalty for underinvoicing with a probability α used in KANT's article, is replaced by the anti-dumping duty σ imposed with a probability 1.

product concerned into the Community⁷¹⁹. If European anti-dumping law is not taken into account, the respective profit functions of each company are :

$$\pi_1 = (1 - \tau_1) [P_1 Y_1 - C_1(Y) + R Y_2] \quad (19)$$

$$\pi_2 = (1 - \tau_2) [P_2 Y_2 - C_2(Y_2) - (1 - \theta) R Y_2] \quad (20)$$

This results the following overall profit function of the MNE :

$$\pi = (1 - \tau_1) [P_1 Y_1 - C_1(Y)] + (1 - \tau_2) [P_2 Y_2 - C_2(Y_2)] + [(\tau_2 - \tau_1) - (1 - \tau_2)\theta] R Y_2 \quad (21)$$

Differentiating equation (21) with respect to the transfer price R, provides :

$$\frac{\delta \pi}{\delta R} = [(\tau_2 - \tau_1) - (1 - \tau_2)\theta] Y_2 = 0 \quad (22)$$

The examination of the last term of equation (21) and of equation (22) shows that the MNE will always choose either the highest or the lowest possible transfer price. If the relative tax rate differential, provided by $(\tau_2 - \tau_1)/(1 - \tau_1)$, is less than the tariff rate, θ , the MNE will charge the lowest possible transfer price ; in the opposite case, it will set the transfer price as high as possible⁷²⁰.

If the anti-dumping legislation is introduced, and given the definition of the anti-dumping duty σ , the profit function of the importer, π_2 , becomes :

$$\pi_2 = (1 - \tau_2) [P_2 Y_2 - C_2(Y_2) - (1 + \theta) R Y_2 - \sigma R Y_2] \quad (23)$$

Thus, total profit function π is :

$$\pi = (1 - \tau_1) [P_1 Y_1 - C_1(Y)] + (1 - \tau_2) [P_2 Y_2 - C_2(Y_2)] + [(\tau_2 - \tau_1) - (1 - \tau_2)\theta - (1 - \tau_2)\sigma] R Y_2 \quad (24)$$

The derivative of π with respect to the transfer price R is :

719 In economic theory research has been carried out not only into the effects of corporate profit taxes and tariffs on transfer pricing, but also into the effects of exchange rates. As, hereinafter the effects of exchanges rates are studied (see, *infra*, 302-306), it is not necessary to complicate the model by introducing exchange rate motives. For the effect of exchange rates on transfer pricing, see : BATRA, R.N., and HADAR, J., «Theory of the Multinational Firm : Fixed versus Floating Exchange Rates», *Oxford Economic Papers*, 1979, (258), 258-269 ; EDEN, L., «The Microeconomics of Transfer Pricing», in *Multinationals and Transfer Pricing*, RUGMAN, A.M., and EDEN, L. (eds.), London, Croom Helm, 1985, (13), 30-37 ; ITAGAKI, T., «Theory of the Multinational Firm : An Analysis of Effects of Government Policies», *International Economic Review*, 1979, (437), 437-448 ; ITAGAKI, T., «The theory of the multinational firm under exchange rate uncertainty», *Canadian Journal of Economics*, 1981, (276), 276-297 ; ITAGAKI, T., «Systems of Taxation of Multinational Firms under Exchange Risk», *Southern Economic Journal*, 1981-1982, (708), 708-723.

720 HORST, T., «The Theory of the Multinational Firm : Optimal Behavior under Different Tariff and Tax Rates», *Journal of Political Economy*, 1971, (1059), 1060-1062.

$$\frac{\delta \pi}{\delta R} = [(\tau_2 - \tau_1) - (1 - \tau_2)\theta]Y_2 - (1 - \tau_2)\sigma Y_2 = 0 \quad (25)$$

The comparison of equation (25) with equation (22) shows that the effect of an anti-dumping duty on the transfer price may be counterbalanced by the effect of corporate profit taxes and tariffs. This will specifically be the case when the relative tax rate differential $(\tau_2 - \tau_1)/(1 - \tau_1)$ is less than the tariff rate θ : the MNE wants to under-invoice its products for tax and tariff purposes, whereas over-invoicing is warranted for avoiding the imposition of an anti-dumping duty. In case of such conflicting motives, the effective transfer price will be between both corner solutions, which, in anti-dumping law, is equal to the resale price, P_2 , after deducting the average total cost, $C_2(Y_2)/Y_2$ (Article 2(9) basic EC Regulation ; Article 2(8)(b) basic ECSC Decision). Indeed, on the assumption that $(\tau_2 - \tau_1)/(1 - \tau_1) < \theta$, the terms $[(\tau_2 - \tau_1) - (1 - \tau_2)\theta]$ and $(1 - \tau_2)\sigma$ may be considered to be the marginal gain and the marginal loss, respectively, from under-invoicing: the higher the transfer price, the more the marginal loss will increase.

A MNE may, thus, have other motives than pure profit maximization. Some of those motives entail over-invoicing, whereas others, like the aim to avoid anti-dumping measures, lead to under-invoicing. The price, used as export price standard, should not be influenced by the motive of the MNE to avoid anti-dumping measures. On the other hand, the MNE should not be sanctioned for pursuing other motives than pure profit maximization. The MNE, however, may be sanctioned under European anti-dumping law for pursuing other motives than profit maximization, as prices charged by independent exporters are compared with the internal transfer prices of the MNE in order to ascertain whether those transfer prices are influenced by the motive to evade European anti-dumping law. Internal transfer prices of MNEs will seldom coincide with the prices of independent exporters. Independent exporters will usually only aim at profit maximization. MNEs, however, may have other motives, which have an impact on their internal transfer prices. As a consequence, transfer prices of MNEs influenced by such other motives, will be considered as having been influenced by the motive of avoiding anti-dumping measures. The MNE may, however, not have pursued the evasion of anti-dumping law. Therefore, a strict comparison between the prices charged by independent exporters and internal transfer prices of MNEs should not be decisive. The MNEs should be allowed to prove that the difference between their internal transfer prices and the prices of an independent exporter may be explained by other motives than the evasion of anti-dumping law.

3.3.3. Export price constructed on any reasonable basis and export price based on the facts available

In European anti-dumping law the export price constructed on any reasonable basis has not yet been applied explicitly. However, in three anti-dumping cases the conditions in which such an export price may be used, *i.e.*, the product was not resold in the condition imported, have already been fulfilled.

- In *styrene monomere from the United States of America*, exports to associated importers who did not resell the product or who used it to produce different other products, were not taken into account in order to determine the export price⁷²¹.
- In *textured polyester fabrics from the United States of America*, the constructed export price was used, adjusted for the processing costs⁷²².
- In *acrylonitrile from the United States of America* and in *N-propyl alcohol from the United States of America*, the actual export price was used to determine the price for exports implying inward processing arrangements⁷²³.

More frequent use has been made of the export price based on the facts available (Article 18 basic EC Regulation ; Article 7(7)(b) basic ECSC Decision). In the majority of cases in which the export price was determined on the facts available, the official statistics concerning imports of the Community or the Member States have been used⁷²⁴. Other sources of information are the

⁷²¹ Council Regulation (EEC) No 2702/87 of 4 September 1987 repealing a definitive anti-dumping duty on styrene monomer originating in the United States of America and terminating the investigation, *O.J.*, 8 September 1987, No L 258/20.

⁷²² Commission Regulation (EEC) No 1337/81 of 18 May 1981 imposing a provisional anti-dumping duty on imports of certain textured polyester fabrics originating in the United States of America, *O.J.*, 20 May 1981, No L 133/17.

⁷²³ Council Decision 83/162/EEC of 18 April 1983 terminating the anti-dumping proceeding in respect of imports of acrylonitrile originating in the United States of America, *O.J.*, 20 April 1983, No L 101/29.

⁷²⁴ Commission Regulation (EEC) No 384/81 of 13 February 1981 imposing a provisional anti-dumping duty on styrene monomer originating in the United States of America, *O.J.*, 14 February 1981, No L 42/14 ; Commission Regulation (EEC) No 2127/82 of 28 July 1982 imposing a provisional anti-dumping duty on trichloroethylene originating in the German Democratic Republic and Poland and terminating the anti-dumping proceeding in respect of trichloroethylene originating in Czechoslovakia, Romania, Spain and the United States of America, *O.J.*, 31 July 1982, No L 223/76 ; Commission Decision 82/881/EEC of 23 December 1982 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of perchlorethylene originating in Czechoslovakia, Romania, Spain and the United States of America and terminating that proceeding, *O.J.*, 30 December 1982, No L 371/47 ; Council Decision 83/9/EEC of 17 January 1983 terminating the anti-dumping proceeding concerning imports of codeine and its salts originating in Czechoslovakia, Hungary, Poland and Yugoslavia, *O.J.*, 20 January 1983, No L 16/30 ; Commission Regulation (EEC) No 348/83 of 10 February 1983 imposing a provisional anti-dumping duty on imports of hexamethylenetetramine originating in the German Democratic Republic and the Soviet Union, and accepting undertakings and terminating the proceeding in respect of imports of hexamethylenetetramine originating in Czechoslovakia and Romania, *O.J.*, 12 February 1983, No L 40/24 ; Commission Decision No 702/83/ECSC of 24 March 1983 imposing provisional anti-dumping duties on certain iron or steel coils for re-rolling originating in Argentina, Brazil, Canada and Venezuela and accepting price undertakings from two Canadian exporters, *O.J.*, 29 March 1983, No L 82/9 ; Commission Decision 84/103/EEC of 23 February 1984 terminating the anti-dumping proceeding concerning imports of non-alloyed unwrought aluminium originating in Norway, Surinam, the Soviet Union and Yugoslavia, *O.J.*, 28 February 1984, No L 57/19 ; Commission Regulation (EEC) No 1129/84 of 18 April 1984 imposing a provisional anti-dumping duty on imports of certain angles, shapes and sections, of iron or steel, originating in the German Democratic Republic, *O.J.*, 26 April 1984, No L 109/11 ; Commission Regulation (EEC) No 699/88 of 15 March 1988 imposing a provisional anti-dumping duty on imports of oxalic acid originating in Taiwan and South Korea, *O.J.*, 18 March 1988, No L 72/12 ; Commission Regulation (EEC) No 2402/89 of 31 July 1989 imposing a provisional anti-dumping duty on imports of barium chloride originating in the People's Republic of China or the German Democratic Republic, *O.J.*, 4 August 1989, No L 227/24 ; Council Regulation (EEC) No 385/90 of 12 February 1990 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in Czechoslovakia and definitively collecting the provisional anti-dumping duty imposed on those imports, *O.J.*, 16 February 1990, No L 42/1 ; Commission Regulation (EEC) No 720/90 of 22 March 1990 imposing a provisional anti-dumping duty on imports of silicon metal originating in the People's Republic of China, *O.J.*, 27 March 1990, No L 80/9 ; Commission Regulation (EEC) No 762/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungstic oxide and tungstic acid originating in the People's Republic of China, *O.J.*, 30 March 1990, No L 83/29 ; Commission Regulation (EEC) No 763/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten carbide and fused tungsten carbide originating in the People's Republic of China and terminating the anti-dumping proceeding concerning imports of those products from the Republic of Korea, *O.J.*, 30 March 1990, No L 83/36 ; Commission Regulation (EEC) No 1537/90 of 28 May 1990 imposing a provisional anti-dumping duty on imports of potassium permanganate originating in the USSR, *O.J.*, 8 June 1990, No L 145/9 ; Council Regulation (EEC) No 2200/90 of 27 July 1990 imposing a definitive anti-dumping duty on imports of silicon metal originating in the People's Republic of China, *O.J.*, 28 July 1990, No L 198/57 ; Council Regulation (EEC) No 541/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of barium chloride originating in the People's Republic of China, *O.J.*, 7 March 1991, No L 60/1 ; Commission Regulation (EEC) No 2818/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports of cotton yarn originating in Brazil, Egypt and Turkey and terminating the anti-dumping proceeding in respect of cotton yarn originating in India and Thailand, *O.J.*, 27 September 1991, No L 271/17 ; Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-

(lowest⁷²⁵) export price established by the European anti-dumping authorities in respect of other exports coming from the same country⁷²⁶, the price data communicated by the importers in their applications for import licenses⁷²⁷, the export prices mentioned in the anti-dumping

dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7 ; Commission Regulation (EEC) No 797/93 of 30 March 1993 imposing a provisional anti-dumping duty on imports of ferro-chrome with a carbon content by weight of max. 0,5 % (low carbon ferro-chrome) originating in Kazakhstan, Russia and Ukraine, *O.J.*, 2 April 1993, No L 80/8 ; Commission Regulation (EEC) No 2463/93 of 1 September 1993 imposing a provisional anti-dumping duty on imports of fluorspar originating in the People's Republic of China, *O.J.*, 7 September 1993, No L 226/3 ; Commission Decision No 67/94/ECSC of 12 January 1994 imposing a provisional anti-dumping duty on imports into the Community of hematite pig iron, originating in Brazil, Poland, Russia and Ukraine, *O.J.*, 15 January 1994, No L 12/5 ; Council Regulation (EC) No 486/94 of 4 March 1994 imposing definitive anti-dumping duties on imports of fluorspar originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 5 March 1994, No L 62/1 ; Council Regulation (EC) No 821/94 of 12 April 1994 imposing a definitive anti-dumping duty on imports of silicon carbide, originating in the People's Republic of China, Poland, the Russian Federation and Ukraine, *O.J.*, 13 April 1994, No L 94/21 ; Commission Decision 94/389/EC of 6 June 1994 terminating the anti-dumping proceeding regarding imports of refined antimony trioxide originating in the People's Republic of China, *O.J.*, 9 July 1994, No L 176/41 ; Commission Regulation (EC) No 3119/94 of 19 December 1994 imposing a provisional anti-dumping duty on imports of ferro-silico-manganese originating in Russia, Ukraine, Brazil and South Africa, *O.J.*, 21 December 1994, No L 330/15.

The use of Eurostat statistics has been rejected :

- because they were said not be correct (Council Regulation (EEC) No 3434/91 of 25 November 1991 imposing a definitive anti-dumping duty on imports of oxalic acid originating in India or the People's Republic of China, *O.J.*, 28 November 1991, No L 326/6) ;
- because they provided information in respect of a category of products which encompassed other products than the dumped one (Commission Regulation (EC) No 371/94 of 17 February 1994 imposing a provisional anti-dumping duty on imports into the Community of large aluminium electrolytic capacitors originating in the Republic of Korea and Taiwan, *O.J.*, 19 February 1994, No L 48/10).

⁷²⁵ Commission Regulation (EEC) No 2477/93 of 6 September 1993 imposing a provisional anti-dumping duty on imports of certain photo albums originating in the People's Republic of China, *O.J.*, 9 September 1993, No L 228/16 ; Council Regulation (EC) No 3664/93 of 22 December 1993 imposing a definitive anti-dumping duty on imports into the Community of photo albums in bookbound form originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 31 December 1993, No L 333/67.

⁷²⁶ Commission Regulation (EC) No 1783/94 of 18 July 1994 imposing a provisional anti-dumping duty on imports of furfuraldehyde originating in the People's Republic of China, *O.J.*, 21 July 1994, No L 186/11.

⁷²⁷ Commission Regulation (EEC) No 84/82 of 14 January 1982 imposing a provisional anti-dumping duty on mechanical wrist-watches originating in the USSR, *O.J.*, 16 January 1982, No L 11/14 ; Commission Decision No 3113/83/ECSC of 4 November 1983 imposing a provisional anti-dumping duty on imports of concrete reinforcing bars originating in Spain, *O.J.*, 5 November 1983, No L 303/13 ; Commission Decision No 163/88/ECSC of 20 January 1988 imposing a provisional anti-dumping duty on imports of certain iron or steel coils, originating in Algeria, Mexico and Yugoslavia, *O.J.*, 22 January 1988, No L 18/31 ; Commission Decision No 708/89/ECSC of 17 March 1989 imposing a provisional anti-dumping duty on imports of certain flat-rolled products of iron or non-alloy steel, cold-rolled, originating in Yugoslavia, *O.J.*, 21 March 1989, No L 78/14.

complaint⁷²⁸, information obtained from a producer in the Community and an importer⁷²⁹ or from some importers⁷³⁰, or the information obtained during the on-spot verification by the European anti-dumping authorities⁷³¹. In review proceeding, the export price determined in the original investigation is sometimes the best information available⁷³². The actual export price is also used when it is the only available information⁷³³. That actual export price may be

⁷²⁸ Commission Regulation (EEC) No 2297/80 of 29 August 1980 imposing a provisional anti-dumping duty on imports of certain polyester yarn originating in the United States of America, *O.J.*, 2 September 1980, No L 231/5 ; Commission Regulation (EEC) No 2079/83 of 25 July 1983 imposing a provisional anti-dumping duty on imports of dicumyl peroxide originating in Japan, *O.J.*, 27 July 1983, No L 203/13 ; Council Regulation (EEC) No 2978/83 of 24 October 1983 amending Regulation (EEC) No 191/80 imposing a definitive anti-dumping duty on lithium hydroxide originating in the United States of America and the Soviet Union, *O.J.*, 26 October 1983, No L 294/3 ; Commission Regulation (EEC) No 2623/88 of 24 August 1988 imposing a provisional anti-dumping duty on imports of urea originating in Austria, Hungary, Malaysia, Romania, the USA and Venezuela, *O.J.*, 25 August 1988, No L 235/5 ; Council Regulation (EEC) No 450/89 of 20 February 1989 imposing a definitive anti-dumping duty on imports of urea originating in the United States of America or Venezuela and adjusting the definitive anti-dumping duty for Saudi Arabia laid down by Regulation (EEC) No 3339/87, *O.J.*, 24 February 1989, No L 52/1 ; Commission Regulation (EEC) No 1472/91 of 29 May 1991 imposing a provisional anti-dumping duty on imports of oxalic acid originating in India or China and terminating the anti-dumping proceeding in respect of imports of oxalic acid originating in Czechoslovakia, *O.J.*, 1 June 1991, No L 138/62 ; Council Regulation (EEC) No 3434/91 of 25 November 1991 imposing a definitive anti-dumping duty on imports of oxalic acid originating in India or the People's Republic of China, *O.J.*, 28 November 1991, No L 326/6 ; Commission Regulation (EC) No 371/94 of 17 February 1994 imposing a provisional anti-dumping duty on imports into the Community of large aluminium electrolytic capacitors originating in the Republic of Korea and Taiwan, *O.J.*, 19 February 1994, No L 48/10 ; Commission Regulation (EC) No 1076/94 of 6 May 1994 imposing a provisional anti-dumping duty on imports of certain watch movements originating in Malaysia and Thailand, *O.J.*, 11 May 1994, No L 120/3 ; Council Regulation (EC) No 2819/94 of 17 November 1994 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in the People's Republic of China, *O.J.*, 19 November 1994, No L 298/32.

⁷²⁹ Commission Regulation (EEC) No 1129/84 of 18 April 1984 imposing a provisional anti-dumping duty on imports of certain angles, shapes and sections, of iron or steel, originating in the German Democratic Republic, *O.J.*, 26 April 1984, No L 109/11 ; Commission Regulation (EEC) No 328/85 of 6 February 1985 imposing a provisional anti-dumping duty on imports of certain glass mirrors originating in South Africa, *O.J.*, 8 February 1985, No L 36/10 ; Commission Regulation (EEC) No 1472/91 of 29 May 1991 imposing a provisional anti-dumping duty on imports of oxalic acid originating in India or China and terminating the anti-dumping proceeding in respect of imports of oxalic acid originating in Czechoslovakia, *O.J.*, 1 June 1991, No L 138/62.

⁷³⁰ Commission Decision 90/154/EEC of 26 March 1990 terminating the anti-dumping proceeding concerning imports of ammonium paratungstate originating in the People's Republic of China and the Republic of Korea, *O.J.*, 30 March 1990, No L 83/117 ; Commission Decision 90/241/EEC of 22 May 1990 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of photo albums originating in South Korea and Hong Kong, and terminating the investigation, *O.J.*, 31 May 1990, No L 138/48 ; Commission Regulation (EEC) No 1613/90 of 13 June 1990 imposing a provisional anti-dumping duty on imports of ball bearings with a greatest external diameter not exceeding 30 mm originating in Thailand, *O.J.*, 16 June 1990, No L 152/24 ; Commission Decision 91/512/EEC of 25 July 1991 accepting undertakings given in connection with the review of anti-dumping measures concerning imports of artificial corundum originating in the Soviet Union, Hungary, Poland, Czechoslovakia and the People's Republic of China and in connection with the anti-dumping proceeding concerning imports of artificial corundum originating in Brazil and Yugoslavia, and terminating the investigation, *O.J.*, 2 October 1991, No L 275/27 ; Commission Regulation (EEC) No 2720/93 of 28 September 1993 imposing a provisional anti-dumping duty on imports of isobutanol originating in the Russian Federation, *O.J.*, 2 October 1993, No L 246/12 ; Council Regulation (EC) No 821/94 of 12 April 1994 imposing a definitive anti-dumping duty on imports of silicon carbide, originating in the People's Republic of China, Poland, the Russian Federation and Ukraine, *O.J.*, 13 April 1994, No L 94/21.

⁷³¹ Commission Regulation (EC) No 1506/94 of 27 June 1994 imposing provisional duties on imports of urea ammonium nitrate solution originating in Bulgaria and Poland, *O.J.*, 30 June 1994, No L 162/16.

⁷³² Council Regulation (EC) No 643/94 of 21 March 1994 amending Regulation (EEC) No 3068/92 in respect of definitive anti-dumping duties on imports of potassium chloride originating in Belarus, Russia and Ukraine, *O.J.*, 24 March 1994, No L 80/1.

⁷³³ Commission Regulation (EEC) No 1321/81 of 15 May 1981 amending Regulation (EEC) No 384/81 imposing a provisional anti-dumping duty on styrene monomer originating in the United States of America, *O.J.*, 19 May 1981, No L 132/17.

the weighted average of the actual export price of only 30 % of total exports to the Community⁷³⁴. Also the weighted average of the prices charged for all the different product types has been used as export price for only one of these types⁷³⁵. Furthermore, the constructed export price may be used instead of the actual export price⁷³⁶. The constructed export price may be determined by calculating the difference between the lowest price charged by the exporter concerned in the Community market, and the costs incurred by another exporter between importation and resale, when there is no information available as to the prices paid by the first independent buyer to the exporter's associated importer and costs of the exporter concerned⁷³⁷. Also the lowest export price of a fully cooperating exporter established in the same country⁷³⁸ or the export prices of exporters established in another country subject to the same anti-dumping proceeding are being applied⁷³⁹. If the price actually charged to an associated importer reflects the fact that the assembled product contains components supplied, at no charge to the producer, by this importer, the export price will be constructed by adding an amount representing the cost of and the profit realizable on the components⁷⁴⁰.

The sources used as information available are often to the detriment of the allegedly dumping exporter. Indeed, the export prices invoiced in the official import statistics will usually be undervalued by the exporter in order to minimize the customs duties to be paid. Also the

⁷³⁴ Commission Regulation (EEC) No 3798/90 of 21 December 1990 imposing a provisional anti-dumping duty on imports of espadrilles originating in the People's Republic of China, *O.J.*, 28 December 1990, No L 365/25 ; Council Regulation (EEC) No 1812/91 of 24 June 1991 imposing a definitive anti-dumping duty on imports of espadrilles originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty, *O.J.*, 28 June 1991, No L 166/1.

⁷³⁵ Commission Regulation (EEC) No 2051/90 of 17 July 1990 imposing a temporary anti-dumping duty on imports of woven polyolefin bags originating in the People's Republic of China, *O.J.*, 19 July 1990, No L 187/36 (corrigendum, *O.J.*, 20 September 1990, No L 256/38).

⁷³⁶ Council Regulation (EEC) No 101/83 of 17 January 1983 imposing a definitive anti-dumping duty on certain chemical fertilizer originating in the United States of America, *O.J.*, 19 January 1983, No L 15/1 ; Council Regulation (EEC) No 1739/85 of 24 June 1985 imposing a definitive anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan, *O.J.*, 27 June 1985, No L 167/3.

⁷³⁷ Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5.

⁷³⁸ Commission Decision No 702/83/ECSC of 24 March 1983 imposing provisional anti-dumping duties on certain iron or steel coils for re-rolling originating in Argentina, Brazil, Canada and Venezuela and accepting price undertakings from two Canadian exporters, *O.J.*, 29 March 1983, No L 82/9.

⁷³⁹ Commission Regulation (EEC) No 3421/90 of 26 November 1990 imposing a provisional anti-dumping duty on imports of aspartame originating in Japan and the United States of America, *O.J.*, 29 November 1990, No L 330/16.

⁷⁴⁰ Commission Regulation (EC) No 534/94 of 9 March 1994 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, *O.J.*, 11 March 1994, No L 68/5.

complainant industry will undervalue export prices in order to increase the dumping margin⁷⁴¹. Likewise, the lowest export price of a fully cooperating exporter will result in a higher dumping margin. Only once the European anti-dumping authorities have explained their case law of choosing relatively low export prices, namely they have held that the use of higher export prices would constitute a bonus for non-cooperation⁷⁴². This argumentation makes sense : where actual export prices are lower than the one used by the European anti-dumping authorities, the exporters would certainly protest and offer full cooperation.

4. NORMAL VALUE AND EXPORT PRICE COMPARED

4.1. ADJUSTMENTS FOR ENSURING A FAIR COMPARISON

Under GATT anti-dumping law a fair comparison must be made between the normal value and the export price. Such a fair comparison implies that the two price standards must be compared at the same level of trade and in respect of sales made at as nearly as possible the same time. In addition, due allowance must be made in each case for the differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability (Article VI(1) GATT ; Article 2.4. GATT Anti-dumping Code). In short, all differences affecting price comparability must be taken into account. GATT anti-dumping law, in this respect, is intended, on the one hand, to detect all types of price discrimination, including cases of covert price discrimination, and, on the other hand, to ignore all situations which apparently seem to be price discriminating, but which, in fact, are not⁷⁴³.

Under European anti-dumping law, as under GATT anti-dumping law, normal value and export price must be compared at as nearly as possible the same time. However, under European anti-dumping law, adjustments are admitted for but a limited number of differences : differences in

⁷⁴¹ See also : VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 444.

⁷⁴² Commission Decision No 702/83/ECSC of 24 March 1983 imposing provisional anti-dumping duties on certain iron or steel coils for re-rolling originating in Argentina, Brazil, Canada and Venezuela and accepting price undertakings from two Canadian exporters, *O.J.*, 29 March 1983, No L 82/9.

⁷⁴³ In a similar sense, see : BESELER, J.F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 89-93.

physical characteristics ; differences in import charges and indirect taxes ; differences in discounts and rebates ; differences in selling expenses resulting from sales made at different levels of trade, or in different quantities, or under different conditions and terms of sale (Article 2(10) basic EC Regulation ; Article 2(9) and (10) basic ECSC Decision)⁷⁴⁴. Though GATT anti-dumping law provides that allowance must be made for all differences which are shown to affect price comparability (Article 2.4. GATT Anti-dumping Code), European anti-dumping law, however, does not necessarily violate GATT anti-dumping law. By restricting the number of differences, European anti-dumping law will not detect all cases of actual price discrimination. This does not go against GATT anti-dumping law which does not require to find and sanction all cases of dumping. However, European anti-dumping law will violate GATT anti-dumping law as, by restricting the number of differences, it will consider cases of apparent, but, in fact, not real price discrimination as actual price discrimination. In that case, anti-dumping relief may be granted, though no actual dumping is being practised⁷⁴⁵. But, perhaps, the European anti-dumping authorities may interpret the few categories of allowable differences broadly so as to allow adjustments for all kinds of differences, and to reduce or even to remove the possible breach of

⁷⁴⁴ C.J.E.C., case 240/84, 7 May 1987, *NTN Toyo Bearing Company Limited a.o. v Council*, E.C.R., 1987, 1854 ; C.J.E.C., case 255/84, 7 May 1987, *Nachi Fujikoshi Corporation v Council*, E.C.R., 1987, 1889 ; C.J.E.C., case 258/84, 7 May 1987, *Nippon Seiko KK v Council*, E.C.R., 1987, 1961 ; C.J.E.C., case 260/84, 7 May 1987, *Minebea Company Limited v Council*, E.C.R., 1987, 2004 ; C.J.E.C., joined cases 294/86 and 77/87, 5 October 1988, *Technointorg v Commission and Council*, E.C.R., 1988, (6077), 6114-6115 ; C.J.E.C., joined cases C-305/86 and C-160/87, 11 July 1990, *Neotype Techmasheexport GmbH v Commission and Council*, E.C.R., 1990, I, (2945), 2983 (Opinion of Advocate General VAN GERVEN) ; C.J.E.C., joined cases C-320/86 and C-188/87, 11 July 1990, *Stanko France v Commission and Council*, E.C.R., 1990, I, (3013), 3015 ; Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, O.J., 22 June 1985, No L 163/1 ; Council Regulation (EEC) No 1739/85 of 24 June 1985 imposing a definitive anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan, O.J., 27 June 1985, No L 167/3 ; Commission Regulation (EEC) No 2865/85 of 14 October 1985 imposing a provisional anti-dumping duty on imports of certain electronic scales originating in Japan and accepting undertakings and terminating the proceeding in respect of certain imports of such products originating in Japan, O.J., 16 October 1985, No L 275/5 ; WAER, P., «Constructed Normal Values in EC Dumping Margin Calculations. Fiction, or a Realistic Approach», *Journal of World Trade*, 1993/3, (47), 53-54.

Therefore, adjustments are rejected if they cannot be subsumed in either of these categories, see : Commission Regulation (EEC) No 2936/82 of 28 October 1982 imposing a provisional anti-dumping duty on copper sulphate originating in Yugoslavia, O.J., 4 November 1982, No L 308/7 ; Council Regulation (EEC) No 29/87 of 22 December 1986 imposing a definitive anti-dumping duty on imports of certain deep freezers originating in the Soviet Union, O.J., 8 January 1987, No L 6/1 ; Council Regulation (EEC) No 864/87 of 23 March 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union, and definitively collecting the amounts secured as provisional duties, O.J., 27 March 1987, No L 83/1 ; Commission Regulation (EEC) No 1043/87 of 10 April 1987 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Yugoslavia, O.J., 14 April 1987, No L 102/5 ; Commission Regulation (EEC) No 1695/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of polyester yarn originating in Mexico, South Korea, Taiwan and Turkey, O.J., 17 June 1988, No L 151/39 (corrigendum, O.J., 18 June 1988, No L 152/58) ; Commission Regulation (EEC) No 1696/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, O.J., 17 June 1988, No L 151/47 ; Council Regulation (EEC) No 3905/88 of 12 December 1988 imposing a definitive anti-dumping duty on imports of polyester yarn originating in Mexico, South Korea, Taiwan and Turkey, O.J., 16 December 1988, No L 347/10 ; Council Regulation (EEC) No 3946/88 of 16 December 1988 imposing a definitive anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, O.J., 17 December 1988, No L 348/49.

⁷⁴⁵ P. WAER (WAER, P., «Constructed Normal Values in EC Dumping Margin Calculations. Fiction, or a Realistic Approach», *Journal of World Trade*, 1993/3, (47), 55), however, argues that European anti-dumping law always violates GATT anti-dumping law by restricting the number of adjustment categories. As he does distinguish between cases in which dumping is found though there is actually no dumping, and cases in which the actual dumping is not detected, he ignores that GATT anti-dumping law does not oblige its Contracting Parties to detect all instances of actual dumping.

GATT anti-dumping law. Hereinafter, it will be investigated whether such a broad interpretation is provided or whether the interpretation upheld by European anti-dumping authorities may result in finding dumping in cases where no actual dumping is being practised.

Moreover, under ECSC anti-dumping law, individual adjustments having an *ad valorem* effect of less than 0,5 % of that price or value are ordinarily considered insignificant (Article 2(10)(e) basic ECSC Decision). The opportunity to disregard claims for adjustments which are insignificant in relation to the price or value of the affected transactions, also goes against GATT anti-dumping law. The cumulation of several insignificant differences for which no adjustments are being made, may result in the determination of a positive dumping margin and, thus, in the imposition of anti-dumping measures, though, in fact, no actual dumping is being practised⁷⁴⁶. In a number of anti-dumping cases, adjustments have not been made, if the differences did not substantially affect price comparability⁷⁴⁷. However, in none of those cases, various insignificant differences have been cumulated. Moreover, the European anti-dumping authorities have refused to disregard claims for allowances having an *ad valorem* effect of less than 0.5 % when, taken together, they have an appreciable effect on the prices or the value of the transactions to which they are related⁷⁴⁸. Nevertheless, the opportunity of cumulation and of serious violations of GATT anti-dumping law subsists. Perhaps, therefore, the provision on *de minimis* adjustments has been deleted in EC anti-dumping law at the occasion of its adjustment to the new GATT anti-dumping Code. A similar amendment to ECSC anti-dumping law is appropriate.

⁷⁴⁶ BELLIS, J.-F., VERMULST, E., and WAER, P., «Further Changes in the EEC Anti-Dumping Regulation : A Codification of Controversial Methodologies», *Journal of World Trade*, 1989, (21), 29.

⁷⁴⁷ Commission Decision 80/316/EEC of 14 March 1980 terminating the anti-dumping proceeding concerning stereo cassette tape heads originating in Japan, *O.J.*, 15 March 1980, No L 69/64 ; Council Regulation (EEC) No 1282/81 of 12 May 1981 imposing a definitive anti-dumping duty on vinyl acetate monomer originating in the United States of America, *O.J.*, 15 May 1981, No L 129/1 ; Commission Regulation (EEC) No 3542/82 of 22 December 1982 imposing a provisional anti-dumping duty on imports of natural magnesite, dead-burned (sintered), originating in the People's Republic of China and in North Korea, *O.J.*, 30 December 1982, No L 371/25 ; Commission Regulation (EEC) No 163/83 of 21 January 1983 imposing a provisional anti-dumping duty on 4,4'-Isopropylidenediphenol originating in the United States of America, *O.J.*, 26 January 1983, No L 23/9 ; Commission Regulation (EEC) No 909/85 of 2 April 1985 imposing a provisional anti-dumping duty on imports of certain kinds of polystyrene sheet originating in Spain, *O.J.*, 4 April 1985, No L 97/30 ; Commission Decision 86/35/EEC of 21 February 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of fibre building board from Finland and Sweden and terminating the investigation, *O.J.*, 25 February 1986, No L 46/23 ; Council Decision 86/468/EEC of 22 September 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain acrylic fibres originating in Israel, Mexico, Romania and Turkey and terminating the investigation, *O.J.*, 24 September 1986, No L 272/29 ; Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50.

⁷⁴⁸ Commission Regulation (EEC) No 313/92 of 4 February 1992 imposing a provisional anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in South Korea, *O.J.*, 11 February 1992, No L 34/8 ; Council Regulation (EEC) No 2306/92 of 4 August 1992 imposing a definitive anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in the Republic of Korea, *O.J.*, 7 August 1992, No L 222/8 (corrigendum, *O.J.*, 21 January 1993, No L 13/20).

4.2. CATEGORIES OF ADJUSTMENTS

4.2.1. Differences in selling expenses

4.2.1.1. General characteristics

ECSC anti-dumping law allows adjustments only for three categories of differences affecting price comparability. One of those three categories is constituted by differences in selling expenses (Article 2(9)(a)(iii) basic ECSC Decision). Those differences have to follow from sales made at different levels of trade, or in different quantities, or under different conditions and terms of sale. Those selling expenses comprise only five categories :

- (i) transport, insurance, handling, loading and ancillary costs ;
- (ii) packing ;
- (iii) credit ;
- (iv) warranties, guaranties, technical assistance and other after-sales services ;
- (v) other selling expenses, *i.e.*, commissions and salaries paid to salesmen, *i.e.*, personnel wholly engaged in direct selling activities.

EC anti-dumping law does not treat of the general category of selling expenses. It allows, though, adjustments for the same categories :

- (i) transport, insurance, handling, loading and ancillary costs ;
- (ii) packing ;
- (iii) credit ;
- (iv) warranties, guaranties, technical assistance and other after-sales services ;
- (v) commissions (Article 2(10) basic EC Regulation).

Both lists are intended to be exhaustive⁷⁴⁹. Therefore, in some anti-dumping cases, the European anti-dumping authorities have refused adjustments for differences in selling expenses

⁷⁴⁹ BELLIS, J.-F., «The EEC Antidumping System», in *Antidumping Law and Practice. A Comparative Study*, JACKSON, J.H., and VERMULST, E.A. (eds.), New York, Harvester Wheatsheaf, 1990, (41), 82 ; BELLIS, J.-F., VERMULST, E., and WAER, P., «Further Changes in the EEC Anti-Dumping Regulation : A Codification of Controversial Methodologies», *Journal of World Trade*, 1989, (21), 28 ; VERMULST, E.A., and GRAAFSMA, F., «A Decade of European Community Anti-Dumping Law and Practice Applicable to Imports from China», *Journal of World Trade*, 1992/3, (5), 25 ; VERMULST, E., and WAER, P., «De nieuwe EEG Anti-dumping Verordening 2423/88 : Een stille revolutie», *S.E.W.*, 1989, (151), 155 ; WAER, P., «Constructed Normal Values in EC Dumping Margin Calculations. Fiction, or a Realistic Approach», *Journal of World Trade*, 1993/3, (47), 55.

because such adjustments were not provided for by European anti-dumping law⁷⁵⁰ or have allowed an adjustment because it could be subsumed under one of the enlisted selling expenses⁷⁵¹. However, as adjustments have been made for differences in selling expenses which are not enlisted⁷⁵², European anti-dumping authorities possibly do not consider the list of

⁷⁵⁰ Council Regulation (EEC) No 3905/88 of 12 December 1988 imposing a definitive anti-dumping duty on imports of polyester yarn originating in Mexico, South Korea, Taiwan and Turkey, *O.J.*, 16 December 1988, No L 347/10 ; Council Regulation (EEC) No 3946/88 of 16 December 1988 imposing a definitive anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 December 1988, No L 348/49 ; Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27) ; Commission Decision 89/537/EEC of 27 September 1989 terminating the anti-dumping proceeding concerning imports of mica originating in Japan, *O.J.*, 3 October 1989, No L 284/45 ; Commission Regulation (EEC) No 1451/92 of 2 June 1992 imposing a provisional anti-dumping duty on imports into the Community of certain large electrolytic aluminium capacitors originating in Japan, *O.J.*, 4 June 1992, No L 152/22 (corrigendum, *O.J.*, 17 June 1992, No L 163/27) ; Commission Regulation (EC) No 534/94 of 9 March 1994 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, *O.J.*, 11 March 1994, No L 68/5 ; Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50.

⁷⁵¹ The European anti-dumping authorities have made an allowance for the practice applied by the exporter on his domestic market to indicate on the invoice a percentage of the amount of the invoice corresponding to the supply of spare parts free of charge, because this practice was considered to be equivalent to warranties for which European anti-dumping law allows adjustments (Commission Regulation (EEC) No 313/92 of 4 February 1992 imposing a provisional anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in South Korea, *O.J.*, 11 February 1992, No L 34/8).

⁷⁵² Adjustments have been made for :

- price discounts and reductions for certain quantity sales, though ECSC anti-dumping law does not provide for such adjustments (Commission Decision 89/56/EEC of 20 January 1989 terminating the anti-dumping proceeding concerning imports of certain seamless tubes of iron or non-alloy steel originating in Austria, *O.J.*, 28 January 1989, No L 25/87) ;
- «differences in quantity» without any further explanation (Council Regulation (EEC) No 385/90 of 12 February 1990 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in Czechoslovakia and definitively collecting the provisional anti-dumping duty imposed on those imports, *O.J.*, 16 February 1990, No L 42/1 ; Council Regulation (EEC) No 2200/90 of 27 July 1990 imposing a definitive anti-dumping duty on imports of silicon metal originating in the People's Republic of China, *O.J.*, 28 July 1990, No L 198/57). Perhaps those «differences in quantity» affect one of the five categories of selling expenses (e.g., transport costs may be different depending on the quantity to be transported), but, if they do not, then ECSC anti-dumping law does not provide any adjustment for them ;
- harbour dues (Commission Regulation (EEC) No 906/92 of 30 March 1992 imposing a provisional anti-dumping duty on imports of silicon metal originating in Brazil, *O.J.*, 10 April 1992, No L 96/17), though European anti-dumping law does not provide for such adjustments. For they seem not to ressort under the notion of «transport costs» since in the same case a separate adjustment for transport costs has been allowed for ;
- costs resulting from non-recoverable waste caused by successive loading and unloading of the export consignments (Commission Decision 90/507/EEC of 7 September 1990 terminating the review of the anti-dumping measures concerning dense sodium carbonate originating in the United States of America, *O.J.*, 16 October 1990, No L 283/38 ; Council Regulation (EEC) No 1115/91 of 29 April 1991 imposing definitive anti-dumping duties in connection with the review of anti-dumping measures concerning imports of ferro-silicon originating in Brazil, *O.J.*, 3 May 1991, No L 111/1 ; Commission Decision 91/240/EEC of 29 April 1991 accepting undertakings offered by certain exporters in connection with the review of anti-dumping measures concerning imports of ferro-silicon originating in Brazil and terminating the investigation as regards those exporters, *O.J.*, 3 May 1991, No L 111/47). Through a broad interpretation, these costs may be subsumed under the category of loading costs. However, European anti-dumping case law does not clarify whether they were considered to be loading costs or some other selling expense provided under European anti-dumping law ;
- financing costs (Commission Regulation (EEC) No 906/92 of 30 March 1992 imposing a provisional anti-dumping duty on imports of silicon metal originating in Brazil, *O.J.*, 10 April 1992, No L 96/17), though European anti-dumping law does not provide for such adjustments.

Adjustments have been rejected for :

- savings in the cost of producing different quantities not because they are not provided under ECSC anti-dumping law, but because of lack of evidence (Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 24 November 1988, No L 317/33. See also : Commission Regulation (EEC) No 3617/90 of 11 December 1990 imposing a provisional anti-dumping duty on imports of certain welded tubes of iron or non-alloy steel, originating in Turkey or in Venezuela and accepting undertakings offered in connection with such imports, *O.J.*, 15 December 1990, No L 351/17, where the Commission stated that «(n)o quantity discounts were granted». This statement only makes sense when adjustments would have been granted if quantity discounts had been made) or because they had already been taken into account (Commission Regulation (EEC) No 313/92 of 4 February 1992 imposing a provisional anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in South Korea, *O.J.*, 11 February 1992, No L 34/8) ;
- «differences in quantity» not because they are not provided under ECSC anti-dumping law, but because of lack of evidence (Council Regulation (EEC) No 2305/92 of 4 August 1992 imposing a definitive anti-dumping duty on imports of silicon metal originating in Brazil and

selling expenses to be exhaustive⁷⁵³. It is not yet clear which interpretation European anti-dumping authorities will eventually uphold. For the moment, there is certainly no legal certainty. Moreover, if the list of selling expenses finally proves to be exhaustive, European anti-dumping law will sometimes violate GATT anti-dumping law⁷⁵⁴. It is, indeed, impossible to anticipate all types of differences in selling expenses, which may affect price comparison.

Not all selling expenses enumerated in European anti-dumping law may give rise to adjustments in European anti-dumping law. Only for differences in selling expenses bearing a direct relationship to the sales of the product under investigation, adjustments may be made. By restricting the type of selling expenses for which adjustments are allowed, European anti-dumping law seems to be at variance with GATT anti-dumping law, which does not require such a direct relationship and, thus, allows adjustments for differences in all kinds of selling expenses, either directly or indirectly related⁷⁵⁵. European anti-dumping law does not define the form such a direct relationship should take. European anti-dumping authorities have chosen for a rather restrictive interpretation. They hold that the relationship should be functional; selling expenses must be incurred because a particular sale is made, and must be strictly necessary to fulfil the terms of the sale under consideration⁷⁵⁶. It is, indeed, a restrictive interpretation. From an economic point

definitively collecting the amounts secured by way of the provisional anti-dumping duty, *O.J.*, 7 August 1992, No L 222/1).

⁷⁵³ With regard to the adjustments made for price discounts and reductions for certain quantity sales, the possibility has also to be envisaged that these price discounts and reduction were considered as «discounts and rebates» in the sense of Article 2(3)(a) and (8)(a) basic ECSC Decision. In that case, such adjustments would not negate the exhaustive character of the list of adjustable selling expenses of Article 2(10)(c) basic ECSC Decision.

⁷⁵⁴ *Supra*, 267-268.

⁷⁵⁵ WAER, P. and VERMULST, E., «EC Anti-Dumping Law and Practice after the Uruguay Round. A New Lease of Life?», *Journal of World Trade*, 1994/2, (5), 13. *Contra*: Advocate General LENZ, who held that GATT anti-dumping law allows adjustments only for differences in selling expenses which are directly related to the sales (C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council, E.C.R.*, 1991, I, (2069), 2134 (Opinion of Advocate General LENZ)).

⁷⁵⁶ Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1; Council Regulation (EEC) No 1739/85 of 24 June 1985 imposing a definitive anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan, *O.J.*, 27 June 1985, No L 167/3; Commission Regulation (EEC) No 2865/85 of 14 October 1985 imposing a provisional anti-dumping duty on imports of certain electronic scales originating in Japan and accepting undertakings and terminating the proceeding in respect of certain imports of such products originating in Japan, *O.J.*, 16 October 1985, No L 275/5; Commission Regulation (EEC) No 2516/86 of 4 August 1986 imposing a provisional anti-dumping duty on imports of housed bearing units originating in Japan, *O.J.*, 7 August 1986, No L 221/16; Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5; Commission Regulation (EEC) No 2800/86 of 9 September 1986 imposing a provisional anti-dumping duty on imports of certain deep freezers originating in the USSR, accepting the undertakings in connection with the investigation of imports of certain deep freezers originating in Yugoslavia or in the German Democratic Republic and terminating the investigation, and terminating the proceeding concerning imports of certain deep freezers, *O.J.*, 11 September 1986, No L 259/14. See also: Commission Regulation (EEC) No 1043/87 of 10 April 1987 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Yugoslavia, *O.J.*, 14 April 1987, No L 102/5; Commission Regulation (EEC) No 2686/92 of 16 September 1992 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea, *O.J.*, 17 September 1992, No L 272/13; Council Regulation (EEC) No 611/93 of 15 March 1993 imposing a definitive anti-dumping duty on imports into the Community of certain electronic microcircuits known as DRAMs originating in the Republic of Korea and exported by companies not exempted from this duty, and collecting definitively the provisional anti-dumping duty, *O.J.*, 18 March 1993, No L 66/1; .

of view, the distinction between fixed and variable costs should be the crucial criterion. Indeed, variable selling expenses are only incurred when the product is actually sold. European anti-dumping case law has applied this criterion properly in connection with costs of distribution and marketing : adjustments are made for variable costs of distribution⁷⁵⁷, whereas fixed costs of distribution⁷⁵⁸ and marketing⁷⁵⁹ are considered as not bearing a direct relationship. However, other variable costs are not always considered to bear a direct relationship⁷⁶⁰. Moreover, from an economic point of view, the European anti-dumping authorities do not always make a correct distinction between fixed and variable costs. For costs incurred only on the

For example, the salaries of sales leaders do not bear such a direct relationship since the sale leaders' role consists essentially in carrying out general functions within the scope of management and direction, not in selling the product directly to the buyer (C.J.E.C., case C-178/87, 10 March 1992, *Minolta Camera Co. Ltd v Council, E.C.R.*, 1992, I, (1577), 1598 (Report for the Hearing : conclusions of the Council), 1616-1617 (Opinion of Advocate General MISCHO) and 1629 ; Commission Regulation (EEC) No 313/92 of 4 February 1992 imposing a provisional anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in South Korea, *O.J.*, 11 February 1992, No L 34/8).

Credit costs related to the financing of value added tax and special excise tax do not bear a direct relationship either (Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50).

⁷⁵⁷ Commission Regulation (EEC) No 2182/80 of 14 August 1980 imposing a provisional anti-dumping duty on certain chemical fertilizer originating in the United States of America, *O.J.*, 15 August 1980, No L 212/43 ; Council Regulation (EEC) No 349/81 of 9 February 1981 imposing a definitive anti-dumping duty on certain chemical fertilizer originating in the United States of America, *O.J.*, 12 February 1981, No L 39/4 ; Commission Decision 81/35/EEC of 9 February 1981 accepting undertakings in connection with the anti-dumping proceedings concerning certain chemical fertilizer originating in the United States of America, *O.J.*, 12 February 1981, No L 39/35 ; Council Regulation (EEC) No 1282/81 of 12 May 1981 imposing a definitive anti-dumping duty on vinyl acetate monomer originating in the United States of America, *O.J.*, 15 May 1981, No L 129/1 ; Commission Decision 81/406/EEC of 4 June 1981 accepting undertakings in connection with the anti-dumping proceeding concerning imports of ball and tapered roller bearings, originating in Japan, Poland, Romania and the Soviet Union and terminating that proceeding, *O.J.*, 11 June 1981, No L 152/44 ; Commission Decision 82/31/EEC of 14 January 1982 accepting undertakings in connection with the anti-dumping proceeding concerning imports of fluid cracking catalysts originating in the United States of America and terminating that proceeding, *O.J.*, 16 January 1982, No L 11/25 ; Commission Regulation (EEC) No 1633/82 of 23 June 1982 imposing a provisional anti-dumping duty on imports of fibre building board (hardboard) originating in Romania, repealing Commission Decision No 80/564/EEC of 4 June 1980 and accepting undertakings in connection with the proceeding in respect of imports of fibre building board from Czechoslovakia, Finland, Hungary, Norway, Poland, Spain, Sweden and the Soviet Union and terminating the proceeding with regard to those countries and Bulgaria, *O.J.*, 25 June 1982, No L 181/19 ; Commission Recommendation No 2975/82/ECSC of 8 November 1982 imposing a definitive anti-dumping duty on certain sheets and plates, of iron or steel, originating in Brazil, *O.J.*, 9 November 1982, No L 312/10 ; Commission Decision 83/428/EEC of 26 August 1983 accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of caravans for camping and parts thereof originating in Yugoslavia and terminating that proceeding, *O.J.*, 30 August 1983, No L 240/12.

⁷⁵⁸ Commission Regulation (EEC) No 2182/80 of 14 August 1980 imposing a provisional anti-dumping duty on certain chemical fertilizer originating in the United States of America, *O.J.*, 15 August 1980, No L 212/43.

⁷⁵⁹ Commission Regulation (EEC) No 1101/81 of 23 April 1981 imposing a provisional anti-dumping duty on potato granules originating in Canada, *O.J.*, 28 April 1981, No L 116/11.

⁷⁶⁰ Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5.

occasion of the sale of the like product are not always considered as bearing a direct relationship⁷⁶¹. Also costs related to selling expenses themselves bearing a direct relationship are not considered to bear a direct relationship to the sales in question⁷⁶². Nevertheless, because of their relationship with selling expenses bearing a direct relationship, such costs will only be incurred if the product is sold.

4.2.1.2. Level of trade

4.2.1.2.1. The ex-factory level

According to GATT anti-dumping law, prices must be compared «at the same level of trade, normally at the ex-factory level» (Article 2.4. GATT Anti-dumping Code). According to the International Rules for the Interpretation of Trade Terms (so-called «Inco-Terms»), sales at the ex-factory level imply that the seller's only responsibility is to make the products available at his premises and that the buyer bears the full cost and risk involved in transporting the products from the seller's premises to the desired destination. Hence, prices at the ex-factory level do not comprise transport costs, insurance costs and the like⁷⁶³. Thus, GATT anti-dumping law requires transport cost, insurance costs and the like to be equally allocated to sales on the

⁷⁶¹ A first example concerns excise duties. The financing of excise duties invoiced to customers is considered as being directly related to the sales of the like product, whereas the financing of the value added tax (VAT) is not.

The differential treatment is due to the fact that, in principle, the amount of excise duties included in sales invoices to customers are payable as such to the tax authorities. The amount of VAT, which has finally to be paid over to the tax authorities, on the other hand, is determined by the balance between the VAT charged to the company on its supplies and the VAT which the company collects from its customers. In the balance of VAT to be financed there is no amount for the like products which is identifiable separately.

As a result, the financing cost of the VAT is considered as a general, overhead, expense (Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1).

However, this cost will be incurred only if the company sells its products. As long as it does not sell its products, the balance will be negative and the company does not bear any financing cost for the VAT. Indeed, if the balance is negative, it does not have to pay any VAT over to the tax authorities.

A second example concerns the transport costs incurred by the producer on sales to his associated sales company : since these costs correspond to the internal transfer of products between associated companies and are incurred in a stage prior to the sales to the first independent buyer, they are considered not to bear a direct relationship (C.J.E.C., case C-171/87, 10 March 1992, *Canon Inc. v Council, E.C.R.*, 1992, I, (1237), 1274 (Opinion of Advocate General MISCHO) and 1294). Transport costs from the factory to the sales offices or warehouses of the dumping exporter are neither considered to bear a direct relationship (Commission Regulation (EEC) No 1451/92 of 2 June 1992 imposing a provisional anti-dumping duty on imports into the Community of certain large electrolytic aluminium capacitors originating in Japan, *O.J.*, 4 June 1992, No L 152/22 (corrigendum, *O.J.*, 17 June 1992, No L 163/27)).

⁷⁶² Council Regulation (EEC) No 2193/83 of 29 July 1983 accepting an undertaking given in connection with the anti-dumping review proceeding on imports of urea ammonium nitrate solution fertilizer (UAN) originating in the United States of America and terminating the proceeding, *O.J.*, 3 August 1983, No L 211/1 ; Commission Regulation (EEC) No 2865/85 of 14 October 1985 imposing a provisional anti-dumping duty on imports of certain electronic scales originating in Japan and accepting undertakings and terminating the proceeding in respect of certain imports of such products originating in Japan, *O.J.*, 16 October 1985, No L 275/5.

⁷⁶³ *Contra* : C.J.E.C., case C-178/87, 10 March 1992, *Minolia Camera Co. Ltd v Council, E.C.R.*, 1992, I, (1577), 1591 (Report for the Hearing : conclusions of the Council) and 1607 (Opinion of Advocate General MISCHO).

domestic market and to export sales. By recommending the ex-factory level, GATT anti-dumping law also excludes the determination of dumping to be influenced by differences in these costs. Indeed, as transport costs and the like vary on the basis of the distance between seller and buyer, it is best to stick to prices at the ex-factory level for price comparison.

European anti-dumping law allows adjustments for differences in selling expenses resulting from sales made at different levels of trade. It provides that normal value and export price must be reduced by the directly related costs incurred for conveying the product concerned from the premises of the exporter to the first independent buyer ; those costs comprise transport, insurance, handling, loading and ancillary costs (such as overtime in loading⁷⁶⁴) (Article 2(10)(e) basic EC Regulation ; Article 2(10)(c)(i) basic ECSC Decision). As the ex-factory level precisely excludes those costs from the price, European anti-dumping law does not merely recommend, but in fact imposes the ex-factory level⁷⁶⁵. This is more appropriate. The obligation to use the ex-factory level increases legal certainty and decreases the probability of unequal treatment between exporters. In figure 1 of Chapter II⁷⁶⁶ it was demonstrated that the choice of the level of trade on which prices are compared is not without consequences : if prices are compared at the ex-factory level, dumping will be found⁷⁶⁷ ; if prices are compared at the cif level (*i.e.*, if they include all costs for conveying the product to the buyer), no dumping proper will be found⁷⁶⁸.

⁷⁶⁴ Commission Decision 85/501/ECSC of 11 November 1985 terminating the anti-dumping proceeding concerning imports of wire rod originating in Brazil, Portugal, Trinidad and Tobago and Venezuela, *O.J.*, 13 November 1985, No L 299/18.

⁷⁶⁵ According to the European anti-dumping authorities, it is not always legally required to compare prices at the ex-factory level, as they have held that «the normal value and export price should *normally* be compared on an ex-factory level» (Council Regulation (EC) No 486/94 of 4 March 1994 imposing definitive anti-dumping duties on imports of fluorspar originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 5 March 1994, No L 62/1) (*emphasis added*).

⁷⁶⁶ *Supra*, 27-29.

⁷⁶⁷ This effect of using the ex-factory level may explain why the importer of silicon carbide from the USSR criticized the making of comparisons on the ex-factory level. He observed that he bought at a price which included the costs of transport over a long distance from the USSR to his premises. Those costs, he underscored, are important in the case of the product concerned, which is of relatively low value in relation to its weight and volume (Commission Decision 86/497/EEC of 7 October 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of silicon carbide originating in the People's Republic of China, Norway, Poland and the USSR, and terminating the investigation regarding imports of that product originating in the People's Republic of China, Norway, Poland, Czechoslovakia, the USSR and Yugoslavia, *O.J.*, 10 October 1986, No L 287/25). The importer's objections can give the impression that the Soviet exporter was practising freight absorption ; otherwise the importer would have no reason for his critique.

⁷⁶⁸ Though figure 1 may give that impression, comparing normal value and export price at the ex-factory level will not necessarily increase the number of dumping cases nor the dumping margin. Indeed, spatial price discrimination does not always result in dumping ; reverse dumping is also possible. Whether dumping or reverse dumping is being practised, depends on the convexity of the demand curve and on the relative degree of competitiveness on the exporting and importing market. See : *supra*, 27-30.

Moreover, also normal value has to be determined on the ex-factory level. It is possible that the allegedly dumping exporter is practising freight absorption on his domestic market. By calculating his domestic prices at the ex-factory level, normal value will be lowered. As a consequence, the probability of finding dumping or the margin of dumping will be less. See : Commission Recommendation No 259/83/ECSC of 27 January 1983 imposing a definitive anti-dumping duty on broad-flanged beams originating in Spain, *O.J.*, 1 February 1983, No L 30/61 (corrigendum, *O.J.*, 8 February 1983, No L 36/10), where the Commission took into account the fact «that in some instances transportation costs on the domestic market incurred by the companies were higher than the corresponding amount billed to the customers».

Moreover, the choice of the level of trade is also crucial for determining whether selling expenses are directly related to the sales in question, thus, whether adjustments are allowed for⁷⁶⁹. As a consequence, the ex-factory level should always be used, unless the necessary information is not available (see : Article 18 basic EC Regulation ; Article 7(7)(b) basic ECSC Decision). European anti-dumping law, however, is not always respected. Prices have been compared at the «cif» (cost, insurance and freight), «fob» (free on board, franco border) or «ex warehouse» level instead of the «ex factory» level. Only exceptionally, those other levels of trade have been used as the best information available⁷⁷⁰.

4.2.1.2.2. Differences on the demand side

Under European anti-dumping law prevailing before August 1988, the concept «level of trade» was put forward as basis for adjustments because of differences in the categories of buyers (distributors, original equipments manufacturers (so-called OEMs), dealers, end-users) which result in cost differences for the exporters⁷⁷¹. Thus, the Court of Justice has ruled that the

⁷⁶⁹ In *chemical fertilizers from the USA* normal value and export price were compared at the level «ex terminal» because deliveries to almost all customers on the domestic market of the exporting country were made «ex terminals». As a consequence, the operating costs of the terminal were considered as general selling expenses bearing no direct relationship with the sales of the product in question ; no adjustments were made for these operating costs, though an adjustment was made for the cost of transportation from the factory to the terminal (Commission Regulation (EEC) No 290/83 of 2 February 1983 imposing a provisional anti-dumping duty on imports of urea ammonium nitrate solution fertilizer originating in the United States of America, *O.J.*, 4 February 1983, No L 33/9 ; Council Regulation (EEC) No 2193/83 of 29 July 1983 accepting an undertaking given in connection with the anti-dumping review proceeding on imports of urea ammonium nitrate solution fertilizer (UAN) originating in the United States of America and terminating the proceeding, *O.J.*, 3 August 1983, No L 211/1).

⁷⁷⁰ The only legally valid basis for using other levels of trade is that the other levels of trade are used as best information available (Article 18 basic EC Regulation ; Article 7(7)(b) basic ECSC Decision). See e.g. : Commission Decision 84/408/EEC of 16 August 1984 accepting an undertaking given in connection with the anti-dumping review proceeding concerning imports of copper sulphate originating in Czechoslovakia and terminating that proceeding, *O.J.*, 22 August 1984, No L 225/22. In the majority of anti-dumping cases, however, no motivation is given why the ex-factory level is not used.

⁷⁷¹ C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, *E.C.R.*, 1992, I, (1335), 1393 ; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, *E.C.R.*, 1992, I, (1409), 1477 ; C.J.E.C., case C-178/87, 10 March 1992, *Minolta Camera Co. Ltd v Council*, *E.C.R.*, 1992, I, (1577), 1591 (Report for the Hearing : conclusions of the Council) and 1607 (Opinion of Advocate General MISCHO) and 1630 ; Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1 ; Council Regulation (EEC) No 1739/85 of 24 June 1985 imposing a definitive anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan, *O.J.*, 27 June 1985, No L 167/3 ; Commission Regulation (EEC) No 2865/85 of 14 October 1985 imposing a provisional anti-dumping duty on imports of certain electronic scales originating in Japan and accepting undertakings and terminating the proceeding in respect of certain imports of such products originating in Japan, *O.J.*, 16 October 1985, No L 275/5.

In other cases, adjustments for different selling expenses resulting from differences among buyers have been rejected not because they would be illegal, but merely because of lack of proof, see : Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5 ; Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12 ; Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1 ; Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12.

normal value and the export price are compared at the same level of trade, if they are both established at the level of the first sale to an independent purchaser⁷⁷².

Present ECSC anti-dumping law does not provide adjustments for such differences on the demand side⁷⁷³. If the list of adjustments provided under European anti-dumping law, is exhaustive, adjustments for differences on the demand side are legally prohibited. Perhaps, to that end, the European anti-dumping authorities use the selective normal value determination, if prices are a function of the channel of sale⁷⁷⁴: for each category of buyers a specific normal value is determined⁷⁷⁵ or sales to specific categories of buyers (especially dealers and end-users) are excluded for the determination of the normal value when these categories of buyers are not

⁷⁷² C.J.E.C., joined cases 277 and 300/85, 5 October 1988, *Canon Inc. a.o. v Council*, E.C.R., 1988, (5731), 5805; C.J.E.C., joined cases 260/85 and 106/86, 5 October 1988, *Tokyo Electric Company Ltd (TEC) a.o. v Council*, E.C.R., 1988, (5855), 5920; C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, E.C.R., 1991, I, (2069), 2188; C.J.E.C., case C-171/87, 10 March 1992, *Canon Inc. v Council*, E.C.R., 1992, I, (1237), 1288 and 1293; C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, E.C.R., 1992, I, (1335), 1393; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, E.C.R., 1992, I, (1409), 1477; C.J.E.C., case C-178/87, 10 March 1992, *Minolta Camera Co. Ltd v Council*, E.C.R., 1992, I, (1577), 1630; C.J.E.C., case C-179/87, 10 March 1992, *Sharp Corporation v Council*, E.C.R., 1992, I, (1635), 1675.

⁷⁷³ Perhaps, therefore, the Court of Justice refers not to present European anti-dumping law, but only to GATT and former European anti-dumping law for its interpretation of the notion of «ex-factory level» as requiring normal value and export price to be compared at the level of the first sale to an independent purchaser (see: C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, E.C.R., 1991, I, (2069), 2188).

⁷⁷⁴ Council Regulation (EC) No 2199/94 of 9 September 1994 imposing a definitive anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, and collecting definitively the provisional duty imposed, *O.J.*, 10 September 1994, No L 236/2.

⁷⁷⁵ C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, E.C.R., 1991, I, (2069), 2093 (Report for the Hearing: conclusions of the Council); Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27); Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1; Council Regulation (EEC) No 112/90 of 16 January 1990 imposing a definitive anti-dumping duty on imports of certain compact disc players originating in Japan and the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 17 January 1990, No L 13/21; Council Regulation (EEC) No 1048/90 of 25 April 1990 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 27 April 1990, No L 107/56 (corrigendum, *O.J.*, 24 May 1990, No L 133/92); Commission Regulation (EEC) No 2064/90 of 17 July 1990 imposing a provisional anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 20 July 1990, No L 188/10 (corrigendum, *O.J.*, 21 November 1990, No L 321/19); Council Regulation (EEC) No 117/91 of 16 January 1991 imposing a definitive anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 19 January 1991, No L 14/1; Commission Regulation (EEC) No 129/91 of 11 January 1991 imposing a provisional anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China, *O.J.*, 19 January 1991, No L 14/31; Council Regulation (EEC) No 1251/91 of 13 May 1991 imposing a definitive anti-dumping duty on imports of audio tapes in cassettes originating in Japan and the Republic of Korea, collecting definitively the provisional duty and terminating the procedure concerning Hong Kong, *O.J.*, 14 May 1991, No L 119/35.

See also: Council Regulation (EC) No 2819/94 of 17 November 1994 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in the People's Republic of China, *O.J.*, 19 November 1994, No L 298/32, where no distinction was made between sales to distributors and sales to end-users since there was no differentiation in terms of prices.

comparable with buyers within the Community⁷⁷⁶. The Court of Justice considers this method even to be legally obligatory when marketing to one type of buyers involves other costs than sales to another type of buyers⁷⁷⁷. The Court, though, along with the European anti-dumping authorities, seems not to regard this method as to prevent adjustments for differences on the demand side. According to the Court, the European anti-dumping authorities, in exercising the power of appraisal they have when evaluating complex economic situations, are entitled to make adjustments for differences in the level of trade⁷⁷⁸. Hence, the Court does not consider the list of adjustments to be exhaustive. Indeed, it has held that European anti-dumping law is not to be interpreted as entitling the European anti-dumping authorities to refuse to make allowances for differences in the level of trade as required by GATT anti-dumping law⁷⁷⁹. As it has approved

⁷⁷⁶ Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27); Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1; Council Regulation (EEC) No 112/90 of 16 January 1990 imposing a definitive anti-dumping duty on imports of certain compact disc players originating in Japan and the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 17 January 1990, No L 13/21; Commission Regulation (EEC) No 313/92 of 4 February 1992 imposing a provisional anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in South Korea, *O.J.*, 11 February 1992, No L 34/8; Council Regulation (EEC) No 2306/92 of 4 August 1992 imposing a definitive anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in the Republic of Korea, *O.J.*, 7 August 1992, No L 222/8 (corrigendum, *O.J.*, 21 January 1993, No L 13/20); Council Regulation (EEC) No 993/93 of 26 April 1993 imposing a definitive anti-dumping duty on imports of certain electronic weighing scales originating in Japan, *O.J.*, 29 April 1993, No L 104/4.

The selective normal value determination already existed under prior European anti-dumping law, see: Council Regulation (EEC) No 349/81 of 9 February 1981 imposing a definitive anti-dumping duty on certain chemical fertilizer originating in the United States of America, *O.J.*, 12 February 1981, No L 39/4; Commission Decision 81/35/EEC of 9 February 1981 accepting undertakings in connection with the anti-dumping proceedings concerning certain chemical fertilizer originating in the United States of America, *O.J.*, 12 February 1981, No L 39/35; Council Regulation (EEC) No 1058/86 of 8 April 1986 imposing a definitive anti-dumping duty on imports of certain electronic scales originating in Japan, *O.J.*, 12 April 1986, No L 97/1.

The selective normal value determination is, in fact, a sampling technique: only certain sales are taken into account. In European anti-dumping law sampling is allowed. Under EC anti-dumping law, it is allowed if the samples are statistically valid or encompass the largest representative volume of production, sales or exports (Article 17 basic EC Regulation); under ECSC anti-dumping law, it is allowed if the most frequently occurring or representative prices are used (Article 2(13) basic ECSC Decision). Thus, sampling should have no impact on the height of the dumping margin. It must not have an effect of adjustments in the sense of Article 2(10) basic EC Regulation or Article 2(9) and (10) basic ECSC Decision. However, the selective normal value determination seems to substitute adjustments for differences in level of trade. Therefore, it may be argued that it is illegal. Nevertheless, the idea underlying the selected normal value determination is in conformity with GATT anti-dumping law. Indeed, the GATT Group of Experts, in its 1959 Report, held that the concept «level of trade» was aimed at «a comparison of prices at the same level of trade - e.g., wholesale» (*B.I.S.D., Eight Supplement*, Geneva, GATT, 1960, 149, consideration 8). Only the method used for arriving at the same level of trade is not allowed.

⁷⁷⁷ C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, *E.C.R.*, 1991, I, (2069), 2189-2190.

⁷⁷⁸ C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, *E.C.R.*, 1991, I, (2069), 2189-2190.

⁷⁷⁹ C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, *E.C.R.*, 1992, I, (1409), 1478.

European anti-dumping case law⁷⁸⁰ in which adjustments for differences among buyers have been rejected because of lack of evidence, the Court, moreover, implicitly held that adjustments for differences on the demand side are legally allowed as soon as there is sufficient evidence available⁷⁸¹. Since the Court's approval, the European anti-dumping authorities have taken account of cost differences depending on differences on the demand side⁷⁸² and, at the occasion of its renewal, EC anti-dumping legislation has explicitly incorporated the interpretation of the notion «level of trade» as referring to differences on the demand side (Article 2(10)(d) basic EC Regulation).

4.2.1.2.3. Associations

Contrary to differences on the demand side, differences on the supply side have always been refused as basis for adjustments to reconstruct the same «level of trade». The European anti-dumping authorities always reject the claim of exporters that all costs and profits of the associated sales companies have to be subtracted from normal value because of a difference in level of trade. Nevertheless, there is good ground for them to make such adjustments, because normal value and export price are determined differently when selling parties are associated. If exporter and importer are associated, the price at which the imported product is first resold to an independent buyer is used as export price standard. That price has to be adjusted *ex officio* for all costs incurred between importation and resale and for a reasonable profit margin (Article 2(9)(a) basic EC Regulation ; Article 2(8)(b) basic ECSC Decision). However, when manufacturer and sales company in the country of origin or in the exporting country are associated, normal value is based on the price at which the product is resold to an independent buyer on the domestic market. Not any adjustment can legally be made for the costs incurred between the sale between the associated

⁷⁸⁰ Commission Regulation (EEC) No 2684/88 of 26 August 1988 imposing a provisional anti-dumping duty on certain imports of video cassette recorders originating in Japan and the Republic of Korea, *O.J.*, 31 August 1988, No L 240/5 ; Council Regulation (EEC) No 501/89 of 27 February 1989 imposing a definitive anti-dumping duty on imports of certain video cassette recorders originating in Japan and the Republic of Korea and definitively collecting the provisional duty, *O.J.*, 28 February 1989, No L 57/55 ; Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27) ; Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1 ; Council Regulation (EEC) No 2474/93 of 8 September 1993 imposing a definitive anti-dumping duty on imports into the Community of bicycles originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 9 September 1993, No L 228/1 ; Council Regulation (EEC) No 2861/93 of 18 October 1993 imposing a definitive anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, and collecting definitively the provisional duty imposed, *O.J.*, 21 October 1993, No L 262/4.

⁷⁸¹ C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, *E.C.R.*, 1991, I, (2069), 2189-2190 ; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, *E.C.R.*, 1992, I, (1409), 1478 ; C.J.E.C., case C-178/87, 10 March 1992, *Minolta Camera Co. Ltd v Council*, *E.C.R.*, 1992, I, (1577), 1630.

⁷⁸² Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50.

parties and the resale to an independent buyer⁷⁸³. Hence, normal value and export price are not determined on the same level of trade. Therefore, an exporter who actually does not dump, will be found to dump at a margin equal to the costs incurred between the sale between the associated parties and the resale to independent buyers on the domestic market of the exporter.

As to the Court of Justice, however, a fair comparison between normal value and export price does not imply identical adjustments to normal value and export price⁷⁸⁴, nor determination of normal value and export price on the basis of identical methods⁷⁸⁵. Indeed, European anti-dumping law does not require normal value and export price to be determined on the same basis in order to calculate the dumping margin. The purpose of the different normal value and export price standards (Article 2(1) up to (9) basic EC Regulation ; Article 2(3) up to (8) basic ECSC Decision), is to determine a normal value and an export price corresponding to conditions of ordinary course of trade⁷⁸⁶. The purpose of the adjustments is to ensure a «fair comparison»

783 See : Commission Regulation (EEC) No 3643/84 of 20 December 1984 imposing a provisional anti-dumping duty on imports of electronic typewriters originating in Japan and terminating the anti-dumping proceeding with regard to Nakajima All Co. Ltd, *O.J.*, 22 December 1984, No L 335/43 ; Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1 ; Council Regulation (EEC) No 1739/85 of 24 June 1985 imposing a definitive anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan, *O.J.*, 27 June 1985, No L 167/3 ; Commission Regulation (EEC) No 2865/85 of 14 October 1985 imposing a provisional anti-dumping duty on imports of certain electronic scales originating in Japan and accepting undertakings and terminating the proceeding in respect of certain imports of such products originating in Japan, *O.J.*, 16 October 1985, No L 275/5 ; Council Regulation (EEC) No 1058/86 of 8 April 1986 imposing a definitive anti-dumping duty on imports of certain electronic scales originating in Japan, *O.J.*, 12 April 1986, No L 97/1 ; Commission Regulation (EEC) No 2516/86 of 4 August 1986 imposing a provisional anti-dumping duty on imports of housed bearing units originating in Japan, *O.J.*, 7 August 1986, No L 221/16 ; Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5 ; Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12 ; Commission Regulation (EEC) No 2005/88 of 5 July 1988 imposing a provisional anti-dumping duty on imports of serial impact fully formed character printers originating in Japan, *O.J.*, 8 July 1988, No L 177/1 ; Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27). See also : C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, *E.C.R.*, 1991, I, (2069), 2097 (Report for the Hearing : plea in law of the applicant) and 2187.

784 C.J.E.C., case 255/84, 7 May 1987, *Nachi Fujikoshi Corporation v Council*, *E.C.R.*, 1987, 1891-1893 ; C.J.E.C., case 258/84, 7 May 1987, *Nippon Seiko KK v Council*, *E.C.R.*, 1987, 1967-1970 ; C.J.E.C., case 260/84, 7 May 1987, *Minebea Company Limited v Council*, *E.C.R.*, 1987, 2009-2011. Indeed, if e.g., transport costs are included in the export price but not in the normal value, transportation costs will have to either deducted from the export price or added to the normal value in order to make a fair comparison. See also : C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, *E.C.R.*, 1991, I, (2069), 2188-2189.

785 C.J.E.C., case 240/84, 7 May 1987, *NTN Toyo Bearing Company Limited a.o. v Council*, *E.C.R.*, 1987, 1852-1854 ; C.J.E.C., case 255/84, 7 May 1987, *Nachi Fujikoshi Corporation v Council*, *E.C.R.*, 1987, 1888-1893 ; C.J.E.C., case 258/84, 7 May 1987, *Nippon Seiko KK v Council*, *E.C.R.*, 1987, 1963-1970 ; C.J.E.C., case 260/84, 7 May 1987, *Minebea Company Limited v Council*, *E.C.R.*, 1987, 2003-2011 ; C.J.E.C., joined cases 277 and 300/85, 5 October 1988, *Canon Inc. a.o. v Council*, *E.C.R.*, 1988, (5731), 5804 ; C.J.E.C., joined cases 260/85 and 106/86, 5 October 1988, *Tokyo Electric Company Ltd (TEC) a.o. v Council*, *E.C.R.*, 1988, (5855), 5897-5898 and 5920 ; C.J.E.C., joined cases 273/85 and 107/86, 5 October 1988, *Silver Seiko Limited a.o. v Council*, *E.C.R.*, 1988, (5927), 5979 ; C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, *E.C.R.*, 1991, I, (2069), 2181 and 2188-2189 ; C.J.E.C., case C-171/87, 10 March 1992, *Canon Inc. v Council*, *E.C.R.*, 1992, I, (1237), 1288-1289 and 1293 ; C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, *E.C.R.*, 1992, I, (1335), 1392 ; C.J.E.C., case C-178/87, 10 March 1992, *Minolta Camera Co. Ltd v Council*, *E.C.R.*, 1992, I, (1577), 1625.

786 C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, *E.C.R.*, 1991, I, (2069), 2187.

between normal value and export price (Article 2(10) basic EC Regulation ; Article 2(9) and (10) basic ECSC Decision)⁷⁸⁷.

As is done by the Court of Justice, a distinction must be made between normal value and export price determination and the fair comparison of normal value and export price. However, this does not explain why normal value must include certain costs which the export price must not include. The European anti-dumping authorities⁷⁸⁸ and the Court of Justice⁷⁸⁹ argue that normal value cannot be adjusted for the costs and profits of an associated sales company, as the sales company is independent only from a legal point of view, but constitutes an economic unit with the manufacturing company. They argue that adjusting normal value for costs and profits of an associated sales company would sanction smaller exporters who do not have the financial means to set up a sales agencies network. There would be discrimination if expenses necessarily included in the selling price of a product when it was sold by a sales department being part of the manufacturer's organization, were not included when that product was sold by a company which, though financially controlled by the manufacturer, was a legally distinct entity. European anti-

⁷⁸⁷ See also : Commission Regulation (EEC) No 3643/84 of 20 December 1984 imposing a provisional anti-dumping duty on imports of electronic typewriters originating in Japan and terminating the anti-dumping proceeding with regard to Nakajima All Co. Ltd, *O.J.*, 22 December 1984, No L 335/43 ; Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1 ; Council Regulation (EEC) No 1739/85 of 24 June 1985 imposing a definitive anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan, *O.J.*, 27 June 1985, No L 167/3 ; Commission Regulation (EEC) No 2865/85 of 14 October 1985 imposing a provisional anti-dumping duty on imports of certain electronic scales originating in Japan and accepting undertakings and terminating the proceeding in respect of certain imports of such products originating in Japan, *O.J.*, 16 October 1985, No L 275/5 ; Council Regulation (EEC) No 1058/86 of 8 April 1986 imposing a definitive anti-dumping duty on imports of certain electronic scales originating in Japan, *O.J.*, 12 April 1986, No L 97/1 ; Commission Regulation (EEC) No 2516/86 of 4 August 1986 imposing a provisional anti-dumping duty on imports of housed bearing units originating in Japan, *O.J.*, 7 August 1986, No L 221/16 ; Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5 ; Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12 ; Commission Regulation (EEC) No 2005/88 of 5 July 1988 imposing a provisional anti-dumping duty on imports of serial impact fully formed character printers originating in Japan, *O.J.*, 8 July 1988, No L 177/1 ; Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27) ; Answer of the Commission to written question No 313/85, *O.J.*, 7 October 1985, No C 255/38.

⁷⁸⁸ Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1 ; Council Regulation (EEC) No 1739/85 of 24 June 1985 imposing a definitive anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan, *O.J.*, 27 June 1985, No L 167/3 ; Commission Regulation (EEC) No 2865/85 of 14 October 1985 imposing a provisional anti-dumping duty on imports of certain electronic scales originating in Japan and accepting undertakings and terminating the proceeding in respect of certain imports of such products originating in Japan, *O.J.*, 16 October 1985, No L 275/5 ; Commission Regulation (EEC) No 2516/86 of 4 August 1986 imposing a provisional anti-dumping duty on imports of housed bearing units originating in Japan, *O.J.*, 7 August 1986, No L 221/16.

⁷⁸⁹ C.J.E.C., joined cases 260/85 and 106/86, 5 October 1988, *Tokyo Electric Company Ltd (TEC) a.o. v Council*, *E.C.R.*, 1988, (5855), 5919 ; C.J.E.C., joined cases 273/85 and 107/86, 5 October 1988, *Silver Seiko Limited a.o. v Council*, *E.C.R.*, 1988, (5927), 5975 ; C.J.E.C., case C-171/87, 10 March 1992, *Canon Inc. v Council*, *E.C.R.*, 1992, I, (1237), 1288.

dumping authorities, further, hold that such adjustments would encourage exporters to adopt such structures which would make European anti-dumping law ineffective⁷⁹⁰.

It seems, however, that European anti-dumping law, by imposing an adjustment to the export price for the costs and profits of associated importers, sanctions big exporters who do have the necessary means to set up a sales agencies network for their exports. Exporters and associated importers, like producers and associated sales companies, do also constitute an economic unit. *De lege ferenda*, there, accordingly, is no reason why the economic unit on the domestic market and the economic unit between exporter and importer should be treated differently. It cannot be explained why the resale price method is applied to determine the export price, whereas the economic unit theory is applied to determine the normal value. This unequal treatment may result in finding dumping where no actual dumping is being practised : if only the export price is adjusted to take account of the costs and profits of the associated sales company, the dumping margin will be inflated. Admittedly, multidivisional enterprises may misuse the resale price method. By re-allocating costs and profits, through different transfer pricing techniques, they may manipulate resale prices and, thus, the dumping margin. Not only normal value, but also the export price may be subject to such misuse. In order to prevent such misuse in respect of the export price, European anti-dumping law provides that allowance should be only made for the real costs and profits which are normally borne by the sales company (Article 2(9)(b) basic EC Regulation ; Article 2(8)(b) basic ECSC Decision). The same provision should be applied to normal value determination⁷⁹¹.

The new GATT Anti-dumping Code seems to have chosen this solution. However, the way this solution has been laid down in the GATT Anti-dumping Code offers the European anti-dumping authorities ample opportunity to maintain their case law. Indeed, in order to address this aspect of European anti-dumping case law⁷⁹², the Code stipulates that, where the export price has been constructed and «price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price» (Article

⁷⁹⁰ Commission Regulation (EEC) No 2516/86 of 4 August 1986 imposing a provisional anti-dumping duty on imports of housed bearing units originating in Japan, *O.J.*, 7 August 1986, No L 221/16.

⁷⁹¹ It cannot be agreed with P. DIDIER that the selective normal value determination (*supra*, p. ...) has resolved the problem of associations. Even if normal value is exclusively based on prices charged to distributors, the costs incurred between the sale between the associated parties and the resale to independent buyers on the domestic market of the exporter remain included in normal value. It may only be agreed that the dumping margin may be lower due to the selective normal value determination, if selling expenses are lower for sales to distributors than for sales to dealers and end-users. However, the different way of determining normal value and export price subsists. It may only be solved by determining normal value and export price in identically the same way, including the provision of Article 2(8) basic EC Regulation and Article 2(8)(a) basic ECSC Decision so that all expenses are allocated in the same way. See : DIDIER, P., «EEC Antidumping : The Level of Trade Issue After the Definitive CD Player Regulation. Japanese Proposal to GATT on the Level of Trade Issue», *Journal of World Trade*, 1990/2, (103), 103-109.

⁷⁹² WAER, P., and VERMULST, E., «EC Anti-Dumping Law and Practice after the Uruguay Round. A New Lease of Life ?», *Journal of World Trade*, 1994/2, (5), 12.

2.4.). The new GATT requirement of equivalent levels of trade will not hinder the European anti-dumping authorities. Along with the Court of Justice, they have already taken the «level-of-trade obstacle» by holding that the level-of-trade-requirement does not imply that normal value and export price be determined or adjusted in the same way. Moreover, the new EC anti-dumping legislation, though it seemingly transposes the new GATT requirement of equivalent levels of trade, severely restricts the application of that requirement : it allows adjustments for differences in level of trade if those differences affect price comparability which must be demonstrated by consistent and distinct differences in functions and prices of the seller for the different levels of trade in the domestic market of the exporting country (Article 2(10)(d) basic EC Regulation). The problem in respect of associations, however, is not caused by differences in functions and prices of the seller for the different levels of trade in the domestic market of the exporting country. On the contrary, the functions of the seller in the domestic market of the exporting country are exactly identical to the function of the seller in the Community (assuming that there are no differences in the level of trade on the demand side). In fact, EC anti-dumping law only addresses the problem of differences on the demand side, which are clearly different from the unequal treatment of associations in- and outside the Community. Hence, EC anti-dumping law has not transposed GATT anti-dumping law on price comparison in respect of associations. There could be no clearer sign of the refusal of the Community to alter its treatment of associations under its anti-dumping law.

4.2.1.3. Quantity

Under EC anti-dumping law, an adjustment must be made for differences in discounts and rebates given for differences in quantities, if these are properly quantified and are directly linked to the sales under consideration (Article 2(10)(c) basic EC Regulation). Because of the required *direct* connection between *sales* and quantity discounts, it seems that EC anti-dumping law only allows adjustments for price discounts for quantity sales and not for savings in the cost of producing different quantities. Such savings will probably not be considered to bear a direct relationship with the sales⁷⁹³.

ECSC anti-dumping law recognizes that differences in selling expenses may be caused by differences in quantity (Article 2(9)(a)(iii), second indent, basic ECSC Decision), but does not provide adjustments for certain differences in quantity, such as price discounts for quantity sales and economies made in the cost of producing different quantities. Hence, in view of the exhaustive character of the list of adjustments allowed under ECSC anti-dumping law (Article

⁷⁹³ The regime on quantity discounts and rebates is identical to that on discounts and rebates in general (see : *infra*, 294-297).

2(10)(c) basic ECSC Decision), such adjustments would be impossible⁷⁹⁴. Nevertheless, European anti-dumping authorities have made adjustments for price discounts under ECSC anti-dumping law. They have also refused adjustments for savings in the cost of producing different quantities, not because they are not allowed, but because of lack of proof⁷⁹⁵.

It will now be investigated whether, from an economic point of view, adjustments for such differences in quantity should be allowed.

4.2.1.3.1. Price discounts for quantity sales

In figure 2 of Chapter II⁷⁹⁶ second-degree price discrimination is possible because the monopolist may be considered as being faced with three different finitely limited, perfectly inelastic individual demand curves, *i.e.*, aq_1 , bq_3 and cq_4 ⁷⁹⁷. A monopolist may also be confronted with different elastic demand curves, as illustrated in figure 9. The two demand curves, D_1 and D_2 , represent the demand of two different types of consumers. The difference between these two types of consumers is assumed to be caused by differences in preference concerning quantity. Indeed, the high-demand consumers (with demand D_2) are willing to pay a higher price for the same quantity in comparison to the low-demand consumers (with demand D_1). If the monopolist can identify each consumer as high-demand or low-demand consumer, he would appropriate total consumer surplus of both types of consumers. The producer could extract consumer surplus by means of a two-part tariff, *i.e.*, he would charge a uniform price OP per unit and demand a differentiated fixed premium equal to each consumer's net surplus at price OP . In this case, low-demand and high-demand consumers would buy respectively a quantity Oq_1 and Oq_2 . The producer earns as total revenue $Obdq_1$ and $Oaeq_2$ from respectively selling quantity Oq_1 and Oq_2 to low-demand and high-demand consumers.

If, however, the monopolist has only knowledge of the fact that there are two different consumer types, but is not able to identify consumers as either of these two types, high-demand consumers would have the incentive to claim that they are low-demand consumers for, if they are treated as low-demand consumers, only the surplus of low-demand consumers would be extracted from them. This would give them a positive consumer surplus because their surplus for a given quantity is higher than the surplus of low-demand consumers. Indeed, if high-demand consumers in figure 9 would buy only a quantity Oq_1 instead of quantity Oq_2 , they would pay all in all the surplus of low-demand consumers, *i.e.*, bPd in figure 9, and, because of the unit price OP , $OPdq_1$. However, at a quantity Oq_1 , high-demand consumer's surplus is $Pacd$ of which only Pbd is extracted by the producer. They, thus, have a net consumer surplus of $bacd$ if they buy a quantity Oq_1 , whereas their consumer surplus would be zero if they buy a quantity Oq_2 .

It may be shown that in this case it is profitable for the producer to resort to second-degree price discrimination⁷⁹⁸. When resorting to second-degree price discrimination, the producer might charge a uniform price OP per unit and a fixed premium equal to the lowest-demand consumer's surplus, which is Pbd in figure 9. The low-demand consumers will buy a quantity Oq_1 and pay globally $OPdq_1 + Pbd$, whereas high-demand consumers will buy a quantity Oq_2 and

⁷⁹⁴ See : BELLIS, J.-F., «The EEC Antidumping System», in *Antidumping Law and Practice. A Comparative Study*, JACKSON, J.H., and VERMULST, E.A. (eds.), New York, Harvester Wheatsheaf, 1990, (41), 83.

⁷⁹⁵ *Supra*, 270-271.

⁷⁹⁶ *Supra*, 31-32.

⁷⁹⁷ GREENHUT, M.L., and OHTA, H., *Theory of Spatial Pricing and Market Areas*, Durham, Duke University Press, 1975, 32-35.

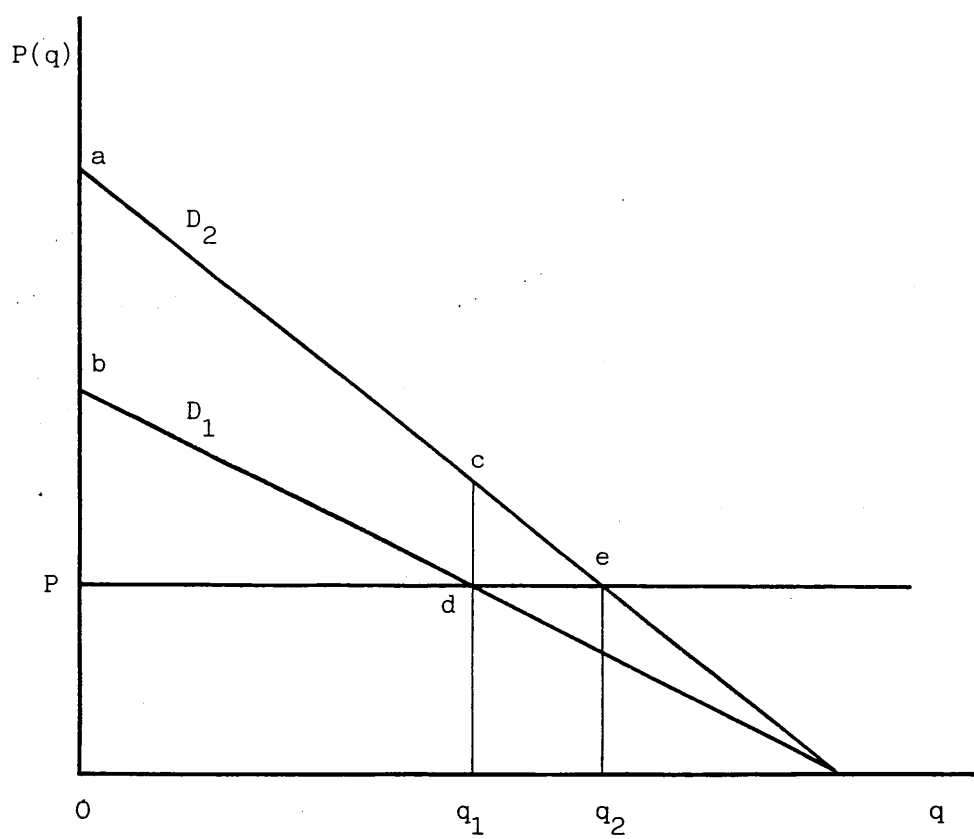
⁷⁹⁸ See TIROLE, J., *The Theory of Industrial Organization*, Cambridge Mass., MIT Press, 1988, 145-146. For a more elaborated approach of price discrimination and quantity, see : MASKIN, E., and RILEY, J., «Monopoly with incomplete information», *Rand Journal of Economics*, 1984, (171), 171-196 ; TIROLE, J., *The Theory of Industrial Organization*, Cambridge Mass., MIT Press, 1988, 148-149.

pay globally $OPeq_2 + Pbd$. Consumer's net surplus is zero for low-demand consumers and baed for high-demand consumers. Moreover, average price per unit is lower for high-demand consumers than for low-demand consumers. Indeed, average price for low-demand consumers amounts to $OP + Pbd/0q_1$, whereas average price for high-demand consumers equals $OP + Pbd/0q_2$; because $0q_1 < 0q_2$, $OP + Pbd/0q_1 > OP + Pbd/0q_2$.

The resulting two-part tariff is in fact the practice of quantity discounts : consumers buying a large quantity pay a lower average price per unit than consumers buying a smaller quantity and may, therefore, be considered as being offered a quantity discount. Quantity discounts, thus, are a form of second-degree price discrimination. Not only quantity discounts, but also quantity premia are possible. It depends on the shape and distribution of consumers' preferences whether quantity discounts or quantity premia are offered⁷⁹⁹.

⁷⁹⁹ TIROLE, J., *The Theory of Industrial Organization*, Cambridge Mass., MIT Press, 1988, 158.

Figure 9



Adjustments for quantity discounts and premia apparently should be allowed because they are second-degree price discrimination. However, allowing adjustments would neutralise the effect of such discounts and premia and the second-degree price discrimination resulting from quantity discounts and premia would not be detected under anti-dumping law. If GATT anti-dumping law is intended to detect all types of real price discrimination, no adjustments should be allowed for quantity discounts and premia.

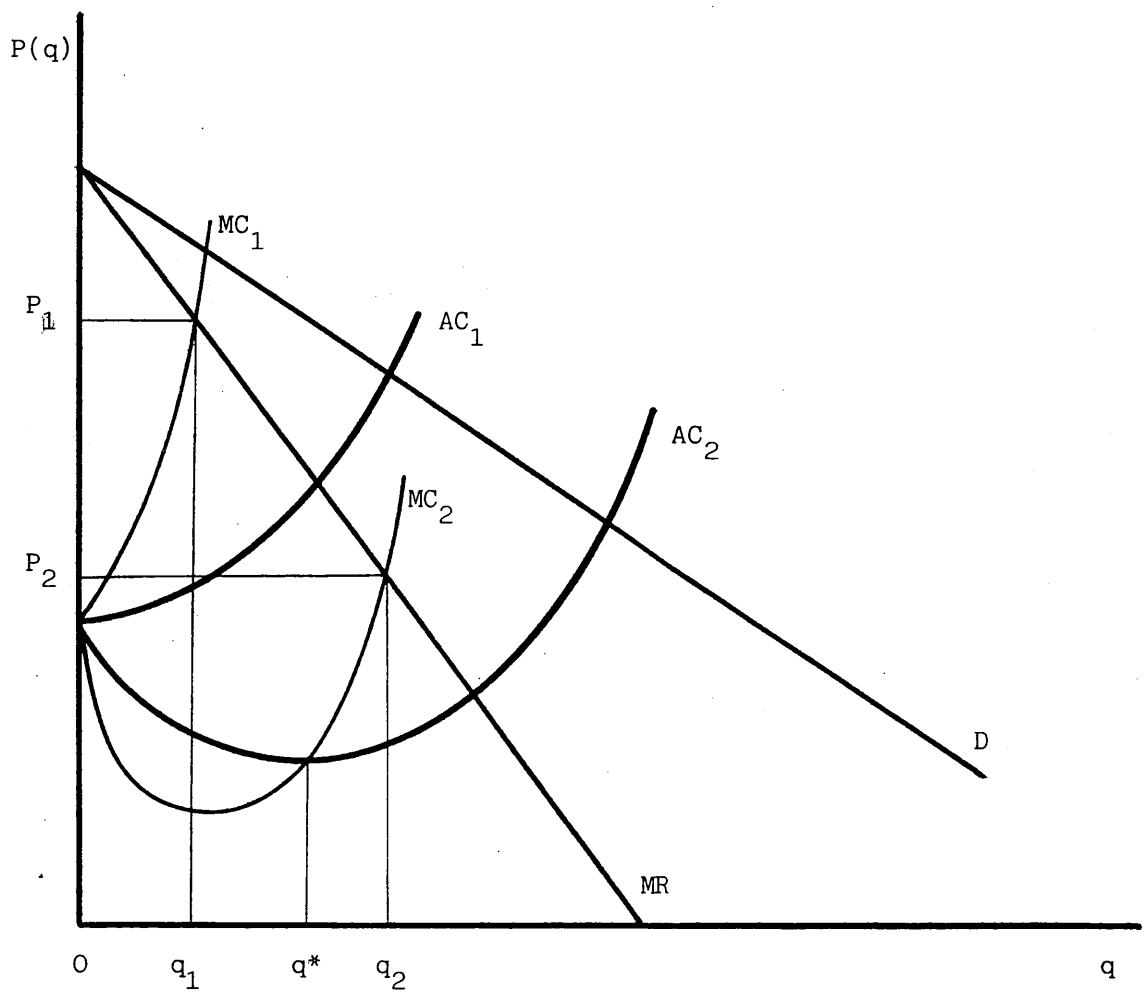
4.2.1.3.2. Savings in the cost of producing different quantities

Production may be characterized by increasing, constant or decreasing returns to scale, *i.e.*, output will proportionally increase by more than, as much as or by less than the increase in inputs. If there are, for instance, increasing returns to scale, the average cost of producing one unit will decline if the scale of production increases. There may be several production methods available to produce one and the same product. For some of them, returns to scale may be always increasing, constant or decreasing. Others are characterized by increasing returns to scale, but once the optimal production scale is reached, returns to scale start to decrease. Clearly, the type of production method, as well as the scale of production, will affect the price level of the product concerned.

This is shown in figure 10, D representing the demand curve. MR represents the corresponding marginal revenue curve. There are two production methods available. The first one is characterized by decreasing returns to scale. Thus, its average costs are always increasing. AC_1 is the average cost curve of this production method, whereas MC_1 is the corresponding marginal cost curve. AC_2 is the average cost curve corresponding to the second production method with increasing returns to scale up to q^* and decreasing returns to scale beyond q^* . Indeed, average costs decline between 0 and q^* and start to increase beyond q^* . MC_2 is the marginal cost curve of this second production method. Interestingly, marginal costs are always strictly rising when there are decreasing returns to scale.

Depending on the relevant production method and, thus, the marginal cost curve the price charged will be different : under MC_2 a larger quantity (Oq_2) is offered at a lower price (OP_2) than under MC_1 . Because the starting point of both marginal cost curves is the same, this difference, in the case illustrated in figure 10, is caused by the increasing returns to scale of the production function corresponding to MC_2 .

Figure 10



Thus, differences in production functions may cause price differentials. Different production technologies may be used for the domestic market and the export market or the prices of inputs may be different depending on whether they are used for producing products sold on the domestic market or the export market⁸⁰⁰.

If the same production process is applied for manufacturing both the products sold on the domestic market and the exported products, price differences may be caused by increasing or decreasing returns to scale.

In figure 11(a) two markets with different elasticities of demand are assumed. Those markets are represented by the demand curves D_1 and D_2 . MR_1 and MR_2 are their corresponding marginal revenue curves. A production with decreasing returns to scale is assumed and, accordingly, marginal costs (MC) are strictly rising.

If the producer considers those two markets separately, he will sell at quantity Oq_5 at a price OP_2 to the first market, and a quantity Oq_3 at a price OP_5 to the second market. The price differential P_2P_5 is caused partly by the differences in elasticity of demand and partly by the decreasing returns to scale.

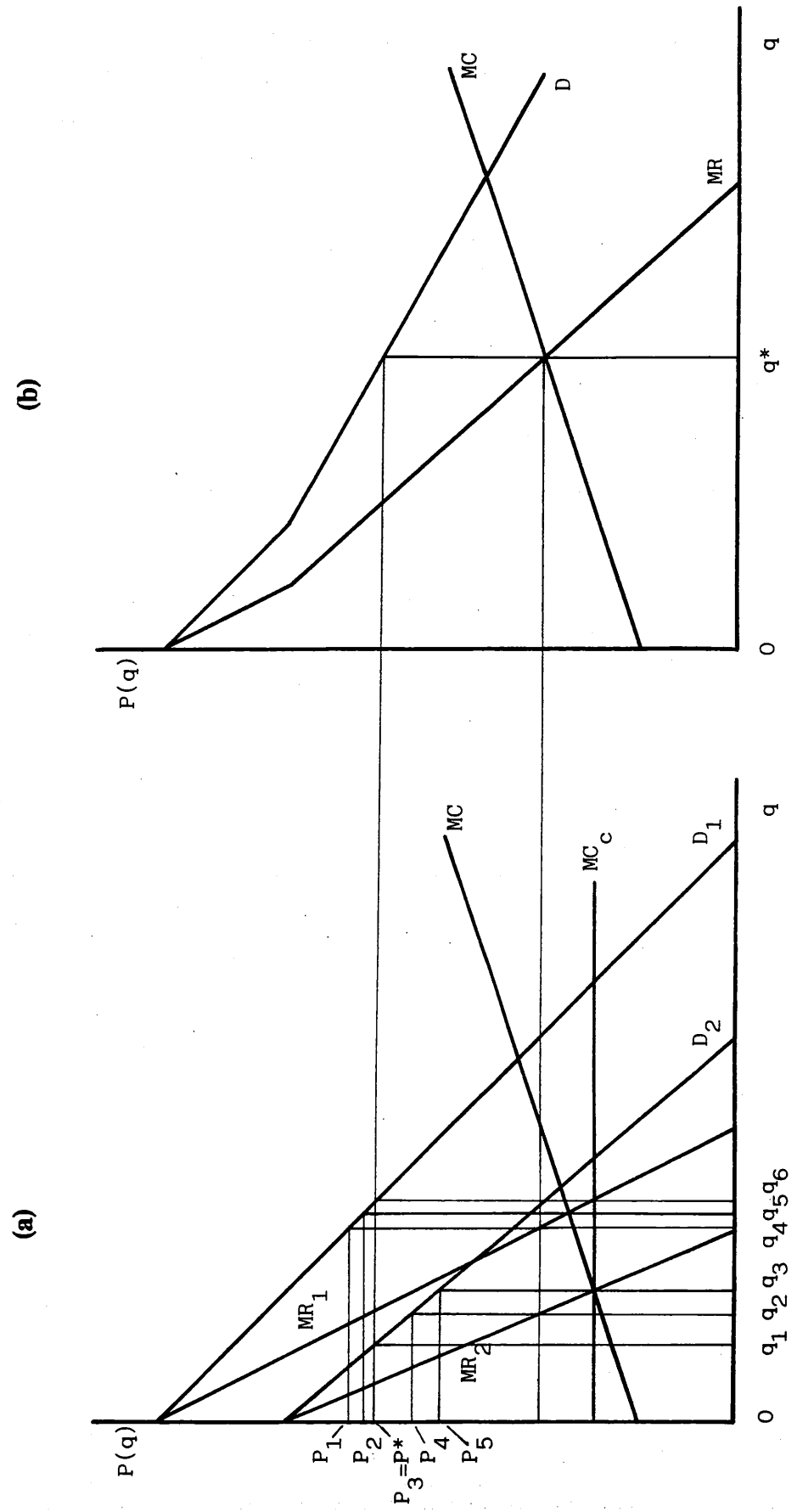
In order to determine the part of the price differential caused by the decreasing returns to scale, assume that there are constant returns to scale. This implies that marginal costs are also constant, as represented by the curve MC_c . Under that assumption, the producer will sell the same quantity Oq_3 at the same price OP_5 to the second market. In the first market, though, he will increase his sales up to Oq_6 and decrease his price to OP_3 . There is still a price differential amounting to P_3P_5 . As there are now constant marginal costs, this price differential is entirely due to the differences in the elasticity of demand.

The other part, P_2P_3 , of the price differential when marginal costs are rising, is, thus, caused by the increasing returns to scale. As it should not be the object of anti-dumping law to sanction producers for having production processes characterized by decreasing returns to scale, an adjustment for this part of the price differential (P_2P_3) should be allowed for. Otherwise, the producer would be sanctioned for the costs dissavings he incurs because of the decreasing returns to scale.

If the production process was characterized by increasing returns to scale, the producer would have enjoyed a cost saving, rather than a cost dissaving, for which too an adjustment should be made. Indeed, otherwise, the producer might practise price discrimination without being sanctioned for it under anti-dumping law.

⁸⁰⁰ Council Regulation (EEC) No 407/83 of 21 February 1983 amending Regulation (EEC) No 3439/80 imposing a definitive anti-dumping duty on imports of certain polyester yarn originating in the United States of America, *O.J.*, 23 February 1983, No L 50/1.

Figure 11



Price differentials due to cost (dis)savings do not constitute price discrimination in the sense of a price policy by which the producer treats different consumers differently in order to extract as much as possible their consumer surplus. Adjustments for (dis)savings in the cost of production are, therefore, meant only to ensure a fair comparison, *i.e.*, to prevent the dumping finding from being biased by differences on the production side.

However, before allowing for such cost (dis)savings, it should be examined whether the different consumers are treated separately or not by the producer, when making his decisions on production and prices. It is, indeed, possible that both consumers are treated together as one market⁸⁰¹. In such a case, cost (dis)savings will be proportionally distributed between both markets and will not be the cause of the possible price differential. As a consequence, no adjustments for cost (dis)savings should be allowed for.

In terms of figure 11, the producer will take into account demand D , being the sum of D_1 and D_2 , if he considers both markets simultaneously. Corresponding marginal revenue is represented by MR . The producer will manufacture a quantity Oq^* . Here, he can choose to sell this quantity at a uniform price OP^* to both consumers 1 and 2 or at a differentiated price OP_1 to consumer 1 and OP_4 to consumer 2. Whether or not the producer chooses to practise price discrimination, it cannot be argued that there are (dis)savings in the cost of production because of the different quantities sold to the different consumers. Indeed, on the production side, the sum of all the quantities sold is taken in its entirety. Therefore, the possible cost (dis)savings are proportionally attributable to the quantities sold to each consumer.

4.2.1.4. Conditions and terms of sale

Under prior European anti-dumping law, the concept «conditions and terms of sale» has been defined by the European anti-dumping authorities as «a technical concept with a relatively limited scope : it concerns the obligations inherent in a sales contract, fixed either in the contract itself or in the general conditions of sale established by the seller»⁸⁰². Whereas present EC anti-dumping law does not treat anymore of differences in conditions and terms of sale, it remains to be seen whether this definition holds some practical relevancy under present ECSC anti-dumping

⁸⁰¹ See : *radio-broadcast receivers of a kind used in motor vehicles from South Korea*, where the European anti-dumping authorities stated that the construction of normal value on the basis of the production costs of the exported models took full account of the economies of scale secured with the exported products which were necessarily greater than those secured through the sales on the Korean domestic market, since the quantities sold for export were significantly greater than those sold on the Korean domestic market (Commission Regulation (EEC) No 313/92 of 4 February 1992 imposing a provisional anti-dumping duty on imports of housed bearing units originating in Japan, *O.J.*, 11 February 1992, No L 34/8).

⁸⁰² Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1 ; Council Regulation (EEC) No 1739/85 of 24 June 1985 imposing a definitive anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan, *O.J.*, 27 June 1985, No L 167/3 ; Commission Regulation (EEC) No 2865/85 of 14 October 1985 imposing a provisional anti-dumping duty on imports of certain electronic scales originating in Japan and accepting undertakings and terminating the proceeding in respect of certain imports of such products originating in Japan, *O.J.*, 16 October 1985, No L 275/5 ; Commission Regulation (EEC) No 2516/86 of 4 August 1986 imposing a provisional anti-dumping duty on imports of housed bearing units originating in Japan, *O.J.*, 7 August 1986, No L 221/16 ; Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5.

law. Since, under ECSC anti-dumping law, the list of «selling expenses» (Article 2(10)(c) basic ECSC Decision) is probably exhaustive⁸⁰³, the European anti-dumping authorities seem only to have to inquire whether a claimed adjustment may be subsumed under one of the categories of selling expenses. However, under ECSC anti-dumping law, adjustment may be made for differences in selling expenses, if they result from *inter alia* different conditions and terms of sale (Article 2(9)(a)(iii), third indent, basic ECSC Decision). As a consequence, the definition of the concept «conditions and terms of sale» is still relevant.

From an economic point of view, adjustment for such differences in conditions and terms of sale must be made if anti-dumping law aims at detecting each form of price discrimination. Indeed, the concept of «conditions and terms of sale» refers to the practice of package selling, which is called «commodity bundling»: the seller offers the basic product in combination with special packing devices, credit terms, warranties, guarantees, technical assistance, after-sales services⁸⁰⁴. The seller may choose either to offer the basic product and these different devices separately and, thus, to practise simple monopoly pricing; he may also only offer the combination of the basic product with (some of) these devices, in which case he is practising pure bundling; if he offers the product and devices separately as well as in packages, he has adopted a mixed bundling strategy⁸⁰⁵.

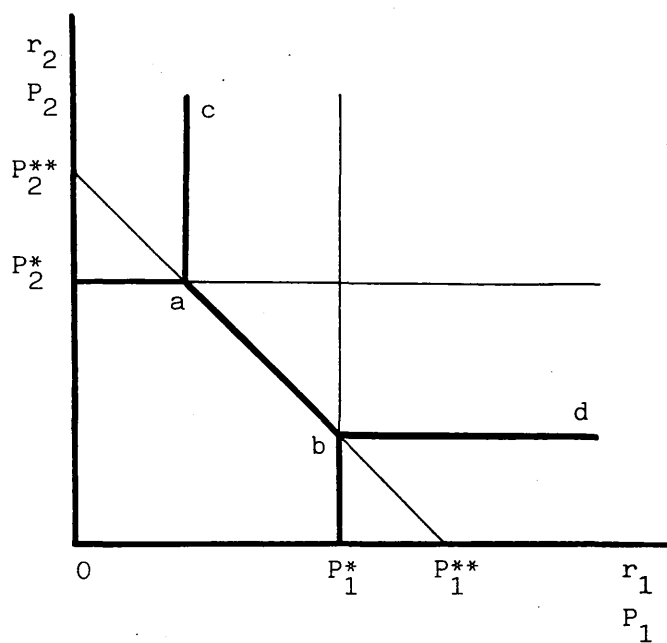
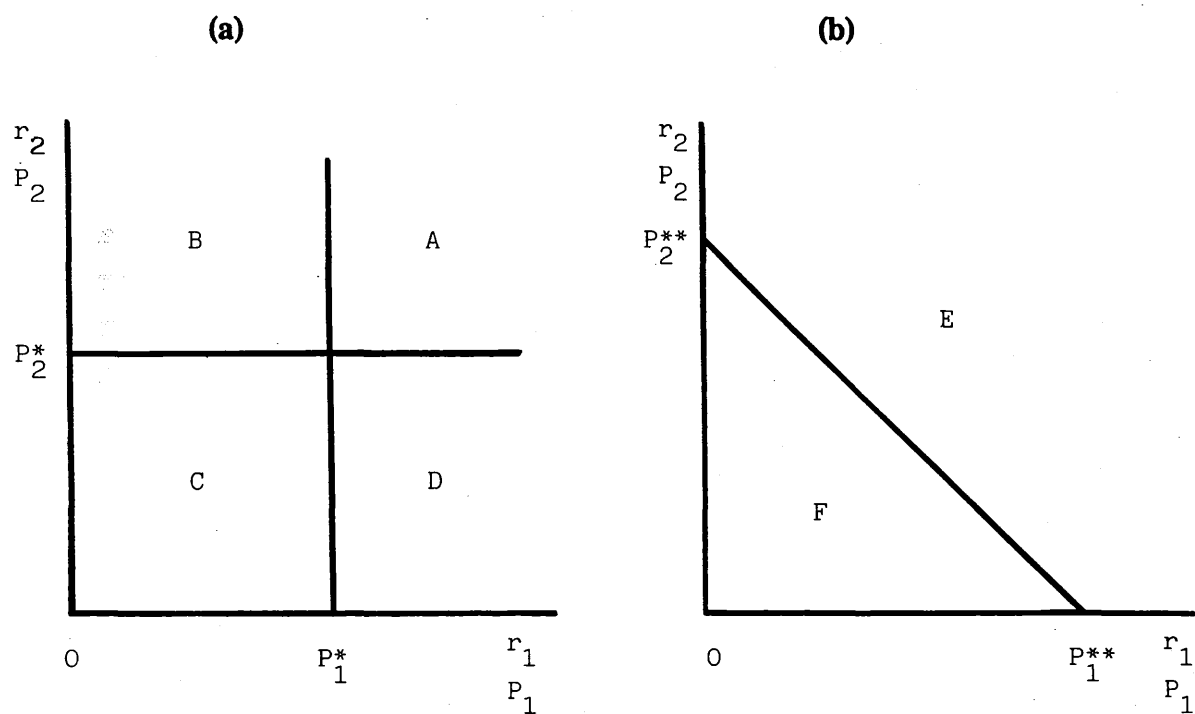
Each of these pricing strategies is illustrated in figure 12 in which r_1 and r_2 represent the reservation prices of the consumers, *i.e.*, the prices the consumers are willing to pay for respectively product 1 and 2. Figure 12(a) represents single monopoly pricing: the producer offers product 1 and 2 at respectively the price of OP^*_1 and OP^*_2 . In this case the consumers situated in area A buy both products, those situated in area C buy neither product, those situated in areas B and D buy respectively product 2 and 1. If the producer resorts to pure bundling, consumers are divided into two groups. The consumers whose reservation price for both products ($= Or_1 + Or_2$) is at least equal to the price of the bundle ($= OP^{**}_1 + OP^{**}_2$), are situated in area E in figure 12(b) and buy the bundle; the other consumers which are situated in area F in figure 12(b), do not buy the bundle. If the producer adopts a mixed bundling strategy, the consumers are again divided into four groups, as illustrated in figure 12(c): those situated in area $OP^*_2abP^*_1$ buy nothing; those situated southeast of P^*_1bd and those situated northwest of P^*_2ac purchase respectively product 1 and 2; the other consumers, situated northeast of $cabd$ buy the bundle. This mixed bundling strategy constitutes in fact a price discriminating pricing strategy. Indeed, it permits the producer to extract consumer surplus from those who value one of the products extremely high as well as from those with a lower variance in their reservation prices. Therefore, the bundle price P^*_b is lower than the sum of the simple monopoly prices P^*_1 and P^*_2 ; thus, $P^*_b < P^*_1 + P^*_2$.

803 *Supra*, 269-271.

804 This approach of the combination of the basic product and a guarantee is, for instance, set forth in: KUBO, Y., «Quality Uncertainty and Guarantee. A Case of Strategic Market Segmentation by a Monopolist», *European Economic Review*, 1986, (1063), 1063-1079.

805 Commodity bundles may include devices which cannot be sold separately (ADAMS, W.J., and YELLEN, J.L., «Commodity Bundling and the Burden of Monopoly», *Quarterly Journal of Economics*, 1976, (475), 475).

Figure 12



(c)

As a consequence, $P^*_1 > P^*_b - P^*_2$; in other words, the consumer buying the bundle pays a lower price for product 1 than the consumer buying only this single product⁸⁰⁶.

Without any adjustment being provided, mixed commodity bundling would be a means to avoid the application of anti-dumping law⁸⁰⁷. Therefore, European anti-dumping legislation correctly allows adjustments. However, mixed commodity bundling is seemingly not applicable to the situations envisaged by ECSC anti-dumping law. The commodity bundles for which adjustments may be made, are combinations of the like product with devices such as credit, warranties, guarantees, technical assistance and other after-sales services (see : Article 2(10)(c) basic ECSC Decision), which cannot be sold separately. However, the opposite is the case. Mixed commodity bundling also applies to combinations of a product with devices which cannot be sold separately.

Indeed, if product 2 with which the basic product is combined is not sold separately, there would be no separate price P^*_2 for that product 2. In figure 12(c) this would imply that the area $OP^*_2abP^*_1$ of consumers buying nothing is enlarged with the area $P^*_2aP^{**}_2$ and the consumers buying the bundle are those situated northeast of P^{**}_2bd .

ECSC anti-dumping law envisages only cases of bundling a product with devices which cannot be sold separately, except for the case of the bundling of homogeneous products. Indeed, the bundling of homogenous products amounts to selling the like products in different quantities⁸⁰⁸. On the other hand, the bundling of heterogenous products, of which each of them may be sold separately, is not provided for. Typical cases of the bundling of heterogenous products are tie-in sales and metering. The classical example of tie-in sales was the practice of IBM in the United States of America before 1936 : IBM rented its tabulating equipment at a very low price but required its customers to buy IBM punch cards ; by charging a price for its cards well in excess of costs, IBM was able to discriminate against customers using relatively more cards. In the early 1960s Xerox practised metering : it leased its copying machines at a very low price and then metered their usage by charging a price per copy well in excess of costs⁸⁰⁹. European anti-dumping law does not allow adjustments for the bundling of heterogenous products. Therefore,

⁸⁰⁶ See : ADAMS, W.J., and YELLEN, J.L., «Commodity Bundling and the Burden of Monopoly», *Quarterly Journal of Economics*, 1976, (475), 477-488 ; GREENHUT, M.L., NORMAN, G., and CHUNG, C.-S., *The economics of imperfect competition. A spatial approach*, Cambridge, Cambridge University Press, 1987, 229-234 ; PHILIPS, L., *La formation des prix*, Louvain-la-Neuve, Cabay, 1983, 259-272.

⁸⁰⁷ ADAMS, W.J., and YELLEN, J.L., «Commodity Bundling and the Burden of Monopoly», *Quarterly Journal of Economics*, 1976, (475), 490.

⁸⁰⁸ ADAMS, W.J., and YELLEN, J.L., «Commodity Bundling and the Burden of Monopoly», *Quarterly Journal of Economics*, 1976, (475), 488-489 ; TIROLE, J., *The Theory of Industrial Organization*, Cambridge, MIT Press, 1988, 160.

⁸⁰⁹ DORWARD, N., *The pricing Decision : Economic Theory and Business Practice*, London, Harper & Row, 1987, 143 ; TIROLE, J., *The Theory of Industrial Organization*, Cambridge (Mass.), The MIT Press, 1988, 146-147.

either no price discrimination will be found in cases where it is being practised, or price discrimination will be found in cases where it is not being practised⁸¹⁰.

4.2.1.5. Discounts and rebates

Under EC anti-dumping law, adjustments must be made for differences in discounts and rebates if these are properly quantified and are directly linked to the sales under consideration (Article 2(10)(c) basic EC Regulation). Under ECSC anti-dumping law, the domestic market price and the actual export price must be net of all discounts and rebates directly linked to the sales under consideration (Article 2(3)(a) and 2(8)(a) basic ECSC Decision). There is a twofold difference between EC and ECSC anti-dumping law. First, EC anti-dumping law only allows adjustments for *differences* in discounts and rebates. Thus, if the discounts and rebates on normal value and export price are identical, no adjustment will be made. Under ECSC anti-dumping, however, the domestic market price and the actual export price must always be adjusted since they must always be net of *all* discounts and rebates. Second, EC anti-dumping law on discounts and rebates applies to all normal value standards and export price standards, whereas ECSC anti-dumping law only applies to the domestic market price and the actual export price. Admittedly, under ECSC anti-dumping law, the constructed export price will be adjusted in order to exclude discounts and rebates in application of the provision that the constructed export price must include all costs normally borne by an importer⁸¹¹. Nevertheless, there is no reason why the other standards, such as the export price to third countries, should not be net of all discounts and rebates. For that reason, as well as for the fact that it reduces the required adjustments to the cases in which discounts and rebates are different, EC anti-dumping law should be preferred.

⁸¹⁰ See : C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, E.C.R., 1992, I, (1335), 1402-1403 ; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, E.C.R., 1992, I, (1409), 1485-1486 ; Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, O.J., 26 August 1986, No L 239/5 ; Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, O.J., 24 February 1987, No L 54/12. In this anti-dumping case the Japanese exporters claimed to practise tie-in sales on their domestic market by requiring the buyers of their photocopiers to buy also their copying paper and toner. By selling the photocopiers at a very low price (even below cost) and by charging a price well above costs for copying paper and toner, the exporters were able to realise profits on their total sales of copiers, paper and toner, and to discriminate against buyers using much copying paper and toner. In its provisional assessment, the Commission, therefore, adjusted the profit margin for the determination of the constructed value (which was the normal value standard used). In the definitive assessment, the Council agreed with the Commission to revise this position : in determining the constructed value - normal value was based on the constructed value for the sales in question were made at a loss - attention was paid only to the sales of photocopiers. Moreover, the question of the practice of tie-in sales was not treated within the framework of allowances for differences in conditions and terms of sales. On the contrary, an adjustment was made on the basis of differences in physical characteristics. Indeed, the European anti-dumping authorities had established that the tie-in sales consisted of the sale of the photocopier and a tied-in maintenance or service contract which included the supply of reprographic drums as well as consumables such as toner and developer. On the other hand, the comparable photocopiers sold for export included reprographic drums. In order to remove the effect on prices of these differences in physical characteristics, the costs of producing these reprographic drums (including a reasonable profit margin) was added to the constructed (normal) value, whereas the actual export price was taken into consideration. By disregarding tie-in sales European anti-dumping authorities constructed a too high normal value and, as a consequence, determined an artificially high dumping margin ranging from 7,2 up to 60 %.

⁸¹¹ *Supra*, 247-249, note 700.

Not only pecuniary rebates, but also rebates-in-kind are deducted. Rebates-in-kind are, for example, compact discs given at the occasion of the sale of a compact disc player⁸¹².

Discounts include deferred discounts if they are also directly linked with the sales under consideration. Under EC anti-dumping law, they must, moreover, be based on consistent practice in prior periods (Article 2(10)(c) basic EC Regulation). Under ECSC anti-dumping law, discounts and rebates on the domestic market price must also be based on a consistent practice or on an undertaking to comply with the conditions required to qualify for the deferred discount (Article 2(3)(a) basic ECSC Decision) ; with regard to the actual export price, deferred discounts and rebates must only be actually granted (Article 2(8)(a) basic ECSC Decision). Since, under ECSC anti-dumping law, it must not be shown that the discounts and rebates on the actual export price are based on a consistent practice, it will be easier to make adjustments for deferred discounts and rebates on the actual export price than on the domestic market price. This difference in treatment will enhance the finding of dumping as, in the absence of such a consistent practice, the same deferred discount must be deducted from the export price, but must not be subtracted from the domestic market price. No reason can be discerned for this different treatment. As it treats discounts and rebates on normal value and export price equally, EC anti-dumping law should therefore be preferred.

Rebates granted by the exporters to their domestic customers which are paid when the latter resell the like product on instalment terms to final customers, may constitute deferred discounts, if they are dealt with in contracts, concluded between the producer and his customers and if they are applied over a considerable period of time⁸¹³. The reimbursement of certain advertising expenses is also a deferred discount, if the exporter and the importer are not associated⁸¹⁴.

Discounts and rebates are directly linked if they effectively reduce the price of the like product for the exporter's customer⁸¹⁵. Therefore, free items and products sold together with the like

⁸¹² Council Regulation (EEC) No 112/90 of 16 January 1990 imposing a definitive anti-dumping duty on imports of certain compact disc players originating in Japan and the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 17 January 1990, No L 13/21.

⁸¹³ Council Regulation (EEC) No 1048/90 of 25 April 1990 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 27 April 1990, No L 107/56 (corrigendum, *O.J.*, 24 May 1990, No L 133/92).

⁸¹⁴ Council Regulation (EEC) No 1048/90 of 25 April 1990 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 27 April 1990, No L 107/56 (corrigendum, *O.J.*, 24 May 1990, No L 133/92).

⁸¹⁵ Council Regulation (EEC) No 1048/90 of 25 April 1990 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 27 April 1990, No L 107/56 (corrigendum, *O.J.*, 24 May 1990, No L 133/92). In the provisional assessment the Commission did not share this point of view (Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1).

product as an incentive for the consumer to purchase, are not considered to be a rebate as they do not reduce the price of the like product. Instead they are regarded as a promotional expense for which European anti-dumping law does not allow any adjustment⁸¹⁶. Also discounts and rebates granted on accessories will not be deducted for they are not directly linked⁸¹⁷. Rebates granted to customers to whom running account facilities for their sales are made available, will not be directly related if the rebate is granted not on the basis of the value of the sales, but on the level of the overall outstanding balance⁸¹⁸. Trade-in payments bear neither a direct relationship since the product may be sold without any trade-in. They correspond to the benefit the producers obtain from the removal of the traded-in products from the market and there being no second-hand market. Since the lack of a second-hand market increases the demand for and, consequently, the price of new products, trade-in payments increase the price of the product⁸¹⁹. Rebates which are conditional on a sale being made by the retailer to an end-user, are not directly related either since that sale is subsequent to, and independent of the allegedly dumping exporter's

⁸¹⁶ Commission Regulation (EEC) No 3262/90 of 5 November 1990 imposing a provisional anti-dumping duty on imports of audio tapes in cassettes originating in Japan, the Republic of Korea and Hong Kong, *O.J.*, 13 November 1990, No L 313/5 (corrigendum, *O.J.*, 12 January 1991, No L 9/36); Council Regulation (EEC) No 1251/91 of 13 May 1991 imposing a definitive anti-dumping duty on imports of audio tapes in cassettes originating in Japan and the Republic of Korea, collecting definitively the provisional duty and terminating the procedure concerning Hong Kong, *O.J.*, 14 May 1991, No L 119/35; Council Regulation (EC) No 2199/94 of 9 September 1994 imposing a definitive anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, and collecting definitively the provisional duty imposed, *O.J.*, 10 September 1994, No L 236/2.

⁸¹⁷ Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 24 November 1988, No L 317/33.

⁸¹⁸ Commission Regulation (EEC) No 1103/93 of 30 April 1993 imposing a provisional anti-dumping duty on imports into the Community of certain electronic weighing scales originating in Singapore and the Republic of Korea, *O.J.*, 6 May 1993, No L 112/20; Commission Regulation (EC) No 534/94 of 9 March 1994 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, *O.J.*, 11 March 1994, No L 68/5.

⁸¹⁹ C.J.E.C., case C-171/87, 10 March 1992, *Canon Inc. v Council*, *E.C.R.*, 1992, I, (1237), 1272-1273 (Opinion of Advocate General MISCHO) and 1293-1294; C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, *E.C.R.*, 1992, I, (1335), 1371-1372 (Opinion of Advocate General MISCHO), 1392 and 1394; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, *E.C.R.*, 1992, I, (1409), 1473-1474; C.J.E.C., case C-178/87, 10 March 1992, *Minolta Camera Co. Ltd v Council*, *E.C.R.*, 1992, I, (1577), 1615-1616 (Opinion of Advocate General MISCHO) and 1628-1629; Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12; Council Regulation (EEC) No 993/93 of 26 April 1993 imposing a definitive anti-dumping duty on imports of certain electronic weighing scales originating in Japan, *O.J.*, 29 April 1993, No L 104/4. *Contra*: VERMULST, E.A., and HOOIJER, J.J., «Annotation on Case C-170/89, *Bureau Européen des Unions de Consommateurs v. Commission*, Judgment of 28 November 1991; Case C-105/90, *Goldstar Co. Ltd. v. Council*, Judgment of 13 February 1992; Case C-188/88, *NMB (Deutschland) GmbH, NMB Italia Srl, NMB (UK) Ltd. v. Commission of the European Communities*, Judgment of 10 March 1992; Case 171/87, *Canon Inc. v. Council*; Case 172/87, *Mita Industrial Co. Ltd. v. Council*; Case 174/87, *Ricoh Company Ltd. v. Council*; Case 175/87, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd. v. Council*; Case 176/87, *Konishiroky Photo Industry Co. Ltd. v. Council*; Case 177/87, *Sanyo Electric Co. Ltd. v. Council*; Case 178/87, *Minolta Camera Co. Ltd. v. Council*; Case 179/87, *Sharp Corporation v. Council*, Judgments of 10 March 1992; Case C-358/89, *Extramet Industrie SA v. Council*, Judgment of 11 June 1992», *Common Market Law Review*, 1993, (115), 178.

sale to the retailer⁸²⁰. With regard to discounts granted at the end of the year, it is not yet clear whether they will be found to be directly linked with the sales under consideration⁸²¹.

Seemingly, the interpretation of the required direct connection is logical. For instance, it is true that sales may be made without trade-in payments. It is equally true that trade-in payments may increase the price of the product. Customers will value the product higher if they can obtain a resale value. Moreover, as there is no second-hand market, demand for the (new) product will be increased and, if there are positive economies of scale, the per unit production costs will, consequently, decrease. On balance, the producer may earn more profits if the effects on price and on production costs outweigh the trade-in payment costs⁸²². However, there is more at stake than it would seem to be the case at first sight. In fact, the producer applying a trade-in scheme, discriminates between his customers: customers who may and do indeed claim a trade-in payment, must pay a lower price for the product than customers who do not⁸²³₈₃₀. Even more so, if the producer applies a trade-in scheme in his home market, but not in his export market, he may be price-discriminating between national markets and, thus, may be practising dumping. By disregarding trade-in payments, this instance of price discrimination will not be detected. Or, even worse, if the producer only applies trade-in payments on his domestic market, he may erroneously be found to practise dumping, since disregarding his domestic trade-in payments increases his normal value. Hence, the examination of the direct connection of discounts and rebates should not be confined to what appears to be true, but requires a more economic approach. That economic approach implies that discounts and rebates should be analysed as a type of commodity bundling. Indeed, a commodity bundle may, for instance, be the combination of the sale of a new product at a high price and the trade-in of an old product at a high trade-in price. It may also be the sale of a product, in combination with a discount on accessories.

⁸²⁰ Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50.

⁸²¹ Under prior European anti-dumping law, adjustments have been made for end of year bonuses (Commission Decision 80/564/EEC of 4 June 1980 accepting undertakings in connection with the anti-dumping proceedings concerning imports of fibre building board originating in Czechoslovakia, Finland, Norway, Poland, Romania, Spain, the Soviet Union and Sweden and determining those proceedings, *O.J.*, 11 June 1980, No L 145/39) and for annual discounts (Commission Recommendation No 259/83/ECSC of 27 January 1983 imposing a definitive anti-dumping duty on broad-flanged beams originating in Spain, *O.J.*, 1 February 1983, No L 30/61 (corrigendum, *O.J.*, 8 February 1983, No L 36/10)). It was not made clear whether they were considered to be adjustments for differences in the conditions and terms of sale. European anti-dumping law requires only for differences in the conditions and terms of sales a direct link with the sales under consideration. Therefore, it is questionable whether such discounts will be considered to be directly linked with the sales under consideration as required by European anti-dumping law (Article 2(10)(c) basic EC Regulation; Article 2(3)(a) and 8(a) basic ECSC Decision).

⁸²² ANDERSON, S.P., and GINSBURGH, V.A., «Price discrimination via second-hand markets», *European Economic Review*, 1994, (23), 23-44.

⁸²³ Trade-in payments are an example of so-called product bundling (*infra*, 291-294): the bundle consists of the (new) product and the trade-in payment. See also: ANDERSON, S.P., and GINSBURGH, V.A., «Price discrimination via second-hand markets», *European Economic Review*, 1994, (23), 23-44.

4.2.2. Normal value and export price compared at the same time

4.2.2.1. Changing market conditions

Normal value and export price must be compared at as nearly as possible the same time (Article 2.4. GATT Anti-dumping Code ; Article 2(10) basic EC Regulation ; Article 2(9)(a) basic ECSC Decision). Probably market conditions changing in time are being considered⁸²⁴. Indeed, an exporter should not held liable for practices caused by changing market conditions which he does not control or is unable to foresee or to respond to, such as inflation and changes in exchange rates.

Though the wording «at as nearly as possible the same time» may seem to grant the anti-dumping authorities some room for discretion in order to take account of all relevant economic elements⁸²⁵, GATT anti-dumping law imposes adjustments for all differences affecting price comparability (Article VI(1) GATT ; Article 2.4. GATT Anti-dumping Code) and contains special provisions in respect of changes in exchange rates (Article 2.4.1. GATT Anti-dumping Code). It will be shown hereinafter that European anti-dumping law does not fully comply with GATT antidumping law, as it does not sufficiently neutralise the effects of changing market conditions, such as inflation and changes in exchange rates, and that the GATT provisions on exchange rates are not able to tackle the problem of exchange dumping.

In European anti-dumping case law no real adjustments are made to neutralise the effect of changing market conditions on the dumping finding. Indeed, in the majority of cases, the European anti-dumping authorities consider the requirement of comparing normal value and export price at the same time to be met if only sales during the investigation period are taken into account⁸²⁶. Sometimes, normal value and export price for sales during the investigation period

⁸²⁴ See e.g., *oxalic acid from Brazil* where it was underscored that the comparison of normal value and export price at as nearly as possible the same time was particularly relevant in view of the extremely high rate of inflation in Brazil and the frequent devaluations of the Cruzeiros *vis-à-vis* the US dollar in which currency the export transactions were made (Commission Regulation (EEC) No 2553/84 of 4 September 1984 imposing a provisional anti-dumping duty on imports of oxalic acid originating in Brazil, accepting an undertaking offered by the exporter in the German Democratic Republic of oxalic acid and terminating the proceeding regarding imports of oxalic acid from the German Democratic Republic and Spain, *O.J.*, 7 September 1984, No L 239/8).

⁸²⁵ C.J.E.C., case C-216/91, 7 December 1993, *Rima Electrometalurgia SA v Council*, recital 101 (Opinion of Advocate General LENZ) (not yet reported).

⁸²⁶ C.J.E.C., joined cases 273/85 and 107/86, 5 October 1988, *Silver Seiko Limited a.o. v Council*, *E.C.R.*, 1988, (5927), 5964 and 5979 ; BRYAN, G., and BOURSERAU, D.G., «Antidumping Law in the European Communities and the United States : A Comparative Analysis», *George Washington Journal of International Law and Economics*, 1984-1985, (631), 647.

are compared on a (three-)monthly basis⁸²⁷, or prices of deliveries made at as nearly as possible the same time are compared⁸²⁸. The investigation period has sometimes been extended in order to take account of price movements on the market⁸²⁹.

For exports, the date taken into account is the day when the exported products are sold *in* the Community, but not the day on which they are sold *for export* to the Community. When there is a non-negligible lapse of time between these two moments, the export price, which is by definition the price at which the product is sold for export⁸³⁰, can hardly be said to have been compared with the normal value at the same time, although only sales during the investigation period are

⁸²⁷ See e.g. : Council Regulation (EEC) No 1282/81 of 12 May 1981 imposing a definitive anti-dumping duty on vinyl acetate monomer originating in the United States of America, *O.J.*, 15 May 1981, No L 129/1 ; Commission Decision 82/881/EEC of 23 December 1982 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of perchlorethylene originating in Czechoslovakia, Romania, Spain and the United States of America and terminating that proceeding, *O.J.*, 30 December 1982, No L 371/47 ; Commission Regulation (EEC) No 163/83 of 21 January 1983 imposing a provisional anti-dumping duty on 4,4'-Isopropylidenediphenol originating in the United States of America, *O.J.*, 26 January 1983, No L 23/9 ; Council Decision 83/162/EEC of 18 April 1983 terminating the anti-dumping proceeding in respect of imports of acrylonitrile originating in the United States of America, *O.J.*, 20 April 1983, No L 101/29 ; Commission Regulation (EEC) No 2690/84 of 21 September 1984 imposing a provisional anti-dumping duty on imports of artificial corundum originating in the People's Republic of China and Czechoslovakia and terminating the proceeding in respect of imports of artificial corundum originating in Spain and Yugoslavia, *O.J.*, 25 September 1984, No L 255/9 ; Commission Regulation (EEC) No 1695/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of polyester yarn originating in Mexico, South Korea, Taiwan and Turkey, *O.J.*, 17 June 1988, No L 151/39 (corrigendum, *O.J.*, 18 June 1988, No L 152/58) ; Commission Regulation (EEC) No 2402/89 of 31 July 1989 imposing a provisional anti-dumping duty on imports of barium chloride originating in the People's Republic of China or the German Democratic Republic, *O.J.*, 4 August 1989, No L 227/24 ; Council Regulation (EEC) No 341/90 of 5 February 1990 accepting undertakings and imposing a definitive anti-dumping duty on imports of ferro-silicon originating in Iceland, Norway, Sweden, Venezuela or Yugoslavia, except those sold for export to the Community by companies whose undertakings have been accepted, *O.J.*, 10 February 1990, No L 38/1 ; Commission Decision 90/421/EEC of 6 August 1990 terminating the anti-dumping proceeding concerning imports of denim fabric originating in Turkey, Indonesia, Hong Kong and Macao, *O.J.*, 17 August 1990, No L 222/50 ; Council Regulation (EEC) No 541/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of barium chloride originating in the People's Republic of China, *O.J.*, 7 March 1991, No L 60/1.

See also : *DRAMs from Japan and EPROMs from Japan*, where a dumping exporter proposed to compare normal value and export price on a quarterly basis because of the unusual situation of the DRAM industry in which products become rapidly outdated and costs of production decline sharply over a short period due to the learning curve effect. The Commission requested the submission of data on a quarterly basis. However, because of the volatility of costs, the absence of cost data and the difficulties in relating actual costs to individual sales transactions, the Commission found it more reasonable to determine normal value on an annual basis. Export prices were determined on a transaction-by-transaction basis (Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79 ; corrigendum, *O.J.*, 10 February 1990, No L 38/44) ; Council Regulation (EEC) No 577/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as EPROMs (erasable programmable read only memories) originating in Japan, *O.J.*, 12 March 1991, No L 65/1). See also : Commission Regulation (EEC) No 2686/92 of 16 September 1992 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea, *O.J.*, 17 September 1992, No L 272/13.

⁸²⁸ Commission Decision 82/122/EEC of 18 February 1982 terminating the anti-dumping procedure concerning imports of polyester/cotton sheets and pillowcases from the USA, *O.J.*, 20 February 1982, No L 48/30.

⁸²⁹ Council Regulation (EEC) No 2907/83 of 17 October 1983 terminating the anti-dumping proceeding concerning imports of unwrought nickel, not alloyed, in the form of cathodes produced by electrolysis, either uncut or cut into squares, originating in the Soviet Union, *O.J.*, 19 October 1983, No L 286/29.

⁸³⁰ *Supra*, 240-241.

taken into account⁸³¹. Moreover, the date taken into account for exports is at variance with European anti-dumping law, since the export price is the price paid for the product sold for export (Article 2(8) basic EC Regulation ; Article 2(8)(a) basic ECSC Decision)⁸³².

By taking the date of delivery as reference point, European anti-dumping case law will only neutralise inflation if the prices as actually paid are determined also on the same date. However, even when deliveries are made at the same time, the domestic sales contract, including the price determination, may have been concluded later than the export contract. If there is inflation in the exporting country during that period and if the date of delivery is relevant, then, *ceteris paribus*, dumping will be found ; if, on the other hand, the date of the conclusion of the contract and, thus, of the determination of the price are considered, then, *ceteris paribus*, no dumping will be found. Hence, in order to avoid any bias in the examination of dumping, the date of the actual price determination should be used⁸³³ or, if the date of delivery is used, prices should be adjusted for inflation. If, for example in the first case, the sales contract involves a combination of a fixed basic price and an indexation clause, the date of the actual price determination is the day on which the indexation clause, is actually applied⁸³⁴. It may be argued that the new GATT Anti-dumping Code and, in pursuance thereof, the new EC anti-dumping legislation share this point of view. Indeed, in respect of the problem of exchange rate fluctuations, they impose the use of the exchange rate on the date of sale. That date of sale is, according to them the date of contract, purchase order, order confirmation or invoice, whichever establishes the material terms of sale (Note (3) at Article 2.4.1. GATT Anti-dumping Code ; Article 2(10)(j) basic EC Regulation). Admittedly, GATT and EC anti-dumping law do contain a similar provision in respect of the

⁸³¹ For example, in *compact disc players from the Republic of Korea*, the investigation period covered the period from 1 June 1986 to 31 May 1987. Production of certain models of compact disc players ceased in 1985 and the quantities of those models which were sold in the Community during the investigation period had been exported to the Community before 1 June 1986 (C.J.E.C., case C-105/90, 13 February 1992, *Goldstar Co. Ltd v Council*, E.C.R., 1992, I, (677), 683 (Report for the Hearing : Facts and procedure). To the objection of a Korean exporter on this point, the Court of Justice replied off the point by stating that the date of production does not as a rule have any bearing on the calculation of the normal value (C.J.E.C., case C-105/90, 13 February 1992, *Goldstar Co. Ltd v Council*, E.C.R., 1992, I, (677), 722-723 ; see also : *ibidem*, 688-689 (Report for the Hearing : conclusions of the Council) and 705 (Opinion of Advocate General VAN GERVEN).

⁸³² C.J.E.C., case C-216/91, 7 December 1993, *Rima Electrometalurgia SA v Council*, recital 82 (Opinion of Advocate General LENZ) (not yet reported).

⁸³³ C.J.E.C., case C-216/91, 7 December 1993, *Rima Electrometalurgia SA v Council*, recitals 86-89 (Opinion of Advocate General LENZ) (not yet reported).

⁸³⁴ The question concerning the relevant moment of time has also been treated in the conclusions of Advocate-General J.P. WARNER in the first *Japanese roller bearings case*. Advocate-General J.P. WARNER did not agree with the exporters who claimed that the relevant date was the date of exportation instead of the date on which the product was resold to the first independent buyer in the European Community. He held that the date of exportation guaranteed that the sales considered were made at as nearly as possible the same moment of time (C.J.E.C., joined cases 113 and 118-121/77, March 29, 1979, *NTN Toyo Bearing Company Ltd a.o. v Council*, E.C.R., 1979, 1256-1257.). He did not base his opinion on any criterion concerning the moment of the effective price determination. But, if this criterion had been used, the conclusion would have been the same : the moment of the resale to the first independent buyer is nearer to the effective price determination than the moment of exportation ; indeed, in the case of an association between exporter and importer, the export price is, according to Article 2(9) basic EC Regulation and Article 2(8)(b) basic ECSC Decision, determined on the basis of the price at which the product is resold to the first independent buyer.

effect of inflation on prices, but it would be illogical not to adopt the same attitude in respect of inflation as in respect of exchange rate fluctuations. However, it is not yet clear whether the European anti-dumping authorities will accept this point of view. Until now, European anti-dumping authorities have adopted the date of delivery as reference, but have compared prices actually paid. They have always refused to make adjustments for inflation between the date of delivery and the date of payment when allowances are made for conditions of payments. In their view, the rate of inflation affects the conditions of payment⁸³⁵. However, they do not explain how the conditions of payment are affected by inflation. Logically, however, adjustments for

⁸³⁵ Commission Regulation (EEC) No 2800/86 of 9 September 1986 imposing a provisional anti-dumping duty on imports of certain deep freezers originating in the USSR, accepting the undertakings in connection with the investigation of imports of certain deep freezers originating in Yugoslavia or in the German Democratic Republic and terminating the investigation, and terminating the proceeding concerning imports of certain deep freezers, *O.J.*, 11 September 1986, No L 259/14; Commission Regulation (EEC) No 1043/87 of 10 April 1987 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Yugoslavia, *O.J.*, 14 April 1987, No L 102/5; Council Regulation (EEC) No 2382/87 of 5 August 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Yugoslavia, *O.J.*, 7 August 1987, No L 218/2.

In respect of these cases, it must be pointed out that they treat of the «date of sale» and not of the «date of delivery». Perhaps, there is a difference between them; but, if so, then the problem subsists since the price was not determined on the date of sale, as it was influenced by the rate of inflation between the date of sale and the date of payment.

The only adjustments which the European anti-dumping authorities have allowed for, have nothing to do with the effect of inflation on prices when delivery and determination of the price do not coincide. They only cope with the administrative inconvenience to determine the dumping margin when there is a high variability in prices. Indeed, in several cases normal value was established on a monthly basis in view of the (high) inflationary situation on the domestic market of the exporting countries (or, in case of NME exporting countries, of the reference country) (Commission Regulation (EEC) No 3074/89 of 11 October 1989 imposing a provisional anti-dumping duty on imports of welded tubes originating in Yugoslavia and Romania, *O.J.*, 13 October 1989, No L 294/10; Commission Decision 90/421/EEC of 6 August 1990 terminating the anti-dumping proceeding concerning imports of denim fabric originating in Turkey, Indonesia, Hong Kong and Macao, *O.J.*, 17 August 1990, No L 222/50; Commission Decision 91/392/EEC of 21 June 1991 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain asbestos cement pipes originating in Turkey, and terminating the investigation, *O.J.*, 31 July 1991, No L 209/37; Commission Regulation (EEC) No 2818/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports of cotton yarn originating in Brazil, Egypt and Turkey and terminating the anti-dumping proceeding in respect of cotton yarn originating in India and Thailand, *O.J.*, 27 September 1991, No L 271/17; Council Regulation (EEC) No 2899/91 of 1 October 1991 amending Regulation (EEC) No 3905/88 and repealing the definitive anti-dumping duty imposed on imports into the Community of polyester yarn originating in Mexico, *O.J.*, 2 October 1991, No L 275/21; Commission Decision 91/512/EEC of 25 July 1991 accepting undertakings given in connection with the review of anti-dumping measures concerning imports of artificial corundum originating in the Soviet Union, Hungary, Poland, Czechoslovakia and the People's Republic of China and in connection with the anti-dumping proceeding concerning imports of artificial corundum originating in Brazil and Yugoslavia, and terminating the investigation, *O.J.*, 2 October 1991, No L 275/27; Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7). If data on a monthly basis are not available, normal values may be determined on a quarterly basis (Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7; Commission Decision No 891/92/ECSC of 30 March 1992 imposing a provisional anti-dumping duty on imports of certain semi-finished products of alloy steel, originating in Turkey and Brazil, *O.J.*, 9 April 1992, No L 95/26; Council Regulation (EC) No 3359/93 of 2 December 1993 imposing amended anti-dumping measures on imports of ferro-silicon originating in Russia, Kazakhstan, Ukraine, Iceland, Norway, Sweden, Venezuela and Brazil, *O.J.*, 9 December 1993, No L 302/1; Commission Decision No 67/94/ECSC of 12 January 1994 imposing a provisional anti-dumping duty on imports into the Community of hematite pig iron, originating in Brazil, Poland, Russia and Ukraine, *O.J.*, 15 January 1994, No L 12/5; Commission Decision 94/82/EC of 10 January 1994 terminating the anti-dumping proceeding concerning imports of gum rosin originating in the People's Republic of China, *O.J.*, 12 February 1994, No L 41/50; Commission Regulation (EC) No 3119/94 of 19 December 1994 imposing a provisional anti-dumping duty on imports of ferro-silico-manganese originating in Russia, Ukraine, Brazil and South Africa, *O.J.*, 21 December 1994, No L 330/15).

In another case, the European anti-dumping authorities have used an index for inflation adjustment to assess the impact on inflation on the production costs of the dumping exporter used for the construction of normal value (Commission Decision No 1775/92/ECSC of 30 June 1992 imposing a definitive anti-dumping duty on imports of certain semi-finished products of alloy steel, originating in Turkey and Brazil, definitively collecting the provisional anti-dumping duty imposed on such imports and accepting an undertaking offered in connection with the anti-dumping proceeding concerning imports of these products, *O.J.*, 2 July 1992, No L 182/23). This index seems not to have been intended to neutralise the effect of inflation on prices determined at different moment of time, but to have been used in order to calculate which the actual production costs of the dumping exporter were.

inflation seem necessary precisely when inflation affects the conditions of payment : either an indexation clause applies, or the sales contract involves higher prices as they would prevail, after inflation, at the date of payment. In both cases, the price actually paid will lie above the price prevailing at the date of delivery, so that, without adjustment, dumping will be found.

Moreover, even when the date of payment is being used as reference or adjustments for inflation are made, changes in the exchange rates must be taken into account. Indeed, exchange dumping may be sanctioned under anti-dumping law, although it does not imply price discrimination. Exchange dumping is usually described as being caused by a continual devaluation of the currency of the exporting country ahead of the inflation rate on its domestic market⁸³⁶. In fact, the problem is that, at a given date, the evolution in the exchange rate and the inflation rate do not match. Empirical evidence, indeed, shows that purchasing power parity, *i.e.*, the proposition that the depreciation of a country's currency equals the excess of domestic inflation over foreign inflation, does not hold, especially not in the short run⁸³⁷. In view of the relatively short investigation periods, purchasing power parity will frequently not hold. As a consequence, exchange dumping will be sanctioned if the exporter has - usually unintentionally - failed to respond quickly or adequately to the incongruous evolution in the exchange rate and the inflation rate⁸³⁸. If there is such a incongruous evolution, the probability of such a failure is much higher. Indeed, if exchange rate and inflation rate evolve concordantly, the exporter will only have to adjust his domestic market price to the inflation rate ; if he charges the same export price as before, he will not be found to practise dumping. If, however, there is a discordant evolution in exchange rate and inflation rate, he will have to adjust both his domestic market price and his export price. For instance, if, at a given date, there is a devaluation, but no inflation, he will have to lower his export price ; but, if, afterwards, inflation occurs and if he adjusts his domestic market price, dumping will be found if he did not immediately adjust his export price too. Such a delay in the adjustment of the export price probably occurs frequently in cases of continuous changes in exchange rate and inflation rate ; in such cases, the exporter does not immediately adjust his prices for reasons of practicability or for reasons of inaccurate and not up-to-date information⁸³⁹. In such cases, the exporter will be found to practise dumping, unless adjustments are allowed for. European anti-dumping case law, however, is rather vague as to

⁸³⁶ WARES, W.A., *The Theory of Dumping and American Commercial Policy*, Lexington, Lexington Books, 1977, 7.

⁸³⁷ ETHIER, W., *Modern International Economics*, New York, Norton, 1983, 354-357.

⁸³⁸ DIDIER, P., «EEC Antidumping Rules and Practices», *Common Market Law Review*, 1980, (349), 358-359 ; DIDIER, P., «Deux années d'application du nouveau règlement antidumping de la CEE», *Cahiers de Droit Européen*, 1982, (21), 37-38.

⁸³⁹ Another example of a case of exchange dumping may be found in *shovels from Brazil*. In this case, the exporter said that he had increased his domestic market prices in advance to take account of the inflation which occurs between manufacture and sale, but that he had not increased his export prices because of the frequent devaluations of the Brazilian currency (Commission Regulation (EEC) No 2464/84 of 24 August 1984 imposing a provisional anti-dumping duty on imports of certain shovels originating in Brazil, *O.J.*, 29 August 1984, No L 231/29).

whether adjustments necessary to avoid the sanctioning of exchange dumping, are actually always made. European anti-dumping case law looks very casuistic. For this very reason it should be criticized. But, it must be criticized even more, as it seems to sanction certain instances of exchange dumping⁸⁴⁰. Even worse, the Court of Justice is not to be expected to alter this case

⁸⁴⁰ Exchange dumping has probably also been sanctioned in *shovels from Brazil* where the exporter claimed that Brazilian domestic market prices should be adjusted because they were increased in advance to take account of the inflation which occurs between manufacture and sale; on the other hand, he claimed that such an increase is not necessary for export sales because of the frequent devaluations of the Brazilian currency. His claim was rejected on the ground that the comparison between domestic and export prices must be made on the basis of the prices actually paid or payable in respect of transactions which took place at the same time (Commission Regulation (EEC) No 2464/84 of 24 August 1984 imposing a provisional anti-dumping duty on imports of certain shovels originating in Brazil, *O.J.*, 29 August 1984, No L 231/29).

It is highly probable that exchange dumping has been sanctioned in *cotton yarn from Brazil and Turkey*. In the provisional anti-dumping determination the Commission refused to use exchange rates adjusted for inflation, not as a matter of principle, but merely because the allegedly dumping exporters were not able to produce arguments that the official exchange rate did not correspond to a realistic economic situation (Commission Regulation (EEC) No 2818/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports of cotton yarn originating in Brazil, Egypt and Turkey and terminating the anti-dumping proceeding in respect of cotton yarn originating in India and Thailand, *O.J.*, 27 September 1991, No L 271/17). However, in the definitive anti-dumping determination the Council and the Commission, when confronted with strong evidence that the exchange rate of the Brazilian cruzado did reflect the Brazilian domestic inflation rate, answered, as matter of principle, that: «(t)he establishment, by the competent authorities, of the exchange rate of a third country's currency is a decision which cannot be the subject of appreciation by the Community institutions in the framework of an anti-dumping proceeding. It is, therefore, the Commission's constant practice, confirmed in the case-law of the Court of Justice, to use the official exchange rate applied to international commercial transactions. To adjust this exchange rate for the purposes of dumping calculations would be inappropriate and contrary to the principle of neutrality as regards the monetary aspects of an anti-dumping case» (Council Regulation (EEC) No 738/92 of 23 March 1992 imposing a definitive anti-dumping duty on imports of cotton yarn originating in Brazil and Turkey, *O.J.*, 27 March 1992, No L 82/1. See also: Council Regulation (EEC) No 2305/92 of 4 August 1992 imposing a definitive anti-dumping duty on imports of silicon metal originating in Brazil and definitively collecting the amounts secured by way of the provisional anti-dumping duty, *O.J.*, 7 August 1992, No L 222/1).

The case law of the Court of Justice to which the European anti-dumping authorities refer, however, does not involve that official exchange rates must always be used without any adjustment for inflation and that the problem of exchange dumping may be disregarded. Indeed, the case in question concerning *standardized multi-phase electric motors from Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the USSR* did not require such adjustments since the rate of devaluation corresponded to the rate of inflation; so no exchange dumping could have arisen (C.J.E.C., joined cases C-305/86 and C-160/87, 11 July 1990, *Neotype Techmasexport GmbH v Commission and Council*, *E.C.R.*, 1990, I, (2945), 2965 (Report for the Hearing: conclusions of the Council and the Commission), 2980 (Opinion of Advocate General VAN GERVEN) and 3002-3003).

In other cases, it was not clear whether the adjustments were apt or, at least, intended to prevent exchange dumping from being sanctioned:

- in *sodium carbonate from Bulgaria, the German Democratic Republic, Poland and Romania* prices were calculated in US dollars in order to neutralize the inflationary effect of the Mexican currency, Mexico being selected as reference country (Council Regulation (EEC) No 1306/89 of 11 May 1989 imposing a definitive anti-dumping duty on imports of light sodium carbonate originating in Bulgaria, the German Democratic Republic, Poland and Romania, *O.J.*, 13 May 1989, No L 131/4);
- in *ferro-chrome from Kazakhstan, Russia and Ukraine*, separate normal values were determined for shipments effected in different periods since the currency of Zimbabwe, which is the reference country, had been devalued significantly (Council Regulation (EEC) No 2717/93 of 28 September 1993 imposing a definitive anti-dumping duty on imports of ferro-chrome with a carbon content by weight of maximum 0,5 % (low carbon ferro-chrome), originating in Kazakhstan, Russia and Ukraine, *O.J.*, 2 October 1993, No L 246/1);
- in *ferro-silicon from Brazil* normal values and export prices were compared in US dollars given Brazil's high and continued inflation. Moreover, normal values were expressed on a monthly basis in US dollars and according to the monthly average exchange rate to offset the inflationary effect of domestic prices in Brazil (Council Regulation (EEC) No 1115/91 of 29 April 1991 imposing definitive anti-dumping duties in connection with the review of anti-dumping measures concerning imports of ferro-silicon originating in Brazil, *O.J.*, 3 May 1991, No L 111/1; Commission Decision 91/240/EEC of 29 April 1991 accepting undertakings offered by certain exporters in connection with the review of anti-dumping measures concerning imports of ferro-silicon originating in Brazil and terminating the investigation as regards those exporters, *O.J.*, 3 May 1991, No L 111/47);
- in *ferro-silicon originating in Brazil and cotton yarn from Brazil and Turkey* monthly average exchange rates were used in order to offset the inflationary effects on the domestic market of the exporting country (Council Regulation (EEC) No 1115/91 of 29 April 1991 imposing definitive anti-dumping duties in connection with the review of anti-dumping measures concerning imports of ferro-silicon originating in Brazil, *O.J.*, 3 May 1991, No L 111/1; Commission Decision 91/240/EEC of 29 April 1991 accepting undertakings offered by certain exporters in connection with the review of anti-dumping measures concerning imports of ferro-silicon originating in Brazil and terminating the investigation as regards those exporters, *O.J.*, 3 May 1991, No L 111/47; Commission Regulation (EEC) No 2818/91 of 23 September 1991 imposing a provisional anti-dumping duty on

law as it considers the European anti-dumping authorities to enjoy a margin of discretion to choose the method appropriate to take account of complex economic situations, such as the interconnection between inflation and exchange rates⁸⁴¹.

Not much improvement is to be expected from the new GATT Anti-dumping Code and, in pursuance thereof, the new EC anti-dumping legislation, which, for the first time, tackle the question of exchange rate fluctuations. As the new Code and the new EC anti-dumping legislation prescribe the use of the exchange rate on the date of sale and forbid the consideration of fluctuations in exchange rates (Article 2.4.1. GATT Anti-dumping Code ; Article 2(10)(j) basic EC Regulation), they explicitly allow to sanction exchange dumping. The rule that exchange rate

imports of cotton yarn originating in Brazil, Egypt and Turkey and terminating the anti-dumping proceeding in respect of cotton yarn originating in India and Thailand, *O.J.*, 27 September 1991, No L 271/17);

- in *ball bearings from Japan and audio tapes from Japan, the Republic of Korea and Hong Kong* monthly average currency rates were used in order to take account of significant fluctuations in the exchange rate of the exporting country (C.J.E.C., case 255/84, 7 May 1987, *Nachi Fujikoshi Corporation v Council, E.C.R.*, 1987, (1861), 1896 ; Commission Regulation (EEC) No 3262/90 of 5 November 1990 imposing a provisional anti-dumping duty on imports of audio tapes in cassettes originating in Japan, the Republic of Korea and Hong Kong, *O.J.*, 13 November 1990, No L 313/5 (corrigendum, *O.J.*, 12 January 1991, No L 9/36));

- *artificial corundum from Brazil and Yugoslavia* a prolonged investigation period of 16 months was chosen in order to be in a better position to take account of the effects of extremely high inflation rates in these countries (Commission Decision 91/512/EEC of 25 July 1991 accepting undertakings given in connection with the review of anti-dumping measures concerning imports of artificial corundum originating in the Soviet Union, Hungary, Poland, Czechoslovakia and the People's Republic of China and in connection with the anti-dumping proceeding concerning imports of artificial corundum originating in Brazil and Yugoslavia, and terminating the investigation, *O.J.*, 2 October 1991, No L 275/27).

In other cases, adjustments made to exchange rates did not relate to exchange dumping. Although the adjustments were not explicitly explained, they seemingly were necessary because the exchange rate originally used by the European anti-dumping authorities did not correspond to the exchange rates actually used by the exporters (Commission Recommendation No 2975/82/ECSC of 8 November 1982 imposing a definitive anti-dumping duty on certain sheets and plates, of iron or steel, originating in Brazil, *O.J.*, 9 November 1982, No L 312/10 ; Commission Decision 83/75/EEC of 15 February 1983 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain fibre building board originating in Brazil, *O.J.*, 19 February 1983, No L 47/30 ; ; Council Regulation (EEC) No 3905/88 of 12 December 1988 imposing a definitive anti-dumping duty on imports of polyester yarn originating in Mexico, South Korea, Taiwan and Turkey, *O.J.*, 16 December 1988, No L 347/10 ; Council Regulation (EEC) No 3946/88 of 16 December 1988 imposing a definitive anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 December 1988, No L 348/49 ; Council Regulation (EEC) No 738/92 of 23 March 1992 imposing a definitive anti-dumping duty on imports of cotton yarn originating in Brazil and Turkey, *O.J.*, 27 March 1992, No L 82/1). It is consistent case law of the European anti-dumping authorities, along with that of the Court of Justice, that such actual exchange rates must be applied. Indeed, in several cases the exporters claimed that the real value of their country's currency should be used and not the official exchange rate. The European anti-dumping authorities, as well as the Court of Justice, answered that the exchange rates actually used by the exporters in their export transactions had to be preferred. As the exporters used the official exchange rates, those rates had to be applied without any adjustment (C.J.E.C., case 255/84, 7 May 1987, *Nachi Fujikoshi Corporation v Council, E.C.R.*, 1987, (1861), 1896 ; C.J.E.C., joined cases C-305/86 and C-160/87, 11 July 1990, *Neotype Techmasexport GmbH v Commission and Council, E.C.R.*, 1990, I, (2945), 2960 (Report for the Hearing : conclusions of the Council), 2979-2980 (Opinion of Advocate General VAN GERVEN) and 3003 ; Commission Regulation (EEC) No 2800/86 of 9 September 1986 imposing a provisional anti-dumping duty on imports of certain deep freezers originating in the USSR, accepting the undertakings in connection with the investigation of imports of certain deep freezers originating in Yugoslavia or in the German Democratic Republic and terminating the investigation, and terminating the proceeding concerning imports of certain deep freezers, *O.J.*, 11 September 1986, No L 259/14 ; Commission Regulation (EEC) No 1043/87 of 10 April 1987 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Yugoslavia, *O.J.*, 14 April 1987, No L 102/5 ; Council Regulation (EEC) No 2382/87 of 5 August 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Yugoslavia, *O.J.*, 7 August 1987, No L 218/2. See also : Commission Regulation (EEC) No 1479/83 of 7 June 1983 imposing a provisional anti-dumping duty on imports of copper sulphate originating in Czechoslovakia and the USSR, *O.J.*, 9 June 1983, No L 151/24).

⁸⁴¹ C.J.E.C., joined cases C-305/86 and C-160/87, 11 July 1990, *Neotype Techmasexport GmbH v Commission and Council, E.C.R.*, 1990, I, (2945), 3002.

fluctuations must be ignored, seems to imply that an exporter, who does not alter his export prices when exchange rates fluctuate, will not be sanctioned for exchange dumping. However, an exporter who tries to follow the exchange rate fluctuations, may be found to practise dumping, as exchange rate fluctuations will always be ignored. Therefore, it would seem to be better that the exchange rate fluctuations should not be ignored blindly. The fact that the date of sale is defined as the date on which the material terms of sale are established (Note (3) at Article 2.4.1. GATT Anti-dumping Code ; Article 2(10)(j) basic EC Regulation), does not alter the conclusion that, under the new GATT and EC rules, exchange dumping may still be sanctioned. The problem is that GATT and EC anti-dumping law do not take account of the possible inability of the exporter to respond in time and to the exact extent to the incongruous evolution in exchange rate and inflation rate. On account of GATT and EC anti-dumping law, there are only two marginal improvements to be mentioned which are, in part, a remedy for the exporter's inability to take account of the interplay between exchange rate and inflation. First, GATT and EC anti-dumping law oblige the anti-dumping authorities to allow exporters sixty days⁸⁴² for adjusting their export prices to reflect sustained movements in exchange rates (Article 2.4.1. GATT Anti-dumping Code ; Article 2(10)(j) basic EC Regulation). Here, the question arises what the difference is between exchange rate fluctuations, which must be ignored, and sustained movements in exchange rates, to which the exporters must adjust their export prices. It seems that exporters must be able, within a period of sixty days, to discern the trend in the daily exchange rate fluctuations and to adapt their export prices to that trend. Needless to say, that exporters are required to have a firm knowledge of capital markets. Moreover, if they do not want to be sanctioned for exchange dumping, they should also know exactly the evolution in inflation and combine that information with the trend in exchange rate movements. The only improvement this new rule implies is that it does not require the exporters to adapt their export prices daily to exchange rate fluctuations. Second, GATT and EC anti-dumping law allow adjustments for hedging (*i.e.*, transactions for avoiding losses from possible exchange rate fluctuations) (Article 2.4.1. GATT Anti-dumping Code ; Article 2(10)(j) basic EC Regulation), which the European anti-dumping authorities have always refused to make adjustments for⁸⁴³. This improvement, though, does not tackle the problem of exchange dumping fundamentally. It only recognizes that exporters are unable to predict exchange rate movements and try to reduce the risks of exchange rate movements by means of hedging. *De lege ferenda*, the assumption about the inability of

⁸⁴² Under GATT anti-dumping law, the period of 60 days is a minimum (see the wording «at least» in Article 2.4.1. GATT Anti-dumping Code).

⁸⁴³ The European anti-dumping authorities have refused adjustments for hedging, which they consider to be a financial device extraneous to the commercial transaction for which European anti-dumping law does provide for adjustments (Commission Regulation (EEC) No 1695/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of polyester yarn originating in Mexico, South Korea, Taiwan and Turkey, *O.J.*, 17 June 1988, No L 151/39 (corrigendum, *O.J.*, 18 June 1988, No L 152/58) ; Commission Regulation (EEC) No 1696/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 June 1988, No L 151/47 ; Council Regulation (EEC) No 3905/88 of 12 December 1988 imposing a definitive anti-dumping duty on imports of polyester yarn originating in Mexico, South Korea, Taiwan and Turkey, *O.J.*, 16 December 1988, No L 347/10 ; Council Regulation (EEC) No 3946/88 of 16 December 1988 imposing a definitive anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 December 1988, No L 348/49).

exporters to respond exactly to the movements in exchange rates and in inflation, which underlies the second improvement, should be the general starting point for the comparison between normal value and export price : exporters should be granted the opportunity to show why and to what extent they were unable to adapt their prices correctly to the interplay between exchange rates and inflation.

4.2.2.2. Intertemporal price discrimination

It has been argued that normal value and export price should be compared at the date of effective price determination in order to neutralise the effects of changing market conditions on the dumping finding. However, even if market conditions do not change, prices may differ in time.

Economic theory distinguishes two types of intertemporal price discrimination. The first type takes the form of second-degree price discrimination. Here, there are two types of consumers : consumers with a high valuation of the product, and low-valuation consumers. The high-valuation consumers are willing to pay a higher price than the low-valuation consumers. As consumers know that there will be future price reductions, they will postpone buying at high prices. However, if the producer is able to commit to a limited production capacity, consumers will also know that they run the risk of being rationed at the low price. If there is but a small chance of obtaining the product at the future low price, the high-valuation consumers will buy today at the higher price. Thus, by committing to a limited production capacity, the producer is able to distinguish high-valuation consumers from low-valuation consumers and to capture (part of) the high-valuation consumers' surplus⁸⁴⁴. Clearly, for this type of price discrimination, no adjustments should be allowed. This type of price discrimination has probably only a limited scope since the producer must be able to commit to a limited production capacity. It only applies to durable products, such as electronic products (*e.g.*, photocopiers, compact disc players), the technology of which is rapidly outdated. Indeed, this type of products is characterized by the permanent development of new models which are quickly outdated, causing their prices to drop in the future.

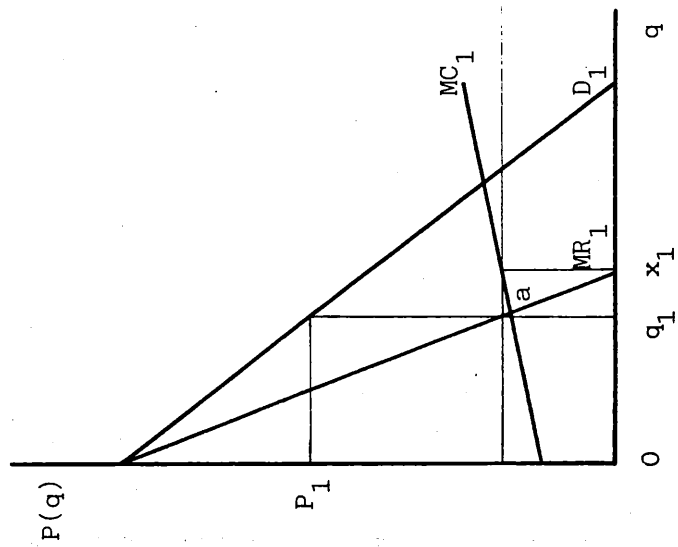
The second type of intertemporal price discrimination is analyzed within the framework of spatial price discrimination⁸⁴⁵. Converting spatial price theory into intertemporal price theory makes that «distance» is translated into «time», that «transport costs» are now «storage costs» and that the net demand curve is the updated value of the gross demand curve.

⁸⁴⁴ VAN CAYSEELE, P., «Consumer rationing and the possibility of intertemporal price discrimination», *European Economic Review*, 1991, (1473), 1473-1484.

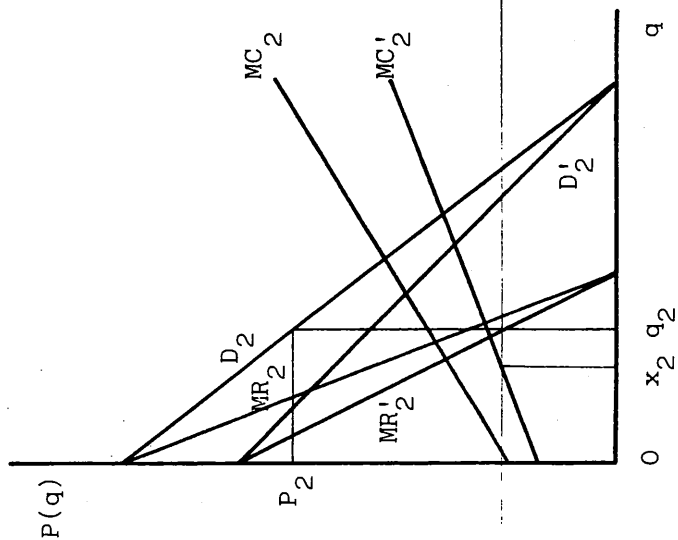
⁸⁴⁵ See : GREENHUT, M.L., NORMAN, G., and CHUNG, C.-S., *The economics of imperfect competition. A spatial approach*, Cambridge, Cambridge University Press, 1987, 209-215 ; PHILIPS, L., «Intertemporal Price Discrimination and Sticky Prices», *Quarterly Journal of Economics*, 1980, (525), 525-542 ; PHILIPS, L., *La formation des prix*, Louvain-la-Neuve, Cabay, 1983, 117-163.

Figure 13

(a)



(b)



(c)

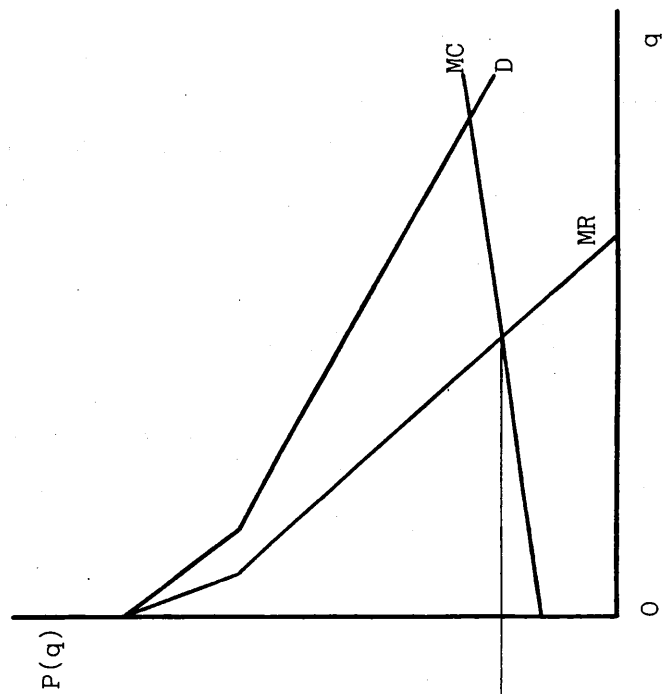


Figure 13(a) represents current demand D_1 , with corresponding marginal revenue curve MR_1 , and current marginal costs MC_1 ; in figure 13(b) gross future demand is represented by the curve D_2 , the corresponding marginal revenue curve being MR_2 , and future marginal costs are represented by the curve MC_2 . If the producer determines the price in both periods independently of each other, he would choose the points a and b in respectively figure 13(a) and 13(b) as optimal solutions. If this is not the case, he will horizontally sum the current demand curve D_1 and the updated future demand curve D_2' into the curve D in figure 13(c). He will also do the same with marginal costs: in figure 13(c) MC is the horizontal sum of the current marginal cost curve MC_1 and the updated future marginal cost curve MC_2' . By equalizing this MC curve with MR, which is the marginal cost curve corresponding to D in figure 13(c), the producer will produce a quantity Ox_1 and sell a quantity Oq_1 at a price OP_1 in the first period, whereas he will produce a quantity Ox_2 and sell a quantity Oq_2 at a price OP_2 in the second period. It follows from figure 13 that intertemporal price discrimination is practised: the change in price from the first period to the second is smaller than the marginal cost of storage. Thus, by analogy with «freight absorption», the producer may be said to practise «storage cost absorption».

In order to detect this type of price discrimination, adjustments must be allowed for possible «storage cost absorption» if normal value and export price do not date from the same moment. This type of price discrimination has a wide scope as it applies to all storable products (e.g., ores, chemical products).

However, European anti-dumping law does not allow adjustments for differences in time as they are not included in the exhaustive list of allowed adjustments (see: Article 2(10) basic EC legislation). As a number of instances of intertemporal price discrimination cannot be detected, European anti-dumping law violates GATT anti-dumping law, under which all dumping practices should be detected. In order to be in conformity with GATT anti-dumping law, prices should be reduced by inventory costs⁸⁴⁶.

⁸⁴⁶ Under prior European anti-dumping law differences in inventory costs or storage expenses were allowed for if they bore a direct relationship to the sales of the product under consideration, see: Commission Regulation (EEC) No 163/83 of 21 January 1983 imposing a provisional anti-dumping duty on 4,4'-Isopropylidenediphenol originating in the United States of America, *O.J.*, 26 January 1983, No L 23/9; Commission Regulation (EEC) No 2681/84 of 18 September 1984 imposing a provisional anti-dumping duty on imports of pentaerythritol originating in Canada and accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of pentaerythritol originating in Sweden and terminating that proceeding, *O.J.*, 22 September 1984, No L 254/5; Council Decision 87/66/EEC of 19 January 1987 accepting undertakings given in connection with imports of binder and baler twine originating in Brazil and Mexico, and terminating the investigations, *O.J.*, 5 February 1987, No L 34/55; Council Regulation (EEC) No 2702/87 of 4 September 1987 repealing a definitive anti-dumping duty on styrene monomer originating in the United States of America and terminating the investigation, *O.J.*, 8 September 1987, No L 258/20; Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1.

Conversely, no adjustment was made for inventory costs and storage expenses which did not bear a direct relationship to the sales of the product in question, see: Commission Regulation (EEC) No 2182/80 of 14 August 1980 imposing a provisional anti-dumping duty on certain chemical fertilizer originating in the United States of America, *O.J.*, 15 August 1980, No L 212/43; Commission Regulation (EEC) No 909/85 of 2 April 1985 imposing a provisional anti-dumping duty on imports of certain kinds of polystyrene sheet originating in Spain, *O.J.*, 4 April 1985, No L 97/30; Commission Regulation (EEC) No 997/85 of 18 April 1985 imposing a provisional anti-dumping duty on imports of glycine originating in Japan, *O.J.*, 19 April 1985, No L 107/8; Council Regulation (EEC) No 2322/85 of 12 August 1985 imposing a definitive anti-dumping duty on imports of glycine originating in Japan, *O.J.*, 15 August 1985, No L 218/1; Commission Decision 86/36/EEC of 26 February 1986 accepting undertakings entered into in connection with the anti-dumping proceeding concerning imports into Greece of certain categories of glass originating in Turkey, Yugoslavia, Romania, Bulgaria, Hungary and Czechoslovakia and terminating the investigation, *O.J.*, 28 February 1986, No L 51/73; Commission Regulation (EEC) No 2800/86 of 9 September 1986 imposing a provisional anti-dumping duty on imports of certain deep freezers originating in the USSR, accepting the undertakings in connection with the investigation of imports of certain deep

4.2.3. Differences in physical characteristics

In European anti-dumping law, adjustments for differences in physical characteristics which affect price comparability, must be made (Article 2(10)(a) basic EC Regulation ; Article 2(9) and (10) basic ECSC Decision). Although it does not provide a definition of the concept «differences in physical characteristics», European anti-dumping law indicates that this concept does not concern differences in basic physical characteristics which are essential to the definition of the like product category. Indeed, the scope of an anti-dumping proceeding only concerns like products, *i.e.*, products which are identical or similar in terms of their basic physical characteristics⁸⁴⁷. Hence, the required adjustments pertain only to differences in other, non-basic physical characteristics which do not affect the definition of the like product category⁸⁴⁸. As has been shown, consumer perception plays an important role in determining which physical characteristics are basic : if consumers perceive a product as not to be similar because of a given difference in physical characteristics, that product will not be considered to be a like product, though it shows many resemblances in terms of other physical characteristics⁸⁴⁹. In the same way, consumer perception is decisive as to adjustments for differences in (non-basic) physical characteristics. Indeed, adjustments will only be allowed for such differences if they have a bearing on consumer perception⁸⁵⁰. For example, differences in regard to quality have no effect on the definition of the like product and must, if necessary, be taken into account when normal value and export price

freezers originating in Yugoslavia or in the German Democratic Republic and terminating the investigation, and terminating the proceeding concerning imports of certain deep freezers, *O.J.*, 11 September 1986, No L 259/14 ; Council Regulation (EEC) No 864/87 of 23 March 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union, and definitively collecting the amounts secured as provisional duties, *O.J.*, 27 March 1987, No L 83/1 ; Commission Regulation (EEC) No 1043/87 of 10 April 1987 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Yugoslavia, *O.J.*, 14 April 1987, No L 102/5 ; Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia, *O.J.*, 9 May 1987, No L 121/11 ; Commission Decision No 2247/87/ECSC of 28 July 1987 imposing a provisional anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Mexico, *O.J.*, 29 July 1987, No L 207/21 ; Commission Decision No 163/88/ECSC of 20 January 1988 imposing a provisional anti-dumping duty on imports of certain iron or steel coils, originating in Algeria, Mexico and Yugoslavia, *O.J.*, 22 January 1988, No L 18/31.

⁸⁴⁷ *Infra*, 377-380.

⁸⁴⁸ C.J.E.C., joined cases C-304/86 and C-185/87, 11 July 1990, *Enital SpA v Commission and Council*, *E.C.R.*, 1990, I, (2939), 2940 ; C.J.E.C., case C-157/87, 11 July 1990, *Electroimpex a.o. v Council*, *E.C.R.*, 1990, I, (3021), 3023.

⁸⁴⁹ *Infra*, 382-385.

⁸⁵⁰ Commission Regulation (EEC) No 550/93 of 5 March 1993 imposing a provisional anti-dumping duty on imports of bicycles originating in the People's Republic of China, *O.J.*, 11 March 1993, No L 58/12.

are compared⁸⁵¹. A second and last indication about the concept «differences in physical characteristics» is provided by European anti-dumping case law, according to which this concept does not cover differences caused by a different use⁸⁵².

In economics, a distinction is made between two kinds of product differentiation, *i.e.*, vertical differentiation and horizontal differentiation. Vertical differentiation refers to quality differences : all consumers prefer higher quality to lower, but there is a difference in their willingness to pay for increments in quality. Horizontal differentiation refers to different varieties of a product, but,

⁸⁵¹ Commission Regulation (EEC) No 313/92 of 4 February 1992 imposing a provisional anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in South Korea, *O.J.*, 11 February 1992, No L 34/8 ; Council Regulation (EEC) No 830/92 of 30 March 1992 imposing a definitive anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and collecting definitively the provisional duty, *O.J.*, 3 April 1992, No L 88/1 (corrigendum, *O.J.*, 5 June 1992, No L 153/16) ; Commission Regulation (EEC) No 550/93 of 5 March 1993 imposing a provisional anti-dumping duty on imports of bicycles originating in the People's Republic of China, *O.J.*, 11 March 1993, No L 58/12 ; Council Regulation (EEC) No 2474/93 of 8 September 1993 imposing a definitive anti-dumping duty on imports into the Community of bicycles originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 9 September 1993, No L 228/1.

Adjustments for differences in physical characteristics have also been made in, *inter alia* : Commission Regulation (EEC) No 2684/88 of 26 August 1988 imposing a provisional anti-dumping duty on certain imports of video cassette recorders originating in Japan and the Republic of Korea, *O.J.*, 31 August 1988, No L 240/5 (differences concerning video colour standards, remote control, recording speed, picture quality, sound recording, number of video heads, and accessories included in the price of the VCR (cables, computer, video tapes, *etc.*)) ; Council Regulation (EEC) No 3836/91 of 19 December 1991 imposing a definitive anti-dumping duty on imports of dihydrostreptomycin originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty, *O.J.*, 31 December 1991, No 362/1 (differences in potency of dihydrostreptomycin) ; Commission Regulation (EEC) No 2799/92 of 25 September 1992 imposing a provisional anti-dumping duty on imports of deadburned (sintered) magnesia originating in the People's Republic of China, *O.J.*, 26 September 1992, No L 282/15 and Commission Regulation (EEC) No 2800/92 of 25 September 1992 imposing a provisional anti-dumping duty on imports of magnesium oxide originating in the People's Republic of China, *O.J.*, 26 September 1992, No L 282/23 (the different MgO grades) ; Council Regulation (EEC) No 3068/92 of 23 October 1992 imposing a definitive anti-dumping duty on imports of potassium chloride originating in Belarus, Russia or Ukraine, *O.J.*, 24 October 1992, No L 308/41 (differences in terms of crystal size, as well as in consumers' image) ; Commission Regulation (EEC) No 797/93 of 30 March 1993 imposing a provisional anti-dumping duty on imports of ferro-chrome with a carbon content by weight of max. 0,5 % (low carbon ferro-chrome) originating in Kazakhstan, Russia and Ukraine, *O.J.*, 2 April 1993, No L 80/8 (differences in the net chromium content ; crushed versus non-crushed ferro-chrome) ; Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5 (differences in the degree of certification, *i.e.*, the testing of the performance of the diskette which influences its market value) ; Commission Regulation (EEC) No 2463/93 of 1 September 1993 imposing a provisional anti-dumping duty on imports of fluorspar originating in the People's Republic of China, *O.J.*, 7 September 1993, No L 226/3 (difference between fluorspar in wet form (filter cake form) and dry form (powder)) ; Council Regulation (EEC) No 2861/93 of 18 October 1993 imposing a definitive anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, and collecting definitively the provisional duty imposed, *O.J.*, 21 October 1993, No L 262/4 (differences in the degree of certification, *i.e.*, the testing of the performance of the diskette which influences its market value) ; Council Regulation (EC) No 3359/93 of 2 December 1993 imposing amended anti-dumping measures on imports of ferro-silicon originating in Russia, Kazakhstan, Ukraine, Iceland, Norway, Sweden, Venezuela and Brazil, *O.J.*, 9 December 1993, No L 302/1 (differences in screening, crushing and weighing) ; Commission Regulation (EC) No 1506/94 of 27 June 1994 imposing provisional duties on imports of urea ammonium nitrate solution originating in Bulgaria and Poland, *O.J.*, 30 June 1994, No L 162/16 (differences in the N-content) ; Commission Regulation (EC) No 3119/94 of 19 December 1994 imposing a provisional anti-dumping duty on imports of ferro-silico-manganese originating in Russia, Ukraine, Brazil and South Africa, *O.J.*, 21 December 1994, No L 330/15 (differences in the content of phosphorus and differences in formats).

In *dead-burned (sintered) magnesia from the People's Republic of China*, adjustments were made for the fact that the importers of the Chinese product had to carry out themselves operations such as analysis of the product and removal of foreign substances, since those operations are normally done by the producers themselves in the reference country (the People's Republic of China is a NME country) (Council Regulation (EC) No 3386/93 of 6 December 1993 imposing a definitive anti-dumping duty on imports of dead-burned (sintered) magnesia originating in the People's Republic of China, *O.J.*, 11 December 1993, No L 306/16). It seems that those operations determine the quality of the product, namely the degree of its purity. If this is not the case, then these adjustments deviate from consistent European anti-dumping case law which rejects to take account of production costs in NME countries, unless those adjustments were made for so-called «natural advantages» of the NME country (see : *infra*, 61-64).

⁸⁵² Differences in playing time of video cassettes are no differences in physical characteristics if they are caused by the different recording systems of the video cassette recorder (Council Regulation (EEC) No 1768/89 of 19 June 1989 imposing a definitive anti-dumping duty on imports of video cassettes originating in the Republic of Korea and Hong Kong, collecting definitively the provisional duty and terminating the anti-dumping proceeding with regard to the imports of video tape reels originating in the Republic of Korea, *O.J.*, 22 June 1989, No L 174/1).

contrary to vertical differentiation, consumers do not agree on the ranking of the different product varieties⁸⁵³. Both horizontal and vertical product differentiation may be applied for price discrimination. In European anti-dumping case law, adjustments have been made for both types of product differentiation and both types of price discrimination will be found. Therefore, European anti-dumping law is in conformity with GATT anti-dumping law, which requires that all practices of dumping are found.

The theory of spatial price discrimination may be applied in order to analyse horizontal differentiation⁸⁵⁴. Indeed, the model of spatial price discrimination illustrated in figure 1 in Chapter II⁸⁵⁵ may easily be adapted to the pricing of horizontally differentiated products. The spatial distance between producer and consumer has to be interpreted as the difference between the basic product variety, as manufactured by the producer and the product variety preferred by the consumer ; transport costs are now the costs of modifying the basic product to the variety preferred by the consumer. The comparison between spatial pricing and the pricing of product varieties holds true. Therefore, it may be concluded that price discrimination may be practised by horizontal product differentiation if the producer controls the modification of the basic product into the desired product variety⁸⁵⁶.

The application of the spatial model to product differentiation holds only true if the producer can observe the consumer's most preferred product characteristics⁸⁵⁷. In many cases, this condition will not be fulfilled. Therefore, a more realistic approach of horizontal differentiation consists of considering horizontal differentiation as a type of commodity bundling⁸⁵⁸ : offering different varieties of a product is offering single and mixed bundles of different characteristics⁸⁵⁹.

Vertical differentiation could also be analyzed as a form of commodity bundling : the product of higher quality may be seen as the bundling of higher quality with the product of lower quality. In this respect, quality differences show great resemblance to differences in quantity. As a higher quantity is strictly preferred to a lower quantity, there is a strict preference of higher quality to lower quality. In view of this parallelism, the approach of differences in quantities as illustrated in figure 9 in this Chapter⁸⁶⁰, may also be applied to vertical differentiation⁸⁶¹. Thus,

⁸⁵³ PHILIPS, L., *La formation des prix*, Louvain-la-Neuve, Cabay, 1983, 298-301 ; SCHMALENSSEE, R., «Industrial Economics : An Overview», *Economic Journal*, 1988, (643), 671.

⁸⁵⁴ SCHMALENSSEE, R., «Industrial Economics : An Overview», *Economic Journal*, 1988, (643), 671.

⁸⁵⁵ *Supra*, 27-29.

⁸⁵⁶ A clear example is that of a car manufacturer offering a basic model A which may be upgraded, at an extra cost, with several features, and an identical model B on which all the extra features are standard ; it often happens that the extra cost of upgrading the basic model A is higher than the price difference between model B and A (GREENHUT, M.L., NORMAN, G., and HUNG, C.S., *The economics of imperfect competition. A spatial approach*, Cambridge, Cambridge University Press, 1987, 111-112 ; PHILIPS, L., *La formation des prix*, Louvain-la-Neuve, Cabay, 1983, 307-311).

⁸⁵⁷ GREENHUT, M.L., NORMAN, G., and HUNG, C.S., *The economics of imperfect competition. A spatial approach*, Cambridge, Cambridge University Press, 1987, 111.

⁸⁵⁸ In connection with commodity bundling, see : *supra*, 291-294.

⁸⁵⁹ PHILIPS, L., *La formation des prix*, Louvain-la-Neuve, Cabay, 1983, 311-314 ; TIROLE, J., *The Theory of Industrial Organization*, Cambridge, MIT Press, 1988, 159-160.

⁸⁶⁰ *Supra*, 283-285.

⁸⁶¹ For such an analysis of vertical differentiation, see : MUSSA, M., and ROSEN, S., «Monopoly and Product Quality», *Journal of Economic Theory*, 1978/18, (301), 301-317 ; PHILIPS, L., *La formation des prix*, Louvain-la-Neuve, Cabay, 1983, 314-344 ; TIROLE, J., *The Theory of Industrial Organization*, Cambridge, MIT Press, 1988, 149-152.

the producer will appropriate all consumer's surplus of the low-quality-preferring consumers, while leaving some net surplus for the high-quality-preferring consumers.

For both horizontal and vertical product differentiation, the product differences must correspond to differences in the preferences of the different groups of consumers. In European anti-dumping case law, the differences in preferences play a crucial role. For adjustments were refused for differences which did not influence the choice of the consumers⁸⁶². Conversely, adjustments were allowed for differences in physical characteristics which influenced the choice of the consumers⁸⁶³ or could have influenced the choice of the consumers if the two types of the product would enter in direct competition⁸⁶⁴. Adjustments were also made for products which show no differences in physical characteristics, but the quality of which is perceived differently by the consumers⁸⁶⁵. Of course, only insofar as these differences in physical characteristics affect the market values, adjustments will be allowed⁸⁶⁶. The amount of the adjustments should not solely be based on the production costs. Instead, it must be based on either the domestic market price or the constructed value (*i.e.*, production costs including general expenses and a reasonable profit margin), because physical differences generally correspond to marketing features for which the difference in price actually paid is much higher than the difference in production costs actually incurred⁸⁶⁷.

⁸⁶² Council Decision 82/423/EEC of 21 June 1982 terminating the anti-dumping proceeding concerning imports of certain refrigerators originating in Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania, the Soviet Union and Yugoslavia, *O.J.*, 29 June 1982, No L 184/23; Council Regulation (EEC) No 2093/91 of 15 July 1991 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China and collecting definitively the provisional duty, *O.J.*, 18 July 1991, No L 195/1; Council Regulation (EEC) No 3091/91 of 21 October 1991 imposing a definitive anti-dumping duty on imports of video tapes in cassettes originating in the People's Republic of China and definitively collecting the provisional duty, *O.J.*, 24 October 1991, No L 293/2.

⁸⁶³ Council Regulation (EEC) No 864/87 of 23 March 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union, and definitively collecting the amounts secured as provisional duties, *O.J.*, 27 March 1987, No L 83/1; Council Regulation (EEC) No 2093/91 of 15 July 1991 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China and collecting definitively the provisional duty, *O.J.*, 18 July 1991, No L 195/1.

⁸⁶⁴ Council Regulation (EEC) No 501/89 of 27 February 1989 imposing a definitive anti-dumping duty on imports of certain video cassette recorders originating in Japan and the Republic of Korea and definitively collecting the provisional duty, *O.J.*, 28 February 1989, No L 57/55.

⁸⁶⁵ Commission Regulation (EEC) No 1034/91 of 23 April 1991 imposing a provisional anti-dumping duty on imports of video tapes in cassettes originating in the People's Republic of China, *O.J.*, 26 April 1991, No L 106/15.

⁸⁶⁶ Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27); Commission Regulation (EC) No 534/94 of 9 March 1994 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, *O.J.*, 11 March 1994, No L 68/5.

⁸⁶⁷ Council Regulation (EEC) No 1048/90 of 25 April 1990 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 27 April 1990, No L 107/56 (corrigendum, *O.J.*, 24 May 1990, No L 133/92).

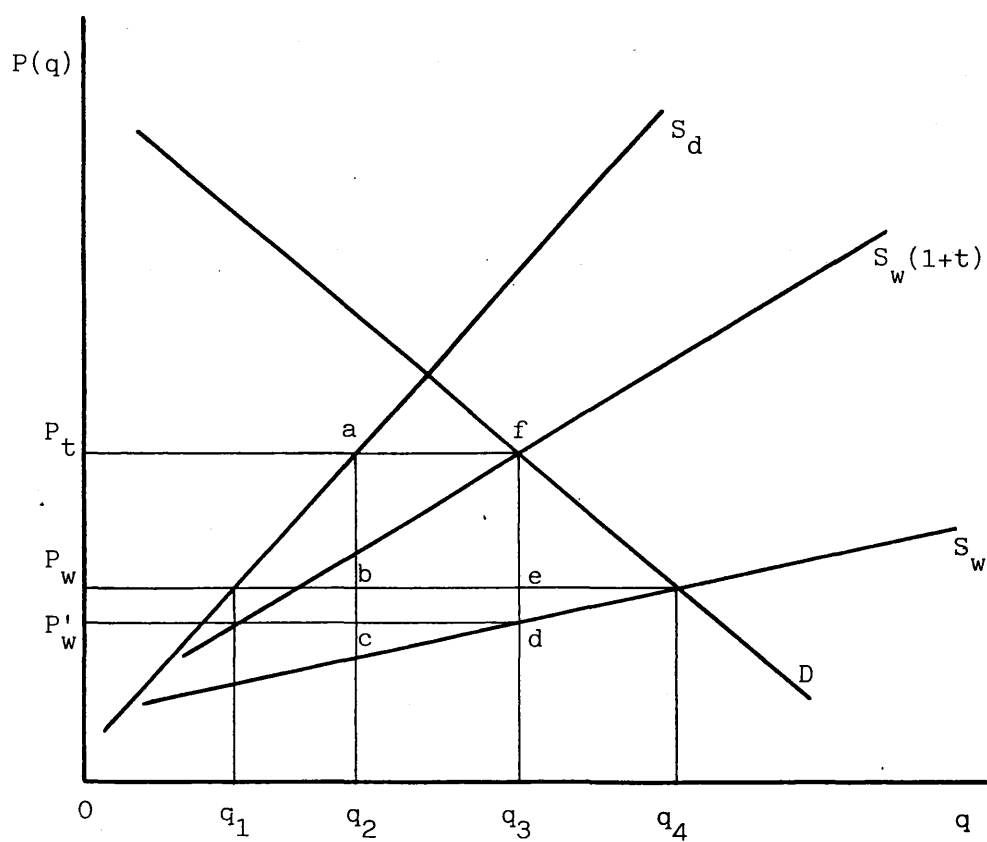
4.2.4. *Differences in import charges and indirect taxes*

Under GATT anti-dumping law due allowance must be made for differences in taxation (Article VI(1) GATT ; Article 2.4. GATT Anti-dumping Code). It is, moreover, forbidden to subject exported products to an anti-dumping duty by reason of the exemption of such product from duties or taxes borne by the like product when intended for consumption in the country of origin or export or by reason of the refund of such duties or taxes (Article VI(4) GATT). GATT anti-dumping law is rendered in European anti-dumping law by the provision that normal value must be reduced by an amount corresponding to any import charges or indirect taxes borne by the like product and by materials physically incorporated therein, when intended for consumption in the country of origin or export and not collected or refunded in respect of the product exported to the Community (Article 2(10)(b) basic EC legislation). However, the European version of GATT anti-dumping law breaks down in two respects : the limitation of the adjustment to indirect taxes and import charges, and the form of the adjustment.

4.2.4.1. Indirect taxes and import charges versus direct direct taxes

Theoretically, a country may choose to apply either the «destination principle» or the «origin principle» to the taxes it imposes. Under the «destination principle», all products used in the same place should be taxed in the same way, irrespective of where they are produced. Therefore, the same domestic taxes of the importing country are imposed on both imported products and on domestically used products, and exported goods are exempted from those domestic taxes. On the other hand, under the «origin principle», all products produced in the same place should be taxed in the same way, irrespective of where they are consumed. Therefore, exported goods should be taxed in the same way as products consumed in the producing country and imported goods are not subject to these domestic direct taxes. Thus, the choice between «origin principle» and «destination principle» determines whether the domestic tax is a production tax or a consumption tax.

Figure 14



Under GATT law, however, the choice between the «destination principle» and the «origin principle» is free as to indirect taxes ; for direct taxes the «origin principle» must be applied (Article III(2) GATT)⁸⁶⁸. This is probably why European anti-dumping law allows adjustments only for indirect taxes and import charges in order to leave the choice between the «destination principle» and the «origin principle» to the exporting country.

The distinction made between direct and indirect taxes is inspired by the idea that direct taxes are fully absorbed by producers, whereas indirect taxes are fully reflected in the prices of the products taxed⁸⁶⁹. This idea, however, does not hold. There is some evidence that also direct taxes are reflected in prices⁸⁷⁰. The fact that direct taxes are usually only partly reflected in prices, poses some administrative problems as to determining the exact amount of the part of the tax reflected in the price⁸⁷¹. Indirect taxes and import charges, however, raise the same administrative problems as they too are not always fully reflected in the price.

In figure 14, the case of a large open economy is illustrated. The supply of the domestic producers is represented by the curve S_d and world supply is represented by the curve S_w ; the curve D represents domestic demand. If no tax nor duty is levied, domestic and world price are equal to OP_w . At this price consumers buy a quantity Oq_4 of which Oq_1 and q_1q_4 are supplied respectively by domestic producers and foreign producers. Assume that the importing country imposes an *ad valorem* import duty t . As a consequence world supply S_w is shifted by a factor $(1 + t)$ to $S_w(1 + t)$, and domestic price raises from OP_w to OP_t whereas world price drops to OP'_w . At this price consumers buy only a quantity Oq_3 of which domestic producers and foreign producers supply respectively Oq_2 and q_2q_3 . As a quantity q_2q_3 is imported, an amount equal to the area $acdf$ is paid as import duty. However, only the area $abef$ is borne by the domestic consumers ; because of the fall of the world price OP_w to OP'_w , the remaining area $bcde$ is borne by the foreign producers. Thus, the import duty t is only partly reflected in the price paid by the consumers.

There is, thus, no reason why, under European anti-dumping law, the adjustment for differences in taxation should be restricted to indirect taxes. It may even be argued that adjustments for direct taxes must likewise be allowed, because GATT anti-dumping law imposes adjustments for

868 KRAUSS, M.B., «Border-Tax Adjustments : A Potential Trans-Atlantic Trade Dispute», *Journal of World Trade Law*, 1976, (145), 145-148 ; McGOVERN, E., *International Trade Regulation. GATT, the United States and the European Community*, Exeter, Globefield Press, 1982, 191-193 and 253-258. For more on the distinction between the destination principle and the origin principle, see : BALDWIN, R.E., *Nontariff Distortions of International Trade*, Washington D.C., The Brookings Institution, 1970, 84-109 ; GROSSMAN, G.M., «Alternative Border Tax Policies», *Journal of World Trade Law*, 1978, (452), 452-460 ; GROSSMAN, G.M., «Border tax adjustments. Do they distort trade ?», *Journal of International Economics*, 1980/10, (117), 117-128 ; JOHNSON, H., and KRAUSS, M., «Border Taxes, Border Tax Adjustments, Comparative Advantage, and the Balance of Payments», *Canadian Journal of Economics*, 1970, (595), 595-602.

869 BESELER, J.F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 109.

870 KRAUSS, M.B., «Border-Tax Adjustments : A Potential Trans-Atlantic Trade Dispute», *Journal of World Trade Law*, 1976, (145), 152-153 ; VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 453.

871 BALDWIN, R.E., *Nontariff Distortions of International Trade*, Washington D.C., The Brookings Institution, 1970, 109 ; KRAUSS, M.B., «Border-Tax Adjustments : A Potential Trans-Atlantic Trade Dispute», *Journal of World Trade Law*, 1976, (145), 153-154.

differences in taxation, without making any distinction between direct and indirect taxes (Article VI(1) GATT ; Article 2.4. GATT Anti-dumping Code)⁸⁷².

4.2.4.2. Form of adjustment

For the application of European anti-dumping law, the part of the tax reflected in the price has not to be identified. The adjustment for import charges and indirect taxes results in a reduction of normal value by an amount corresponding to the import charges or indirect taxes borne by the product and its inputs when destined for consumption on the domestic market of the country of origin or export (Article 2(10)(a) basic EC Regulation ; Article 2(10)(b) basic ECSC Decision). Under prior European anti-dumping law, however, adjustments for such differences resulted either in reducing the normal value⁸⁷³ or increasing the export price⁸⁷⁴ by the refunded amount of the tax. At first sight, the new rule of European anti-dumping law seems more logical : normal value and export prices are compared at a level net of indirect taxes and import charges, just as they are also compared net of transportation costs. As taxes, like transportation costs, may be

⁸⁷² It might, however, be argued that adjustments for differences in taxation should be restricted to indirect taxes and import charges. Indeed, Article VI(4) GATT stipulates that «no product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes». It, thus, deals with taxes levied on products and, therefore, aims at indirect taxes and import charges. Article VI(4) GATT, however, seems to be an application of the general provision which requires to make adjustments for the purpose of ensuring a fair comparison between normal value and export price and which does not impose such restriction in respect of adjustments for differences in taxation.

⁸⁷³ Commission Decision 82/543/EEC of 6 August 1982 accepting an undertaking given in connection with the anti-dumping proceeding concerning paracetamol (INN) crystals or powder originating in China and terminating the proceeding, *O.J.*, 11 August 1982, No L 236/23 ; Commission Regulation (EEC) No 2936/82 of 28 October 1982 imposing a provisional anti-dumping duty on copper sulphate originating in Yugoslavia, *O.J.*, 4 November 1982, No L 308/7 ; Commission Recommendation No 2975/82/ECSC of 8 November 1982 imposing a definitive anti-dumping duty on certain sheets and plates, of iron or steel, originating in Brazil, *O.J.*, 9 November 1982, No L 312/10 ; Commission Decision 83/75/EEC of 15 February 1983 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain fibre building board originating in Brazil, *O.J.*, 19 February 1983, No L 47/30 ; Council Regulation (EEC) No 486/83 of 28 February 1983 imposing a definitive anti-dumping duty on copper sulphate originating in Yugoslavia and definitively collecting the amounts secured by way of provisional duty, *O.J.*, 2 March 1983, No L 55/4 ; Commission Regulation (EEC) No 909/85 of 2 April 1985 imposing a provisional anti-dumping duty on imports of certain kinds of polystyrene sheet originating in Spain, *O.J.*, 4 April 1985, No L 97/30.

⁸⁷⁴ Commission Decision 81/430/EEC of 15 June 1981 terminating the anti-dumping proceeding concerning imports of certain seamless tubes or non-alloy steels originating in Spain, *O.J.*, 23 June 1981, No L 165/27 ; Commission Regulation (EEC) No 2127/82 of 28 July 1982 imposing a provisional anti-dumping duty on trichloroethylene originating in the German Democratic Republic and Poland and terminating the anti-dumping proceeding in respect of trichloroethylene originating in Czechoslovakia, Romania, Spain and the United States of America, *O.J.*, 31 July 1982, No L 223/76 ; Commission Recommendation No 2975/82/ECSC of 8 November 1982 imposing a definitive anti-dumping duty on certain sheets and plates, of iron or steel, originating in Brazil, *O.J.*, 9 November 1982, No L 312/10 ; Commission Decision 82/881/EEC of 23 December 1982 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of perchlorethylene originating in Czechoslovakia, Romania, Spain and the United States of America and terminating that proceeding, *O.J.*, 30 December 1982, No L 371/47 ; Commission Recommendation No 259/83/ECSC of 27 January 1983 imposing a definitive anti-dumping duty on broad-flanged beams originating in Spain, *O.J.*, 1 February 1983, No L 30/61 (corrigendum, *O.J.*, 8 February 1983, No L 36/10) ; Commission Decision 83/75/EEC of 15 February 1983 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain fibre building board originating in Brazil, *O.J.*, 19 February 1983, No L 47/30 ; Commission Regulation (EEC) No 909/85 of 2 April 1985 imposing a provisional anti-dumping duty on imports of certain kinds of polystyrene sheet originating in Spain, *O.J.*, 4 April 1985, No L 97/30 ; Commission Decision 85/501/ECSC of 11 November 1985 terminating the anti-dumping proceeding concerning imports of wire rod originating in Brazil, Portugal, Trinidad and Tobago and Venezuela, *O.J.*, 13 November 1985, No L 299/18.

different according to the destination of the product, the comparison between normal value and export price at a level net of indirect taxes and import charges, will not be distorted by differences in taxation.

Though in most cases, the choice between either reduction of normal value or increase of the export price by the amount of the tax, is neutral, the new rule poses a problem, when domestically produced materials are used to manufacture the final product consumed in the domestic market of the exporting country, but when imported materials, subject to import charges, are used to manufacture the exported product. Even if these import duties were refunded on exports, no adjustment can be made under European anti-dumping law because no import charges are borne by the materials physically incorporated in the product consumed in the exporting country⁸⁷⁵.

European anti-dumping law does not explicitly connect taxes with refunds. The amount refunded in respect of the product exported to the Community may be either smaller or higher than the amount of taxes collected on the product exported. In the first case, the reduction of normal value by the full amount of the tax collected on the products and inputs sold on the domestic market of the country of origin or export, results in a dumping margin which is lower than the real dumping margin. This case, however, does not pose any legal problem as GATT anti-dumping law does not require that all instances of dumping be sanctioned.

In the second case, if the refund is higher than the amount of the tax, an export subsidy will be sanctioned under anti-dumping law⁸⁷⁶. There may be a problem, here since, under GATT law, export subsidies may be sanctioned only by countervailing duty law, whereas anti-dumping law must be aimed exclusively at sanctioning (injurious) dumping⁸⁷⁷. European anti-dumping authorities cannot solve this problem, even when they ensure that the amount of the adjustment

⁸⁷⁵ Commission Regulation (EEC) No 2684/88 of 26 August 1988 imposing a provisional anti-dumping duty on certain imports of video cassette recorders originating in Japan and the Republic of Korea, *O.J.*, 31 August 1988, No L 240/5 ; Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1 ; BELLIS, J.-F., VERMULST, E., and WAER, P., «Further Changes in the EEC Anti-Dumping Regulation : A Codification of Controversial Methodologies», *Journal of World Trade Law*, 1989, (21), 28.

⁸⁷⁶ UGONIS, M., and PUIFFERRAT, J., «La nouvelle législation anti-dumping de la Communauté Européenne», *Revue du Marché Commun*, 1982, (117), 118.

⁸⁷⁷ Commission Decision 84/512/EEC of 23 October 1984 accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of paraformaldehyde originating in Spain and terminating the investigation, *O.J.*, 26 October 1984, No L 282/58.

does not exceed the amount of the refund⁸⁷⁸. Under prior European anti-dumping law, though, they could avoid the sanction of export subsidies by means of anti-dumping law. For, in making adjustments for import charges and indirect taxes, they could add the refunded tax amount to the export price. If they chose to adjust the export price, adjustment had to be made for the amount refunded or for the amount which would have been collected if exports were not tax-exempted. Thus, if a too large amount was refunded and added to the export price, the export subsidy would not influence the dumping finding and anti-dumping law would not sanction any export subsidy. Under prior European anti-dumping law, European anti-dumping authorities, therefore, considered the question of possible export subsidization irrelevant in their dumping investigation⁸⁷⁹.

5. DUMPING MARGIN

5.1. DEFINITION

European anti-dumping law defines the dumping margin as the amount by which normal value exceeds the export price (Article 2(12) basic EC Regulation ; Article 2(14)(a) basic ECSC Decision). Instances of reverse dumping, *i.e.*, when normal value does not exceed the export price, should not be taken into account. The definition of the dumping margin is neutral in cases where the exporter's normal value always exceeds his export price, as well as in cases where his normal value never exceeds his export price. However, this is not so, in cases where the normal value of an exporter at times exceeds his export price, but then again does not exceed his export price. Indeed, when dumping margins vary, a weighted average dumping margin may be

⁸⁷⁸ Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7 ; Council Regulation (EEC) No 830/92 of 30 March 1992 imposing a definitive anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and collecting definitively the provisional duty, *O.J.*, 3 April 1992, No L 88/1 (corrigendum, *O.J.*, 5 June 1992, No L 153/16) ; Council Regulation (EEC) No 54/93 of 8 January 1993 imposing a definitive duty on imports of synthetic fibres of polyesters originating in India and the Republic of Korea, *O.J.*, 15 January 1993, No L 9/2.

⁸⁷⁹ Commission Decision 81/430/EEC of 15 June 1981 terminating the anti-dumping proceeding concerning imports of certain seamless tubes or non-alloy steels originating in Spain, *O.J.*, 23 June 1981, No L 165/27 ; Commission Regulation (EEC) No 2127/82 of 28 July 1982 imposing a provisional anti-dumping duty on trichloroethylene originating in the German Democratic Republic and Poland and terminating the anti-dumping proceeding in respect of trichloroethylene originating in Czechoslovakia, Romania, Spain and the United States of America, *O.J.*, 31 July 1982, No L 223/76 ; Commission Decision 82/881/EEC of 23 December 1982 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of perchlorethylene originating in Czechoslovakia, Romania, Spain and the United States of America and terminating that proceeding, *O.J.*, 30 December 1982, No L 371/47 ; Commission Decision 84/512/EEC of 23 October 1984 accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of paraformaldehyde originating in Spain and terminating the investigation, *O.J.*, 26 October 1984, No L 282/58.

established (Article 2(12) basic EC Regulation ; Article 2(14)(b) basic ECSC Decision)⁸⁸⁰. Disregarding the cases of reverse dumping increases the weighted average dumping margin, as will be demonstrated⁸⁸¹ because these cases cannot compensate the cases where normal value exceeds the export price.

Moreover, not only cases of reverse dumping, but also cases of low dumping may be disregarded. If in the majority of cases specific dumping margins are low, the weighted average dumping margin will also be low. The few cases with high dumping margins will then have only a marginal effect on the weighted average dumping margin. But even if a low weighted average dumping margin is established, the exporters may still be sanctioned. European anti-dumping authorities are not obliged to look only at the weighted average dumping margin. For European anti-dumping law states that «(w)here dumping margins vary, weighted averages *may* be established» (Article 2(12) basic EC Regulation ; Article 2(14)(b) basic ECSC Decision) (emphasis added). Thus, they can look at specific dumping margins. If some of these specific dumping margins are rather high, it is possible that anti-dumping relief will be granted⁸⁸².

5.2. AVERAGING TECHNIQUE VERSUS TRANSACTION-BY-TRANSACTION BASIS

Under GATT and EC anti-dumping law, the dumping margin must be calculated by means of a comparison of a weighted average normal value with weighted average export price, or of a comparison of individual normal values and individual export prices on a transaction-by-transaction basis. A weighted average normal value may only be compared with individual export prices if there is «a pattern of export prices which differ significantly among different purchasers,

⁸⁸⁰ See e.g. : *chemical fertilizer from the United States of America*, where «for brokers who may buy the product from various United States' producers for export to the EEC (...), the dumping margin was determined as being the weighted average dumping margin of those companies investigated which were found to have been dumping» (Council Regulation (EEC) No 349/81 of 9 February 1981 imposing a definitive anti-dumping duty on certain chemical fertilizer originating in the United States of America, *O.J.*, 12 February 1981, No L 39/4).

⁸⁸¹ *Infra*, 323-324.

⁸⁸² For example, in *silicon carbide from Norway* (Commission Decision 86/497/EEC of 7 October 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of silicon carbide originating in the People's Republic of China, Norway, Poland and the USSR, and terminating the investigation regarding imports of that product originating in the People's Republic of China, Norway, Poland, Czechoslovakia, the USSR and Yugoslavia, *O.J.*, 10 October 1986, No L 287/25) the average weighted dumping margin for one of the three Norwegian exporters amounted only to 1.7 %, a dumping margin which usually is considered to be a *de minimis* dumping margin not causing any injury to the Community industry (*infra*, 563-567). The Commission, nevertheless, considered the Norwegian exporter in question to be causing injury to the Community industry and, thus, deemed anti-dumping relief necessary because «while overall dumping levels may have been found to be modest, this could not be said of certain specific levels». In particular, specific dumping margins amounting to 40.6 % and 14.6 % had been established in respect of two special categories of silicon carbide representing 35 % of total Norwegian exports of silicon carbide to the Community. See also : Commission Regulation (EEC) No 2865/85 of 14 October 1985 imposing a provisional anti-dumping duty on imports of certain electronic scales originating in Japan and accepting undertakings and terminating the proceeding in respect of certain imports of such products originating in Japan, *O.J.*, 16 October 1985, No L 275/5.

regions or time-periods». Under GATT anti-dumping law an explanation must be provided why such differences cannot be taken into account by the use of a weighted average-to-weighted average or transaction-to-transaction comparison. Pursuant to EC-anti-dumping law, that explanation should always be the fact that the normal methods of comparison do not reflect the full degree of dumping being practised (Article 2.4.2. GATT Anti-dumping Code ; Article 2(11) basic EC Regulation). It is not yet clear whether the exception will not be abused. It is, indeed, the question whether the European anti-dumping authorities will consider that the weighted average-to-weighted average comparison will reflect the full degree of dumping if there are individual instances of reverse dumping. Moreover, it seems that if the transaction-to-transaction comparison is applied, the instances of reverse dumping will be ignored because of the definition of the dumping margin, though there is no evidence that the exporter is practising reverse dumping merely to circumvent the application of anti-dumping law.

Nevertheless, the new GATT and EC provisions on the use of averaging techniques and the transaction-to-transaction comparison are a welcome development compared to prior EC anti-dumping and present ECSC anti-dumping law, which is at variance with GATT anti-dumping law and enhances the finding of high dumping margins. With regard to normal value, ECSC anti-dumping law provides that, when prices vary, normal value should «normally be established on a weighted average basis» (Article 2(13) basic ECSC Decision). When prices vary, export prices should, however, normally be compared with the normal value on a transaction-by-transaction basis except where the use of weighted averages would not materially affect the results of the investigation (Article 2(13) basic ECSC Decision)⁸⁸³.

⁸⁸³ Commission Regulation (EEC) No 2051/90 of 17 July 1990 imposing a temporary anti-dumping duty on imports of woven polyolefin bags originating in the People's Republic of China, *O.J.*, 19 July 1990, No L 187/36 (corrigendum, *O.J.*, 20 September 1990, No L 256/38) ; Council Regulation (EEC) No 2685/90 of 17 September 1990 amending Regulation (EEC) No 2089/84 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 20 September 1990, No L 256/1 (corrigendum, *O.J.*, 10 January 1991, No L 7/38) ; Commission Decision 91/256/EEC of 14 May 1991 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of welded wire-mesh originating in Yugoslavia and terminating the investigation, *O.J.*, 18 May 1991, No L 123/54 ; Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50.

However, in some anti-dumping cases weighted average export prices have been used - which may possibly include export prices above normal value - without it having been shown that their use did not affect the results of the investigation (Commission Regulation (EEC) No 1321/81 of 15 May 1981 amending Regulation (EEC) No 384/81 imposing a provisional anti-dumping duty on styrene monomer originating in the United States of America, *O.J.*, 19 May 1981, No L 132/17 ; Commission Regulation (EEC) No 2317/85 of 12 August 1985 imposing a provisional anti-dumping duty on imports of roller chains for cycles originating in the USSR and the People's Republic of China, *O.J.*, 14 August 1985, No L 217/7 ; Commission Decision 86/36/EEC of 26 February 1986 accepting undertakings entered into in connection with the anti-dumping proceeding concerning imports into Greece of certain categories of glass originating in Turkey, Yugoslavia, Romania, Bulgaria, Hungary and Czechoslovakia and terminating the investigation, *O.J.*, 28 February 1986, No L 51/73 ; Commission Regulation (EEC) No 3019/86 of 30 September 1986 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania and the USSR, *O.J.*, 1 October 1986, No L 280/68 ; Council Regulation (EEC) No 864/87 of 23 March 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union, and definitively collecting the amounts secured as provisional duties, *O.J.*, 27 March 1987, No L 83/1 ; Commission Regulation (EEC) No 1043/87 of 10 April 1987 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Yugoslavia, *O.J.*, 14 April 1987, No L 102/5 ; Commission Regulation (EEC) No 1537/90 of 28 May 1990 imposing a provisional anti-dumping duty on imports of potassium

ECSC anti-dumping law, thus, does not require that the methods chosen for calculating the normal value and the export price should be similar or identical⁸⁸⁴. On the contrary, it expresses a strong preference for an asymmetric approach : when prices vary, weighted average normal value should be compared to the export prices on a transaction-by-transaction basis. Notwithstanding this preference, the European anti-dumping authorities are free to choose the most appropriate method for calculating the dumping margin and that choice requires an appraisal of complex economic situations⁸⁸⁵.

The preference for this asymmetric approach results from the definition of the dumping margin, according to which the dumping margin is the amount by which normal value exceeds the export price (Article 2(14)(a) basic ECSC Decision). Indeed, in *ball bearings from Japan and Singapore*⁸⁸⁶ the European anti-dumping authorities noted that :

«(...) it (has been) argued that 'negative' dumping margins should compensate for positive margins which, as a result, would have allowed for dumping to continue on a substantial scale. In order to clarify the situation, the Council, by Regulation (EEC) No. 1681/79, modified the then existing legislation by laying down that the dumping margin was the amount by which the normal value exceeded the export price, thus ruling out the concept of a 'negative' dumping margin.

A comparison of the normal value with a weighted average export price, comprising dumped and non-dumped sales, would be in contradiction with the Council's amendment of the Community's anti-dumping legislation. Therefore, it has been a consistent practice of the Commission not to use weighted average export prices for the determination of the dumping margin, except in cases where, for administrative reasons, it was not considered feasible to employ the transaction-by-transaction

permanganate originating in the USSR, *O.J.*, 8 June 1990, No L 145/9).

In one anti-dumping case the use of weighted average export prices was motivated by the fact that the volume of transactions was so large that a transaction-by-transaction analysis would have unduly delayed the taking of a provisional decision (Commission Regulation (EEC) No 3643/84 of 20 December 1984 imposing a provisional anti-dumping duty on imports of electronic typewriters originating in Japan and terminating the anti-dumping proceeding with regard to Nakajima All Co. Ltd, *O.J.*, 22 December 1984, No L 335/43). In another anti-dumping case weighted average export prices were used in so far as their use did not affect the results of the investigation (Council Regulation (EEC) No 2685/90 of 17 September 1990 amending Regulation (EEC) No 2089/84 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 20 September 1990, No L 256/1 (corrigendum, *O.J.*, 10 January 1991, No L 7/38)). In a third anti-dumping case, monthly average export prices were used in view of the necessity of using the official Community statistics for the determination of the export prices (Commission Regulation (EEC) No 1537/90 of 28 May 1990 imposing a provisional anti-dumping duty on imports of potassium permanganate originating in the USSR, *O.J.*, 8 June 1990, No L 145/9).

884 C.J.E.C., case 240/84, 7 May 1987, *NTN Toyo Bearing Company Limited a.o. v Council*, E.C.R., 1987, (1809), 1854 ; C.J.E.C., case 255/84, 7 May 1987, *Nachi Fujikoshi Corporation v Council*, E.C.R., 1987, (1861), 1889 ; C.J.E.C., case 258/84, 7 May 1987, *Nippon Seiko KK v Council*, E.C.R., 1987, (1932), 1963-1964 ; C.J.E.C., case 260/84, 7 May 1987, *Minebea Company Limited v Council*, E.C.R., 1987, (1975), 2003-2004 ; C.J.E.C., case C-178/87, 10 March 1992, *Minolta Camera Co. Ltd v Council*, E.C.R., 1992, I, (1577), 1631.

885 C.J.E.C., case 240/84, 7 May 1987, *NTN Toyo Bearing Company Limited a.o. v Council*, E.C.R., 1987, (1809), 1854-1855 ; C.J.E.C., case 255/84, 7 May 1987, *Nachi Fujikoshi Corporation v Council*, E.C.R., 1987, (1861), 1890-1891 ; C.J.E.C., case 258/84, 7 May 1987, *Nippon Seiko KK v Council*, E.C.R., 1987, (1932), 1964-1965 ; C.J.E.C., case 260/84, 7 May 1987, *Minebea Company Limited v Council*, E.C.R., 1987, (1975), 2006 ; C.J.E.C., case C-178/87, 10 March 1992, *Minolta Camera Co. Ltd v Council*, E.C.R., 1992, I, (1577), 1618 (Opinion of Advocate General MISCHO) and 1631.

886 Council Regulation (EEC) No 2089/84 of 19 July 1984 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 21 July 1984, No L 193/1.

method or where the averaging of export prices would have had no effect on the overall outcome of the proceedings.»⁸⁸⁷.

The European anti-dumping authorities' considerations were confirmed by the Court of Justice in the second *Japanese ball bearings cases*⁸⁸⁸ where it stated :

«The transaction-by-transaction method is the only method capable of dealing with certain manoeuvres in which dumping is disguised by charging different prices, some above the normal value, and some below it. The application of the weighted average method in such a situation would not meet the purpose of the anti-dumping proceeding, since that method would in essence mask sales at dumping prices by those at what are known as "negative" dumping prices, and would thus in no way eliminate the injury suffered by the Community industry concerned.»

The Court of Justice, however, did not confine the asymmetric approach to cases where the exporter has been guilty of manoeuvres aimed at disguising dumping⁸⁸⁹.

The Court of Justice and the European anti-dumping authorities are legally correct in the light of the definition of the dumping margin provided under ECSC anti-dumping law. Still, it is true that the asymmetric approach disadvantages the exporters : it may inflate the dumping margin, for no credit is given for export sales above normal value⁸⁹⁰. It may even result in a finding of dumping, although the exporter actually does not dump. A numerical example shows how this happens. Assume an exporter who has made three sales operations on his domestic market ; at the same time, he has also exported three times to the Community :

⁸⁸⁷ See also : C.J.E.C., case C-178/87, 10 March 1992, *Minolta Camera Co. Ltd v Council*, E.C.R., 1992, I, (1577), 1601 (Report for the Hearing : conclusions of the Council) ; Commission Decision 86/497/EEC of 7 October 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of silicon carbide originating in the People's Republic of China, Norway, Poland and the USSR, and terminating the investigation regarding imports of that product originating in the People's Republic of China, Norway, Poland, Czechoslovakia, the USSR and Yugoslavia, O.J., 10 October 1986, No L 287/25 ; Council Regulation (EEC) No 374/87 of 5 February 1987 definitively collecting the provisional anti-dumping duty and imposing a definitive anti-dumping duty on imports of housed bearing units originating in Japan, O.J., 6 February 1987, No L 35/32.

⁸⁸⁸ C.J.E.C., case 240/84, 7 May 1987, *NTN Toyo Bearing Company Limited a.o. v Council*, E.C.R., 1987, (1809), 1855 ; C.J.E.C., case 255/84, 7 May 1987, *Nachi Fujikoshi Corporation v Council*, E.C.R., 1987, (1861), 1891 ; C.J.E.C., case 258/84, 7 May 1987, *Nippon Seiko KK v Council*, E.C.R., 1987, (1923), 1965 ; C.J.E.C., case 260/84, 7 May 1987, *Minebea Company Limited v Council*, E.C.R., 1987, (1975), 2006.

⁸⁸⁹ C.J.E.C., case C-178/87, 10 March 1992, *Minolta Camera Co. Ltd v Council*, E.C.R., 1992, I, (1577), 1619 (Opinion of Advocate General MISCHO) and 1631.

⁸⁹⁰ PETERSMANN, E.-U., «Need for Reforming Antidumping Rules and Practices. The Messy World of Fourth-Best Policies», *Aussenwirtschaft*, 1990, (179), 189 ; VAN BAEL, I., «EEC Anti-Dumping Law and Procedure Revisited», *Journal of World Trade*, 1990/2, (5), 7 ; VAN BAEL, I., and BELLIS, J.-F., *Anti-Dumping and other Trade Protection Laws of the EEC*, Bicester, CCH Editions, 1990, 110-111 ; VERMULST, E.A., and GRAAFSMA, F., «A Decade of European Community Anti-Dumping Law and Practice Applicable to Imports from China», *Journal of World Trade*, 1992/3, (5), 26 ; VERMULST, E.A., and WAER, P., «Noot onder Hof van Justitie der Europese Gemeenschappen, zaken 240/84 NTN Toyo Bearing Company Ltd. ; 255/84 Nachi Fujikoshi Corporation ; 216/84 Koyo Seiko ; 258/84 Nippon Seiko KK en 260/84 Minebea Company Ltd. vs Raad EG», S.E.W., 1988, (106), 113.

date of sale	normal value	export price
t_1	10	10
t_2	8	8
t_3	12	12

When both normal value and export price are compared on a transaction-by-transaction basis, no dumping will be found. If, however, the weighted average normal value, which equals 10, is compared to the export prices on a transaction-by-transaction basis, the exporter will be found not to practise dumping at time t_1 , to practise dumping, at a dumping margin of 2, at time t_2 , and to practise reverse dumping, at a dumping margin of -2, at time t_3 . If all those instances are taken into account, the weighted average dumping margin equals zero ($= [0+2+(-2)]/3$). However, under European anti-dumping law, the dumping margin for instances of reverse dumping necessarily equals zero. As a consequence, the weighted average dumping margin equals $2/3$ ($= [0+2+0]/3$), though the exporter does not actually practise dumping.

Clearly, it should not be the purpose, nor the result of ECSC anti-dumping law to find dumping where it is not being practised. Hence, the asymmetric approach, along with the disregard of reverse dumping, should be repealed : in principle, the methods for calculating the normal value and the export price should be identical and all export transactions should be taken into account, including the instances of reverse dumping, unless there is conclusive evidence that the exporter practices reverse dumping merely in order to circumvent the application of anti-dumping law. Moreover, since this suggestion is precisely the content of the GATT Anti-dumping Code (Article 2.4.2.), ECSC anti-dumping law will have to be amended in this sense.

5.3. *SAMPLING TECHNIQUES*

When a large number of complainants, exporters or importers, types of product or transactions is involved, the European anti-dumping authorities may, in EC anti-dumping proceedings, limit their examination to a reasonable number of parties, products or transactions by using samples which are statistically valid on the basis of the information available at the time of the selection, or to the largest representative volume of production, sales or exports which can reasonably be investigated within the time available (Article 17(1) basic EC Regulation). In this respect, EC anti-dumping law is an exact copy of GATT anti-dumping law (Article 6(10) GATT Anti-dumping Code). In ECSC anti-dumping proceedings, the European anti-dumping authorities may, when prices vary, resort to sampling techniques, *e.g.*, the use of the most frequently occurring or representative prices may be applied to establish normal value and export prices in cases in which a significant volume of transactions is involved (Article 2(13) basic ECSC Decision).

EC and ECSC sampling differ in that, under ECSC anti-dumping law, sampling may be resorted to if two conditions are met : there must be a significant volume of transactions and prices must also vary. EC anti-dumping law does not require price variability, but rather a large number of parties. EC anti-dumping law seems more practicable as it does not oblige the European anti-dumping authorities to examine and show whether prices vary. Though, ECSC anti-dumping law refers to «the most occurring or representative prices», its representativeness requirement applies also to a sample of parties or transactions : samples of, for instance, exporters must also be representative⁸⁹¹. Indeed, as EC anti-dumping law, ECSC anti-dumping law also allows sampling of products and interested parties⁸⁹² since it holds up price sampling as an example⁸⁹³.

The representativeness requirement indicates that sampling techniques should not affect the magnitude of the dumping margin. If the latter is correct, they should not be used as an alternative method for adjustments required to ensure a fair comparison between normal value and export price. Probably, therefore, the European anti-dumping authorities have refused to make restricted samples of transactions taking place on the domestic market of the exporting country, which, in terms of quantity, resemble export transactions⁸⁹⁴, and, in so doing, have rejected sampling as a substitute for adjustments for differences in quantity.

⁸⁹¹ Commission Regulation (EEC) No 2818/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports of cotton yarn originating in Brazil, Egypt and Turkey and terminating the anti-dumping proceeding in respect of cotton yarn originating in India and Thailand, *O.J.*, 27 September 1991, No L 271/17 ; Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7 ; Council Regulation (EEC) No 738/92 of 23 March 1992 imposing a definitive anti-dumping duty on imports of cotton yarn originating in Brazil and Turkey, *O.J.*, 27 March 1992, No L 82/1 ; Commission Decision No 67/94/ECSC of 12 January 1994 imposing a provisional anti-dumping duty on imports into the Community of hematite pig iron, originating in Brazil, Poland, Russia and Ukraine, *O.J.*, 15 January 1994, No L 12/5.

⁸⁹² For an application, see : Commission Regulation (EEC) No 2818/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports of cotton yarn originating in Brazil, Egypt and Turkey and terminating the anti-dumping proceeding in respect of cotton yarn originating in India and Thailand, *O.J.*, 27 September 1991, No L 271/17 ; Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7 ; Council Regulation (EEC) No 738/92 of 23 March 1992 imposing a definitive anti-dumping duty on imports of cotton yarn originating in Brazil and Turkey, *O.J.*, 27 March 1992, No L 82/1 ; Council Regulation (EEC) No 830/92 of 30 March 1992 imposing a definitive anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and collecting definitively the provisional duty, *O.J.*, 3 April 1992, No L 88/1 (corrigendum, *O.J.*, 5 June 1992, No L 153/16) ; Commission Regulation (EEC) No 550/93 of 5 March 1993 imposing a provisional anti-dumping duty on imports of bicycles originating in the People's Republic of China, *O.J.*, 11 March 1993, No L 58/12 ; Commission Decision No 67/94/ECSC of 12 January 1994 imposing a provisional anti-dumping duty on imports into the Community of hematite pig iron, originating in Brazil, Poland, Russia and Ukraine, *O.J.*, 15 January 1994, No L 12/5.

⁸⁹³ See the wordings «*e.g.*» in Article 2(13) basic ECSC Decision.

⁸⁹⁴ Commission Regulation (EEC) No 997/85 of 18 April 1985 imposing a provisional anti-dumping duty on imports of glycine originating in Japan, *O.J.*, 19 April 1985, No L 107/8 ; Council Regulation (EEC) No 2322/85 of 12 August 1985 imposing a definitive anti-dumping duty on imports of glycine originating in Japan, *O.J.*, 15 August 1985, No L 218/1 ; Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1.

However, there are anti-dumping cases in which sampling techniques have been used instead of adjustments. Thus, a number of product types sold on the domestic market of the exporting country with features that were sufficiently akin to those of the exported product types, have been chosen. The European anti-dumping authorities made this sample in order to determine the normal value, so as to allow a valid price comparison to be made, without it being necessary to make adjustments that were that great or that complex that it would be impossible to make a reasonable estimate of the value of any differences in their physical features⁸⁹⁵. Also selective normal value determination, which is in fact a sampling technique, has been applied in order to adjust prices because of differences in the level of trade due to differences on the demand side⁸⁹⁶. Though such sampling should, as a matter of principle, be rejected, it, admittedly, renders European anti-dumping law more in conformity with GATT anti-dumping law. Indeed, in the first case, it leads to a more accurate determination of the dumping margin since the value of differences in physical characteristics will not have to be assessed - at least insofar as the selected product types are representative. In the second case, ECSC anti-dumping law does not allow adjustments for differences in quantities nor for differences in the level of trade due to differences on the demand side (*i.e.*, different kinds of buyers : distributors, OEMs, retailers, end-users). In this respect, ECSC anti-dumping law goes against GATT anti-dumping law which requires that adjustments are made for all differences which affect price comparability⁸⁹⁷.

ECSC anti-dumping law does not lay down how the results from sampling should be used. It seems, however, to be consistent case law to use the weighted average dumping margin established in respect of the selected exporters as the dumping margin of the not selected

⁸⁹⁵ Commission Regulation (EEC) No 313/92 of 4 February 1992 imposing a provisional anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in South Korea, *O.J.*, 11 February 1992, No L 34/8.

⁸⁹⁶ *Supra*, 276-279.

⁸⁹⁷ *Supra*, 276-279 and 283.

(cooperating) exporters⁸⁹⁸ and to use the dumping margin established in respect of the sample of products as dumping margin for the whole range of products⁸⁹⁹.

GATT and EC anti-dumping law, on the other hand, specify how the results of the sampling must be used. Pursuant to them, the exporters included in the sample will get their individual dumping margin, whereas the weighted average dumping margin of the sampled exporters, excluding the weight of exporters with zero or *de minimis* dumping margins and excluding the dumping margins established in respect of uncooperating exporters (see : Article 6.8. GATT Anti-dumping Code ; Article 18 basic EC Regulation), will be applied to the other exporters (Article 9.4. GATT Anti-dumping Code ; Article 9(6) basic EC Regulation)). The latter specification increases the dumping margin for non-sampled exporters when compared with ECSC anti-dumping case law which takes account of zero and *de minimis* dumping margins in assessing the weighted average dumping margin and which apparently has not included the dumping margin established in respect

⁸⁹⁸ Commission Regulation (EEC) No 2818/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports of cotton yarn originating in Brazil, Egypt and Turkey and terminating the anti-dumping proceeding in respect of cotton yarn originating in India and Thailand, *O.J.*, 27 September 1991, No L 271/17 ; Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7 ; Council Regulation (EEC) No 738/92 of 23 March 1992 imposing a definitive anti-dumping duty on imports of cotton yarn originating in Brazil and Turkey, *O.J.*, 27 March 1992, No L 82/1 ; Council Regulation (EEC) No 830/92 of 30 March 1992 imposing a definitive anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and collecting definitively the provisional duty, *O.J.*, 3 April 1992, No L 88/1 (corrigendum, *O.J.*, 5 June 1992, No L 153/16) ; Commission Regulation (EEC) No 550/93 of 5 March 1993 imposing a provisional anti-dumping duty on imports of bicycles originating in the People's Republic of China, *O.J.*, 11 March 1993, No L 58/12.

⁸⁹⁹ C.J.E.C., case C-171/87, 10 March 1992, *Canon Inc. v Council*, *E.C.R.*, 1992, I, (1237), 1290. See e.g. : Council Regulation (EEC) No 1739/85 of 24 June 1985 imposing a definitive anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan, *O.J.*, 27 June 1985, No L 167/3 ; Council Regulation (EEC) No 2685/90 of 17 September 1990 amending Regulation (EEC) No 2089/84 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 20 September 1990, No L 256/1 (corrigendum, *O.J.*, 10 January 1991, No L 7/38) ; Council Regulation (EEC) No 2685/90 of 17 September 1990 amending Regulation (EEC) No 2089/84 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 20 September 1990, No L 256/1 (corrigendum, *O.J.*, 10 January 1991, No L 7/38) ; Commission Decision No 891/92/ECSC of 30 March 1992 imposing a provisional anti-dumping duty on imports of certain semi-finished products of alloy steel, originating in Turkey and Brazil, *O.J.*, 9 April 1992, No L 95/26 ; Commission Regulation (EEC) No 1956/92 of 7 July 1992 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in India and the Republic of Korea, *O.J.*, 16 July 1992, No L 197/25 ; Council Regulation (EEC) No 3482/92 of 30 November 1992 imposing a definitive anti-dumping duty on imports of certain large electrolytic aluminium capacitors originating in Japan and collecting definitively the provisional anti-dumping duty, *O.J.*, 3 December 1992, No L 353/1 (corrigendum, *O.J.*, 28 January 1993, No L 19/34).

of uncooperating exporters⁹⁰⁰. Irrespective of its negative effect on non-sampled exporters, this specification should be repealed because there is no reason why zero and *de minimis* dumping margins should not be taken into account in respect of cooperating non-sampled exporters, especially since sampling is already unfavourable to non-sampled exporters which do not or only marginally practise dumping.

5.4. FACTS AVAILABLE

Sometimes, the European anti-dumping authorities do not have the necessary information to establish the dumping margin, either because the exporters did not cooperate or because they remained unknown. Then they must determine the dumping margin on the basis of the information available (Article 6.8. and Annex II GATT Anti-dumping Code ; Article 18 basic EC Regulation ; Article 7(7)(b) basic ECSC Decision). In most anti-dumping cases, the highest dumping margin established by the European anti-dumping authorities in respect of cooperating exporters⁹⁰¹ is used as the best information available. This is considered to be the most

900 Commission Regulation (EEC) No 2818/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports of cotton yarn originating in Brazil, Egypt and Turkey and terminating the anti-dumping proceeding in respect of cotton yarn originating in India and Thailand, *O.J.*, 27 September 1991, No L 271/17 ; Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7 ; Council Regulation (EEC) No 738/92 of 23 March 1992 imposing a definitive anti-dumping duty on imports of cotton yarn originating in Brazil and Turkey, *O.J.*, 27 March 1992, No L 82/1 ; Council Regulation (EEC) No 830/92 of 30 March 1992 imposing a definitive anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and collecting definitively the provisional duty, *O.J.*, 3 April 1992, No L 88/1 (corrigendum, *O.J.*, 5 June 1992, No L 153/16) ; Commission Regulation (EEC) No 550/93 of 5 March 1993 imposing a provisional anti-dumping duty on imports of bicycles originating in the People's Republic of China, *O.J.*, 11 March 1993, No L 58/12.

According to P. WAER and E. VERMULST, sometimes zero and *de minimis* dumping margins are disregarded in order to establish the weighted average dumping margin for non-sampled exporters. However, they do not provide information of such cases (WAER, P., and VERMULST, E., «EC Anti-Dumping Law and Practice after the Uruguay Round. A New Lease of Life ?», *Journal of World Trade*, 1994/2, (5), 17).

901 In principle, the dumping margin used for non-cooperating or unknown exporters equals the dumping margin established in respect of the cooperating exporters. Sometimes, however, there may be a difference. For example, when adjustments necessary for a fair comparison between normal value and export price (see Article 2(10) basic EC Regulation ; Article 2(9) and (10) basic ECSC Decision) were carried out as claimed and proved by the cooperative exporters, which lower the dumping margin, these adjustments will not be allowed for with regard to non-cooperating and unknown exporters and a higher dumping margin will be established in their respect (Council Regulation (EEC) No 3836/91 of 19 December 1991 imposing a definitive anti-dumping duty on imports of dihydrostreptomycin originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty, *O.J.*, 31 December 1991, No 362/1). Their disregard complies with European anti-dumping law which provides for such adjustments only when an interested party claims them and proves its claim is justified (Article 2(10) basic EC Regulation ; Article 2(9) basic ECSC Decision). Obviously, exporters who do not cooperate or do not make themselves known, can hardly be said to have claimed and justified any such adjustment.

appropriate method, as any lower dumping margin would constitute a bonus for non-cooperation or create an opportunity for circumvention⁹⁰².

Exceptionally, European anti-dumping authorities have adopted another approach for non-cooperating or unknown exporters. In some instances, the dumping margin for these exporters was deemed equal to the highest dumping margin in the complaint⁹⁰³ (if necessary, adjusted on the basis of studies by international organizations or data submitted by other producers established in the exporting country than those investigated⁹⁰⁴), or another dumping margin is calculated on the basis of the product types most sold for export by the cooperating exporters⁹⁰⁵. In review proceedings, the dumping margin established during the original proceeding has also been used⁹⁰⁶. The dumping margin thus used, is always higher than the highest dumping margin established by the European anti-dumping authorities with regard to cooperating exporters. There

902 See e.g. : Commission Regulation (EEC) No 1451/92 of 2 June 1992 imposing a provisional anti-dumping duty on imports into the Community of certain large electrolytic aluminium capacitors originating in Japan, *O.J.*, 4 June 1992, No L 152/22 (corrigendum, *O.J.*, 17 June 1992, No L 163/27); Commission Regulation (EC) No 1506/94 of 27 June 1994 imposing provisional duties on imports of urea ammonium nitrate solution originating in Bulgaria and Poland, *O.J.*, 30 June 1994, No L 162/16. See also : BOURGEOIS, J.H.J., «EC Anti-dumping Enforcement - Selected Second Generations Issues», in *Antitrust and Trade Policy in the United States and the European Community*, HAWK, B.E. (ed.), New York, Bender, 1986, (563), 595-596.

903 Commission Regulation (EEC) No 2005/88 of 5 July 1988 imposing a provisional anti-dumping duty on imports of serial impact fully formed character printers originating in Japan, *O.J.*, 8 July 1988, No L 177/1 ; Council Regulation (EEC) No 34/89 of 5 January 1989 imposing a definitive anti-dumping duty on imports of serial impact fully formed (SIFF) character printers originating in Japan, *O.J.*, 7 January 1989, No L 5/23 ; Council Regulation (EEC) No 501/89 of 27 February 1989 imposing a definitive anti-dumping duty on imports of certain video cassette recorders originating in Japan and the Republic of Korea and definitively collecting the provisional duty, *O.J.*, 28 February 1989, No L 57/55 ; Commission Regulation (EEC) No 2805/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports into the Community of certain thermal paper originating in Japan, *O.J.*, 26 September 1991, No L 270/15 ; Commission Regulation (EC) No 534/94 of 9 March 1994 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, *O.J.*, 11 March 1994, No L 68/5.

904 Council Regulation (EEC) No 830/92 of 30 March 1992 imposing a definitive anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and collecting definitively the provisional duty, *O.J.*, 3 April 1992, No L 88/1 (corrigendum, *O.J.*, 5 June 1992, No L 153/16).

905 Commission Regulation (EEC) No 313/92 of 4 February 1992 imposing a provisional anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in South Korea, *O.J.*, 11 February 1992, No L 34/8 ; Council Regulation (EEC) No 2306/92 of 4 August 1992 imposing a definitive anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in the Republic of Korea, *O.J.*, 7 August 1992, No L 222/8 (corrigendum, *O.J.*, 21 January 1993, No L 13/20).

906 Council Regulation (EEC) No 407/83 of 21 February 1983 amending Regulation (EEC) No 3439/80 imposing a definitive anti-dumping duty on imports of certain polyester yarn originating in the United States of America, *O.J.*, 23 February 1983, No L 50/1 ; Council Regulation (EEC) No 485/83 of 28 February 1983 amending Regulation (EEC) No 1100/80 imposing a definitive anti-dumping duty on certain acrylic fibres originating in the United States of America, *O.J.*, 2 March 1983, No L 55/1 ; Council Regulation (EEC) No 905/83 of 18 April 1983 amending Regulation (EEC) No 2940/81 imposing a definitive anti-dumping duty on p-xylene (paraxylene) originating in Puerto Rico, the United States of America and the United States Virgin Islands, *O.J.*, 20 April 1983, No L 101/1 ; Council Regulation (EEC) No 906/83 of 18 April 1983 amending Regulation (EEC) No 2761/81 imposing a definitive anti-dumping duty on o-xylene (ortho-xylene) originating in Puerto Rico and the United States of America, *O.J.*, 20 April 1983, No L 101/4 ; Council Regulation (EEC) No 2275/84 of 1 August 1984 amending Regulation (EEC) No 1100/80 imposing a definitive anti-dumping duty on certain acrylic fibres originating in the United States of America, *O.J.*, 4 August 1984, No L 209/1 ; Council Regulation (EEC) No 2585/85 of 12 September 1985 amending Regulation (EEC) No 3439/80 imposing a definitive anti-dumping duty on imports of certain polyester yarn originating in the United States of America, *O.J.*, 13 September 1985, No L 246/57.

is, though, an exception where the dumping margin of unknown exporters was determined as being the average weighted dumping margin of the dumping exporters⁹⁰⁷.

In spite of the scarce information provided in European anti-dumping case law⁹⁰⁸, the extent of

⁹⁰⁷ Council Regulation (EEC) No 349/81 of 9 February 1981 imposing a definitive anti-dumping duty on certain chemical fertilizer originating in the United States of America, *O.J.*, 12 February 1981, No L 39/4.

⁹⁰⁸ Only in the following cases it has been explained why the highest possible dumping margin is preferred :

- in *video cassette recorders from Japan*, the use of the highest dumping margin mentioned in the complaint was grounded on the consideration that the exporters, by choosing not to cooperate, may be presumed to have accepted the allegations made in the complaint and therefore cannot ask to be treated in the same way as a company which cooperated fully in the proceeding and demonstrated that its dumping margin was lower than that calculated on the basis of the complaint (Council Regulation (EEC) No 501/89 of 27 February 1989 imposing a definitive anti-dumping duty on imports of certain video cassette recorders originating in Japan and the Republic of Korea and definitively collecting the provisional duty, *O.J.*, 28 February 1989, No L 57/55);
- in *small screen colour television receivers from the Republic of Korea*, the gravity of non-collaboration (explicit refusal by a large Korean exporter to cooperate though approached by the Commission during its on-the-spot investigations, underpinned by a corresponding failure to cooperate on the part of large Community importers known to have purchased considerable quantities of the exporter in question) was decisive for the Commission to use neither the dumping margins established during the investigation by the Commission nor the dumping margins alleged in the complaint. Here, the dumping margin was equated with the amount by which the average domestic Korean sales prices of the collaborating exporters exceeded the average export price for imports into the Community from Korea, as shown by the Community Eurostat statistics. The resulting dumping margin was higher than the highest dumping margin established by the Commission with regard to the cooperating Korean exporters and the highest dumping margin alleged in the complaint (Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1. Upheld in : Council Regulation (EEC) No 1048/90 of 25 April 1990 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 27 April 1990, No L 107/56 (corrigendum, *O.J.*, 24 May 1990, No L 133/92)). As soon as the originally non-cooperating Korean exporter did not export anymore to the Community and had converted his production facilities to the manufacture of other electronic products, the dumping margin in respect of the other non-cooperating exporters, whose exports to the Community were very small, was lowered at the level of the highest dumping margin established in respect of the cooperating exporters (Council Regulation (EEC) No 2900/91 of 1 October 1991 amending Regulation (EEC) No 1048/90 with regard to the imposition of a definitive anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 2 October 1991, No L 275/24);
- in *audio tapes in cassettes from Hong Kong*, the majority of the Hong Kong exporters did not cooperate. In view of the gravity of the non-collaboration, the Commission considered that it might be contemplated to base the finding of dumping in respect of the non-collaborating exporters either on the amount by which the average Hong Kong normal value exceeds the average export price as shown by the Community Eurostat statistics, or on the information contained in the complaint. In this anti-dumping case, however, the Commission found it adequate to use the highest dumping margin established with regard to the cooperating Hong Kong exporters, owing to the relatively small amount of Hong Kong exports of audio cassettes to the Community (Commission Regulation (EEC) No 3262/90 of 5 November 1990 imposing a provisional anti-dumping duty on imports of audio tapes in cassettes originating in Japan, the Republic of Korea and Hong Kong, *O.J.*, 13 November 1990, No L 313/5 (corrigendum, *O.J.*, 12 January 1991, No L 9/36));
- in *magnetic disks (3,5" microdisks) from Hong Kong*, the European anti-dumping authorities referred to the seriousness of the non-cooperation on the part of the Hong Kong producers in order to use the dumping margin mentioned in the anti-dumping complaint which was considerably higher than the dumping margin of the cooperating Hong Kong producers (Commission Regulation (EC) No 534/94 of 9 March 1994 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, *O.J.*, 11 March 1994, No L 68/5; Council Regulation (EC) No 2199/94 of 9 September 1994 imposing a definitive anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, and collecting definitively the provisional duty imposed, *O.J.*, 10 September 1994, No L 236/2).

If the exporters are willing to cooperate, but if it is not possible to individually assess their dumping margins, the weighted average dumping found in respect of the other cooperating exporters will be used as their dumping margin. Clearly, this dumping margin is below the highest dumping margin found in respect of the cooperating exporters :

- in *video cassettes from Hong Kong*, the Council took the view that, given the fact that some exporters were willing to cooperate even though they were unable to provide the necessary information, it would be inappropriate to apply to those exporters the highest dumping margin established with regard to the cooperating Hong Kong exporters and considered it proper to apply the weighted average dumping margins found for the cooperating Hong Kong exporters (Council Regulation (EEC) No 1768/89 of 19 June 1989 imposing a definitive anti-dumping duty on imports of video cassettes originating in the Republic of Korea and Hong Kong, collecting definitively the provisional duty and terminating the anti-dumping proceeding with regard to the imports of video tape reels originating in the Republic of Korea, *O.J.*, 22 June 1989, No L 174/1);

the non-cooperation seems to be the reason for this pattern : the greater the unwillingness to cooperate, the higher the probability is that the highest possible dumping margin will be used. Also reasons of representativeness may be decisive : if the exports of the cooperating exporters reach a relatively high (low) level in comparison with the total exports from the exporting country involved to the Community, the dumping margins established are considered to be (not) representative and are, therefore, (not) used as dumping margin in respect of the non-cooperating exporters⁹⁰⁹.

- in *radio-broadcast receivers of a kind used in motor vehicles from South Korea*, the Commission appeared willing to accept that many of the Korean exporters were not of a size sufficient to be able to reply to the Commission's questionnaire or to make representations to the Commission. Therefore, the Commission was prepared to take a representative sample on the basis of a list of all the Korean exporters. As the information requested to this end did not reach the Commission in time and the Commission had serious doubts about the representativeness of the cooperating exporters, a dumping margin specific to the non-cooperating and unknown exporters was calculated. This dumping margin was higher than that of the cooperating exporters. It is yet unclear whether the Commission deliberately aimed at such a higher dumping margin in order to sanction the non-cooperating and unknown exporters (Commission Regulation (EEC) No 313/92 of 4 February 1992 imposing a provisional anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in South Korea, *O.J.*, 11 February 1992, No L 34/8);
- in *ferro-silicon from Brazil*, it was impossible to determine the individual dumping margin in respect of cooperating producers who did not export to the Community. The weighted average dumping margin found for cooperating exporters who did export, was used as their dumping margin (Council Regulation (EC) No 3359/93 of 2 December 1993 imposing amended anti-dumping measures on imports of ferro-silicon originating in Russia, Kazakhstan, Ukraine, Iceland, Norway, Sweden, Venezuela and Brazil, *O.J.*, 9 December 1993, No L 302/1).

⁹⁰⁹ Commission Regulation (EEC) No 2818/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports of cotton yarn originating in Brazil, Egypt and Turkey and terminating the anti-dumping proceeding in respect of cotton yarn originating in India and Thailand, *O.J.*, 27 September 1991, No L 271/17; Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7; Council Regulation (EEC) No 830/92 of 30 March 1992 imposing a definitive anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and collecting definitively the provisional duty, *O.J.*, 3 April 1992, No L 88/1 (corrigendum, *O.J.*, 5 June 1992, No L 153/16); Commission Regulation (EEC) No 1451/92 of 2 June 1992 imposing a provisional anti-dumping duty on imports into the Community of certain large electrolytic aluminium capacitors originating in Japan, *O.J.*, 4 June 1992, No L 152/22 (corrigendum, *O.J.*, 17 June 1992, No L 163/27); Commission Regulation (EEC) No 1956/92 of 7 July 1992 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in India and the Republic of Korea, *O.J.*, 16 July 1992, No L 197/25; Commission Regulation (EEC) No 1994/92 of 14 July 1992 imposing a provisional anti-dumping duty on imports into the Community of outer rings of tapered roller bearings originating in Japan, *O.J.*, 18 July 1992, No L 199/8; Council Regulation (EEC) No 2305/92 of 4 August 1992 imposing a definitive anti-dumping duty on imports of silicon metal originating in Brazil and definitively collecting the amounts secured by way of the provisional anti-dumping duty, *O.J.*, 7 August 1992, No L 222/1; Council Regulation (EEC) No 2306/92 of 4 August 1992 imposing a definitive anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in the Republic of Korea, *O.J.*, 7 August 1992, No L 222/8 (corrigendum, *O.J.*, 21 January 1993, No L 13/20); Council Regulation (EEC) No 2849/92 of 28 September 1992 modifying the definitive anti-dumping duty on imports of ball bearings with a greatest external diameter exceeding 30 mm originating in Japan imposed by Regulation (EEC) No 1739/85, *O.J.*, 1 October 1992, No L 286/2 (corrigendum, *O.J.*, 25 March 1993, No L 72/36); Council Regulation (EEC) No 54/93 of 8 January 1993 imposing a definitive duty on imports of synthetic fibres of polyesters originating in India and the Republic of Korea, *O.J.*, 15 January 1993, No L 9/2; Council Regulation (EEC) No 55/93 of 8 January 1993 imposing a definitive anti-dumping duty on imports of outer rings of tapered roller bearings originating in Japan, *O.J.*, 15 January 1993, No L 9/7; Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5; Commission Regulation (EC) No 534/94 of 9 March 1994 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, *O.J.*, 11 March 1994, No L 68/5; Council Regulation (EC) No 2199/94 of 9 September 1994 imposing a definitive anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, and collecting definitively the provisional duty imposed, *O.J.*, 10 September 1994, No L 236/2.

See also :

- *small screen colour television receivers from the Republic of Korea*, where the cessation of exports and production of the like product by the originally largest non-cooperating exporter resulted in a lower dumping margin equal to the highest dumping margin established in respect of the cooperating exporters. For this modification of the dumping margin, the Council noted that the other non-cooperating exporters exported only very small quantities to the Community (Council Regulation (EEC) No 2900/91 of 1 October 1991 amending Regulation (EEC) No 1048/90 with regard to the imposition of a definitive anti-dumping

Uncooperative and unknown exporters are, thus, assumed to dump on the Community market or, rather, they are assumed to conceal that they are dumping. Such an assumption may be criticized for its «one-way flexibility», because it increases the instances of dumping. Moreover, everyone should, as a matter of principle, be innocent until proven guilty. Nevertheless, the assumption made by the European anti-dumping authorities is acceptable. Indeed, as GATT and EC anti-dumping law explicitly state, the result of an anti-dumping investigation may be less favourable to the party, which does not cooperate or only cooperates partially and thus withholds relevant information, than if that party had cooperated (Paragraph 7 of Annex II GATT Anti-dumping Code ; Article 18(6) basic EC Regulation). An accurate determination of the dumping margin requires the cooperation of the allegedly dumping exporter. Only the exporter involved has an accurate and full knowledge of his costs and prices. An exporter who does not react against an anti-dumping complaint must find it rewarding to remain silent, and will probably only react if he does not dump or if the allegations against him are exaggerated. Moreover, the assumption made by the European anti-dumping authorities enables them to make accurate determinations of the dumping margin as it stimulates the dumping exporters to cooperate⁹¹⁰. Of course, exporters may be unable to provide all the information required on account of their size and because of inadequate financial and human resources. Such exporters should not be assumed to conceal their dumping. European anti-dumping case law seems to share this point of view as there is evidence that the European anti-dumping authorities are prepared to take account of the inability of small exporters to cooperate, and to adopt another approach such as the sampling of a number of representative small exporters⁹¹¹. This attitude complies with GATT anti-dumping law according to which, the anti-dumping authorities must take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and must provide any assistance (Article 6.13. GATT Anti-dumping Code).

The provisions of GATT and EC anti-dumping law on the way the results of the sampling of exporters must be applied⁹¹², might give the impression that European anti-dumping case law

duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 2 October 1991, No L 275/24). The dumping margin could also have been reduced because the gravity of the non-cooperation of the other exporters was lower than that of the originally largest non-cooperating exporter. The latter had refused to cooperate though approached by the Commission during its on-the-spot investigations (see : Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1 ; Council Regulation (EEC) No 1048/90 of 25 April 1990 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 27 April 1990, No L 107/56 (corrigendum, *O.J.*, 24 May 1990, No L 133/92))
radio-broadcast receivers of a kind used in motor vehicles, originating in South Korea (supra, 331, note 908).

⁹¹⁰ BOURGEOIS, J.H.J., «EC Antidumping Enforcement - Selected Second Generation Issues», in *Antitrust and Trade Policy in the United States and the European Community*, HAWK, B.E. (ed.), New York, Bender, 1986, (563), 595-596.

⁹¹¹ Commission Regulation (EEC) No 313/92 of 4 February 1992 imposing a provisional anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in South Korea, *O.J.*, 11 February 1992, No L 34/8.

⁹¹² *Supra*, 326-327.

applying the highest dumping margin possible to non-cooperating exporters is no longer allowed⁹¹³. However, that impression is false. In respect of non-cooperating exporters, sampling is simply not applied. Indeed, non-cooperating exporters are not investigated, not because it would be impracticable (because of the large number of exporters) (see : Article 6.10. GATT Anti-dumping Code ; Article 17(1) basic EC Regulation)), but rather because it is simply impossible (because of their uncooperative behaviour). Consequently, as no sampling is applied, the provisions as to the results of the sampling do not apply either. This is, moreover, explicitly pointed out by EC anti-dumping law which limits the rules on the results of sampling to «imports from exporters or producers which have made themselves known (...) but were not included in the (sampling)» (Article 9(6) basic EC Regulation).

6. CONCLUSION

For exporters to the Community, it is quite difficult to ascertain in advance whether or not they will be found dumping. If they are sure not to have been practising dumping, dumping may be found in their respect (lack of legal certainty). Dumping may even be found in cases where they actually do not dump at all (so-called «one-way flexibility»). Indeed, European anti-dumping law is conceived in very broad terms, but is nevertheless biased - either in its conception or in its interpretation and implementation - in favour of finding dumping. For reasons of this «one-way flexibility», several legal provisions concerning the determination of dumping cannot be justified from an economic point of view. By way of conclusion, a survey is provided of the most striking instances of lack of legal certainty and «one-way flexibility» as demonstrated in the present Chapter.

6.1. *DOMESTIC MARKET PRICE AS NORMAL VALUE STANDARD : THE PRINCIPLE BY WAY OF EXCEPTION*

By imposing the exporter's domestic market price of the like product as first normal value standard to be used, GATT and European anti-dumping law, at first sight, seem to guarantee legal certainty. As the exporter may be expected to know his own domestic market price, he should

⁹¹³ WAER, P. and VERMULST, E., «EC Anti-Dumping Law and Practice after the Uruguay Round. A New Lease of Life ?», *Journal of World Trade*, 1994/2, (5), 17.

have the opportunity of knowing in advance whether or not he is dumping (*i.e.*, «knowledge of dumping»).

That domestic market price is normally the price charged on the market of the country of origin. Products may, however, be exported to a third country (the exporting country) from where they are re-exported to the Community. Because the interpretation of the concept «origin» does not exclude price changes in the exporting country unknown to the producer/exporter, «knowledge of dumping» will be non-existent.

Moreover, in many instances, the domestic market price used is not the price charged by the exporter for the like product on his domestic market. Indeed, there is a clear preference to use any domestic market price, such as the exporter's domestic market price of other, though similar products and even the domestic market price of other producers/exporters. As these prices are seldom identical to the exporter's domestic market price of the like product, the use of these prices alters the outcome of the dumping investigation and may result in finding dumping where it is not being practised. Moreover, the exporter will seldom have any accurate knowledge of the prices of his competitors on his domestic market, so that he cannot know in advance whether, on his account, dumping will be found.

Furthermore, GATT and European anti-dumping law do not allow the exporter's domestic market price to be used, when no comparable sales are made in the ordinary course of trade. GATT and European anti-dumping law have placed a restrictive interpretation on the concept of «comparable sales in the ordinary course of trade». Under European anti-dumping law, there are four instances of no comparable sales in the ordinary course of trade (sales between associated parties ; sales at a loss ; sales of insufficient quantities ; and sales not intended for consumption) which are given a large application. For example, the assumption that sales between associated parties are not in the ordinary course of trade is practically un rebuttable. Also the concept «sales at a loss» is extensively interpreted. European anti-dumping law considers sales at a loss not to be in the ordinary course of trade, if such sales are made in substantial quantities during a period of minimum six months and do not permit the recovery of total costs within that minimum period. It, thus, offers the possibility to encompass only those instances of sales at a loss which are not the result of ordinary profit maximization. European anti-dumping authorities, though, have declined that possibility by employing the minimum periods during which it is impossible to recover total costs, rather than longer periods coinciding with a business cycle.

European anti-dumping does not pay special regard to sales on the domestic market of developing countries, though GATT anti-dumping law leaves the door open for considering them as not being made in the ordinary course of trade. This is probably no mere accident, as the domestic market prices in developing countries are likely to be high, due to the usual high protection of their

domestic markets, whereas sales between associated parties, sales at a loss, sales of insufficient quantities and sales not intended for consumption are all assumed to be made at unusually low prices. That assumption is not always borne out by the facts. For example, sales of insufficient quantities may imply reverse dumping (*i.e.*, a domestic market price higher than the export price) if low, insufficient quantities are sold on the exporter's domestic market, only because demand is low.

Moreover, even if that assumption proves to be right, the concept «comparable sales in the ordinary course of trade», seems to be used to guarantee findings of (excessive margins of) dumping. First, when the exporter and his sales company are associated, normal value is determined on the basis of the price charged by the sales company to the first independent buyer. As no adjustments are made for the costs and profits of the associated sales company, normal value is increased. Second, in the case of sales not intended for consumption, there is no reason why the prices of such sales are disregarded for normal value determination, whereas they are not for export price determination. This differential treatment results in relatively high normal values and relatively low export prices and, consequently, holds a bias towards finding (higher margins of) dumping. Third, when sales are made at a loss, the constructed value is used as normal value standard. That constructed value must always contain a margin for profit, regardless of whether, from an economic point of view, profits are feasible under the prevailing economic circumstances of the case.

6.2. CONSTRUCTED VALUE AS NORMAL VALUE STANDARD : A FURTHER REJECTION OF SALES AT A LOSS

In the absence of comparable sales in the ordinary course of trade, either the constructed value or the export price to third countries must be used as normal value standard. European anti-dumping case law reveals a strong preference for the constructed value. Export prices to third countries are seldom used because of the possibility of them being dumped prices. Thus, European anti-dumping authorities prefer that normal value standard which, they think, produces the highest normal value and, consequently, the highest dumping margin.

As the constructed value is the sum of all production costs, including general expenses, and a reasonable profit margin, producers are assumed to practise full-cost pricing and the conviction that sales at a loss are not in the ordinary course of trade is further confirmed. Both that assumption and that belief are only a means to increase the height of the normal value. They are, however, economically not justified. Producers do not practise full-cost pricing. They do not determine their prices solely on the basis of an addition of production costs and a profit margin.

They also take into account other factors, such as market demand and competition, and, thus, give evidence of practising marginal pricing. As a consequence, ordinary profit maximizing prices will not always yield a profit nor will they always cover all production costs.

The height of the normal value is further increased by the requirement that the production costs must be incurred in the ordinary course of trade. Thus, production costs are not valued on the basis of prices charged for inputs between associated companies. Instead, the production costs, including general expenses, of the associated company are added to those of the allegedly dumping exporter, resulting in a higher normal value. The requirement that production costs must be incurred in the ordinary course of trade has one positive aspect, namely that it prevents exporters from being sanctioned for input and social dumping. In a start-up or an expansion phase, in which producers are normally not able to cover all their production costs, it could also prevent exporters from being found dumping. However, the European anti-dumping authorities did not, of their own free will, accept such an interpretation of the concept «ordinary course of trade», undoubtedly because such an interpretation would clash with the overall effort in European anti-dumping law to find (high margins of) dumping. Only under pressure of the new GATT Anti-dumping Code, according to which account must be taken of the fact that usually during a start-up period not all production costs are covered. But, here, the Community, when transposing that GATT provision in European anti-dumping law, clearly tries to reduce the scope of that provision to the minimum.

The constructed value also reduces legal certainty on the part of the exporter. For it must include a «reasonable amount» for general expenses and profit. As European anti-dumping law does not give any precise definition of the vague concept «reasonable amount», it cannot be predicted which amount will be added for general expenses and profits. Moreover, whereas, in principle, production costs are allocated on a turnover basis, another allocation may be accepted if it is «more appropriate» or «reasonable». Again the vague concepts «appropriate» and «reasonable» make every prediction impossible. In regard to both the reasonable amount for general expenses and profits and the cost allocation, European anti-dumping case law contains some general guidelines : in most cases, actually incurred general expenses and actually realized profits are taken into account, whereas, in only a small number of cases, costs were not allocated on a turnover basis. However, exceptions are made to those guidelines, though it cannot be predicted when. Finally, precisely because it has to be constructed, the determination of the constructed may be inflicted with calculation errors which are, by definition, unpredictable.

6.3. *NON-MARKET ECONOMY COUNTRIES*

European anti-dumping law considers prices and costs of NME countries not to constitute a reliable basis for normal value determination because they are not the result of the market mechanism. Therefore, it forbids to take account of them and imposes to determine normal value with reference to the prices and costs of a ME country, the so-called reference country.

The determination of normal value on the basis of a reference country has two major flaws. First, the possibility that NME countries may be more efficient than the reference country, which may even be the most efficient ME country, is disregarded. As a consequence, NME countries may be found dumping merely because they are more efficient. Second, as the reference countries, because they also manufacture the like product, are in competition with the NME countries, they may find it to their interest to give false information by declaring higher prices in order to increase the probability that the NME countries will be found dumping.

NME countries are also denied any degree of legal certainty as they have practically no knowledge about the prices and costs of their competitors in the reference country. Moreover, they cannot possibly predict which reference country will be selected and how normal value (domestic market price, constructed value, export price to third countries) will be determined. For European anti-dumping law only requires the reference country and the type of normal value to be selected in an appropriate and not unreasonable manner. Though several criteria relevant for selecting the reference country may deduced from European anti-dumping case law, none of them are conclusive, as they may offset each other. The choice of normal value standard is usually identical to that for ME countries : domestic market price may only be used if it concerns comparable sales made in the ordinary course of trade ; otherwise, either the constructed value or, exceptionally, the export price to third countries is used. Therefore, it may be concluded that the choice of the normal value standard, is characterized by the same «one-way flexibility» as for ME countries. Moreover, European anti-dumping law even provides less legal certainty to NME countries as in a number of cases another normal value has been adopted than the one applied for the reference country. Thus, the concept «comparable sales in the ordinary course of trade» provides little guidance, as it may be interpreted differently in respect of the same transactions on the domestic market of one and the same country. It may sometimes even be disregarded as there are cases in which domestic market prices have been used as normal value standard for NME countries, even though there were no comparable sales on the domestic market of the reference country.

6.4. EXPORT PRICES

The export price is determined on the basis of the actual export price, or, if exporter and importer are associated, on the basis of the constructed export price, *i.e.*, the price paid by the first independent buyer.

In one of its characteristics, export price determination is the opposite of normal value determination : export price determination is a search for an export price which is as low as possible. First, products exported to the Community under the inward processing regime are used for determining the export prices, whereas similar processing arrangements on the exporter's domestic market are disregarded for normal value determination. Second, when exporter and importer are associated, the export price is determined on the basis of the price paid by the first independent buyer, after deducting all the costs incurred and all the profits realized by the associated importers. This contrasts with normal value determination for which associated parties are considered to constitute an economic unit and, consequently, the price paid by the first independent buyer is used as normal value, without any deduction for costs or profits of the associated sales company.

The other characteristic is identical to that of normal value determination : legal certainty is not guaranteed. First, the price paid by trading firms to the producer/exporter is taken into account even if the producer/exporter does not know the destination. Second, for determining the export price of an exporter associated with the importer, costs normally borne by the importer and a reasonable profit margin must be determined. Not even in the light of European anti-dumping case law, can it be predicted what such costs and such a profit margin are.

6.5. ADJUSTMENTS

Normal value and export price will seldom be comparable to each other. For example, transport costs on the exporter's domestic market are usually smaller than for exports to the Community. If both normal value and export price comprise these transport costs, the dumping finding will not be accurate. Even if dumping is actually practised, no dumping can be found merely because of the difference in transport cost. Of course, for other differences between normal value and export price, also dumping may be found where it does not exist.

GATT anti-dumping law is aimed at finding all instances of actual dumping, without confounding them with cases of apparent dumping. It allows all adjustments which are necessary to that end. European anti-dumping law, however, seems to allow only a limited number of adjustments. As a

consequence, findings of dumping may be made in cases of no-dumping. The most conspicuous example concerns the category of selling expenses in combination with normal value and export price determination for associated parties. European anti-dumping law allows adjustments for selling expenses only if they are directly related to the sales taken into account. Normal value and export price as determined for associated parties are not comparable, because normal value comprises all the costs and profits of the associated sales company whereas the costs and profits of the associated importer are excluded from the export price. In order to make them comparable, one might expect that normal value would be adjusted for these costs and profits. However, normal value will be adjusted only for the directly related selling expenses because of the required direct relationship between selling expenses and sales. As a result, normal value, contrary to the export price, comprises all indirectly related selling expenses of the associated sales company. Consequently, the dumping margin is inflated by the amount of the indirectly related selling expenses. The new GATT Anti-dumping Code has made a first, moderate attempt to stop the unequal treatment of associations by requiring that, where the export price has been constructed and price comparability has been affected, the anti-dumping authorities establish the normal value at a level of trade equivalent to the level of trade of the constructed export price. European anti-dumping law, however, has restricted the scope of the new GATT rule so that it will not have any effect on the problem of price comparability in respect of associations.

6.6. DUMPING MARGIN

The dumping margin is the amount by which normal value exceeds the export price. Like all the other elements of the dumping investigation, the determination of the dumping margin contributes to the finding of dumping, even in cases where no dumping is being practised. To that end, European anti-dumping law has developed two mechanisms: the comparison between a weighted average normal value and export prices on a transaction-by-transaction basis and the disregard of reverse dumping (*i.e.*, the cases where the export price exceeds normal value). As such a misrepresentation of reality is unacceptable, both methods should be repealed or should, at least, be restricted to cases in which it is clearly proven that the exporter deliberately practises reverse dumping in order to offset his dumping practices and, accordingly, to circumvent anti-dumping law. The new GATT Anti-dumping Code puts a limit to this practice. It requires that a comparison is made either between weighted average normal value and weighted average export price or between individual normal values and individual export prices on a transaction-by-transaction basis. A comparison of weighted average normal value and individual export prices is only allowed if there is a pattern of export prices which differ significantly among different purchasers, regions or time periods and if such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction

comparison. EC anti-dumping law has already been adapted to this new GATT law. The question, however, is whether the European anti-dumping authorities will not abuse the exception by applying it as the general rule.

PART II

ANTI-DUMPING RELIEF



CHAPTER IV

THE WELFARE EFFECTS OF ANTI-DUMPING RELIEF

1. INTRODUCTION

Though dumping is generally held to be an unfair trade practice, the mere existence of dumping is not sufficient for anti-dumping relief to be granted. GATT and European anti-dumping law require that the dumped imports cause injury to the domestic industry of the importing country (Article VI(1) and (6)(a) GATT ; Articles 7.1.(ii), 8.1., 9.2. and 11.1. GATT Anti-dumping Code ; Article 7(1), 8(1) and 9(4) basic EC Regulation ; Articles 10(2)(b), 11(1) and 12(1) basic ECSC Decision). European anti-dumping law further requires that the anti-dumping relief be in the interests of the Community (Articles 7(1), 9(4) and 21 basic EC Regulation ; Articles 11(1) and 12(1) basic ECSC Decision).

Economic trade theory traditionally points out that free trade maximizes both global and country welfare and, accordingly, does not suggest any trade restrictions as the first-best policy. Since, anti-dumping relief is trade-restrictive, this Chapter revolves around the question whether anti-dumping relief does not reduce welfare. The importing country enforcing anti-dumping law will probably only look at its own welfare. Indeed, under European anti-dumping law, the European anti-dumping authorities must examine whether the interests of the Community call for anti-dumping relief. Under the heading of «Community interests», they will probably only pay attention to the effects of anti-dumping relief on the Community welfare. Therefore, this Chapter will only pay attention to the effects of anti-dumping relief on the welfare of the importing country⁹¹⁴. For answering the question about the welfare effects of anti-dumping relief, no distinction will be made between competitive pricing and predatory pricing. Anti-dumping relief may, perhaps, even increase national welfare in cases where the dumping is not predatory. Clearly, in case of predatory dumping, those welfare-increasing effects of anti-dumping relief will

⁹¹⁴ This work does not investigate the effects which the mere existence of anti-dumping law may have on trade patterns. However, it seems that the threat of anti-dumping enforcement affects trade in the same way as anti-dumping relief, in particular, undertakings (as the threat of anti-dumping enforcement, unlike anti-dumping duties, does not generate income for the importing country's authorities) (see e.g. : HERANDER, M.G., and SCHWARTZ, J.B., «An Empirical Test of the Impact of the Threat of U.S. Trade Policy : The Case of Antidumping Duties», *Southern Economic Journal*, 1984-1985, (59), 59-79 ; MESSERLIN, P., «The EC Antidumping Regulations : A First Economic Appraisal, 1980-85», *Weltwirtschaftliches Archiv*, 1989, (563), 563-587.). Hence, it may be concluded that the welfare effects of threatening to enforce anti-dumping law are similar to those of undertakings.

have to be added to its welfare-increasing effects resulting from the prevention of the monopolization of the Community market.

The present Chapter focuses on the two main types of anti-dumping relief : anti-dumping duties and undertakings (Articles 7 up to 9 GATT Anti-dumping Code ; Articles 7 up to 9 basic EC Regulation ; Articles 10 up to 12 basic ECSC Decision). Under European anti-dumping law, there is, though, a third type of anti-dumping relief : so-called special measures, being defined as measures which do not run counter to obligations under GATT (Article 22(iii) basic EC Regulation ; Article 17(3) basic ECSC Decision). This Chapter does not pay attention to this third type of anti-dumping relief because it is applied but very rarely and, if imposed, closely resembles one of the main types of anti-dumping relief or, at least, have similar trade-restrictive effects⁹¹⁵.

In section 2 of this Chapter, the welfare effects of anti-dumping duties will be examined. Section 2.1. will provide a brief description of the legal characteristics of anti-dumping duties under GATT and European anti-dumping law. In view of those characteristics, the next section will examine the welfare effects of anti-dumping duties, from an economic point of view. Finally,

⁹¹⁵ In only three European anti-dumping cases, such special measures may have been applied :

- after having established that the undertaking had been violated, the European anti-dumping authorities, in *nuts of iron or steel from Taiwan*, imposed a duty additional to the normal customs duty (Council Regulation (EEC) No 2464/77 of 7 November 1977 adopting special measures in respect of imports of certain nuts of iron or steel originating in Taiwan, *O.J.*, 10 November 1977, No L 286/7). This additional duty must be a special measure because no new anti-dumping proceeding in respect of *nuts of iron or steel from Taiwan* was initiated, whereas the then prevailing European anti-dumping legislation (Council Regulation (EEC) No 459/68) did not provide the possibility of imposing anti-dumping duties without the opening of a new anti-dumping proceeding, not even if the originally accepted undertaking had been violated ;
- in *aluminium from Norway, Surinam, the Soviet Union and Yugoslavia*, it was considered that, due to the price increases worldwide and on the Community market, the interests of the Community did not call for anti-dumping protection. Nevertheless, it was pointed out that future developments would be closely followed so that a decision might be taken rapidly, should the Community industry deem it necessary to request a reopening of the proceeding in the light of changed circumstances, (Commission Decision 84/103/EEC of 23 February 1984 terminating the anti-dumping proceeding concerning imports of non-alloyed unwrought aluminium originating in Norway, Surinam, the Soviet Union and Yugoslavia, *O.J.*, 28 February 1984, No L 57/19) ;
- when the Norwegian Government adopted a series of measures aimed at restricting the volume of Norwegian salmon supplied to the market and expressed the wish to contribute to the balanced development of fresh salmon exports to the Community, while respecting traditional trade flows, the Commission considered that it was unnecessary to impose antidumping measures on *Atlantic salmon from Norway*. Instead, it announced it would closely follow the market trend for farmed salmon and the export of Norwegian farmed salmon to Community. If necessary, or by request of any Member State, it would initiate talks with the Norwegian Government. Should those discussions not lead to a satisfactory solution, the Commission would consider as a matter of urgency - upon request from the Community industry - whether to initiate new anti-dumping proceedings (Commission Decision 91/142/EEC of 15 March 1991 terminating the anti-dumping proceeding concerning imports of Atlantic salmon originating in Norway, *O.J.*, 16 March 1991, No L 69/32 (corrigendum, *O.J.*, 21 March 1991, No L 75/64) ; Answer of the Commission to written question No 3066/90, *O.J.*, 13 December 1991, No C 323/3).

The additional duty imposed in *nuts of iron or steel from Taiwan* will have the same effects as an anti-dumping duty, because it is also a selective customs duty. The follow-up set up in *aluminium from Norway, Surinam, the Soviet Union and Yugoslavia* and *Atlantic salmon from Norway*, on the other hand, may have a chilling effect on imports of aluminium from those countries. It increases the probability of being caught dumping, and, as a consequence, it may have an increasing effect on the prices of the imported product. The price-increasing effect will be further reinforced by the increase in costs due to the administrative burden imposed on the exporters. Hence, the possible effect of the follow-up is identical to the effect of a selective customs duty, namely increasing the prices of the imported products originating in certain countries. The difference with a customs duty is that the follow-up does not generate income for the government of the importing country. In this respect the follow-up is identical to undertakings. Therefore, the results of the subsequent analysis of the effects of undertakings will also hold for the follow-up.

section 2.3. will compare the legal characteristics of anti-dumping duties with the findings of the economic analysis in section 2.2.

Section 3 will focus on undertakings. Section 3.1. will provide an overview of the legal characteristics of undertakings. Section 3.2. will point out the economic differences between undertakings and anti-dumping duties in terms of national welfare. Section 3.3. will then examine whether GATT and European anti-dumping law take those economic differences into account, when choosing between anti-dumping duties and undertakings. Finally, section 4 will conclude the present Chapter by providing a summary of the findings of the comparison between the legal and the economic analysis.

2. ANTI-DUMPING DUTIES

2.1. LEGAL DEFINITION

GATT and European anti-dumping law do not define the notion of «anti-dumping duty». They only require that the amount of the anti-dumping duties must not exceed the dumping margin (Article VI(2) GATT ; Articles 7.2., 9.1. and 9.3. GATT Anti-dumping Code ; Articles 7.2. and 9.4. basic EC Regulation ; Article 13(3) basic ECSC Decision). Under European anti-dumping law, they must not exceed the injury margin if the latter is lower than the dumping margin (Articles 7.2. and 9.4. basic EC Regulation ; Article 13(3) basic ECSC Decision)⁹¹⁶. GATT European anti-dumping law further provide that anti-dumping duties apply to the product covered by the anti-dumping proceeding and to the country which that product originates in or which it is exported from (Article 12.2.1. and 12.2.2. GATT Anti-dumping Code ; Article 14(2) basic EC Regulation ; Article 13(2) basic ECSC Decision). ECSC anti-dumping law specifies also that there are different types of duty (Article 13(2) basic ECSC Decision). Therefore, the notion of anti-dumping duty should be interpreted in its usual meaning, taking into account the few specifications provided by GATT and European anti-dumping law : it is a selective customs duty, *i.e.*, a duty levied on the imports of dumped products originating in or being exported from certain specific countries subject to the anti-dumping proceeding. There are different types of

⁹¹⁶ C.J.E.C., case 53/83, 23 May 1985, *Allied Corporation a.o. v Council*, E.C.R., 1985, (1621), 1659.

customs duties, namely *ad valorem* duties, specific duties and variable duties or a combination of them⁹¹⁷.

Under GATT and European anti-dumping law, such duties may only be imposed, if the dumping inflicts injury upon the industry established in the importing country, *casu quo* the Community, producing a product similar to the dumped product (*i.e.*, the so-called «Community industry») (Article VI(1) GATT ; Articles 3 and 4 GATT Anti-dumping Code ; Articles 3 and 4 basic EC Regulation ; Article 4 basic ECSC Decision). The injury suffered by the Community industry is measured by means of relevant economic factors, such as production, sales, prices, profits, return on investment (Article 3.4. GATT Anti-dumping Code ; Article 3(5) basic EC Regulation ; Article 4(2)(c) basic ECSC Decision).

If both dumping and injury are found, the granting of anti-dumping relief is not obligatory under GATT anti-dumping law. GATT anti-dumping law only expresses the desire that the imposition of anti-dumping duties be permissive in cases where injurious dumping is found (Article 9.1. GATT Anti-dumping Code). This wish has been rendered in European anti-dumping law by granting the European anti-dumping authorities the power to decide not to take any anti-dumping action if the interests of the Community do not call for such an action (Articles 7(1), 9(4) and 21 basic EC Regulation ; Articles 11(1) and 12(1) basic ECSC Decision). The European anti-dumping authorities enjoy a wide margin of discretion in implementing the notion «Community interests», subject to only a marginal judicial control⁹¹⁸. Indeed, whereas ECSC anti-dumping does not clarify the notion, EC anti-dumping law describes it in general terms as comprising «all the various interests taken as a whole, including the interests of the domestic industry and users and consumers» (Article 21(1) basic EC Regulation). In compliance with that definition, the European anti-dumping authorities have implemented this notion by subsuming under it all the components of the Community having an interest in the imports of the dumped products : the Community industry, the users of the like product (consumers and processing industries), the employees in the Community industry and the processing industries, and the Community authorities in pursuing different policies (antitrust policy, trade policy, national security).

⁹¹⁷ *Infra*, 660.

⁹¹⁸ C.J.E.C., case 191/82, 4 October 1983, *Fédération de l'industrie de l'huilerie de la CEE (FEDIOL) v Commission*, E.C.R., 1983, (2913), 2934-2935 ; C.J.E.C., case 188/85, 14 July 1988, *EEC Seed Crushers' and Oil Processors' Federation (Fediol) v Commission*, E.C.R., 1988, (4193), 4231 ; C.J.E.C., case 156/87, 14 March 1990, *Gestetner Holdings plc v Council and Commission*, E.C.R., 1990, I, (781), 824 and 843.

2.2. ECONOMIC ANALYSIS

2.2.1. Anti-dumping duties under perfect competition without market imperfections

Traditional trade theory assumes perfect competition and absence of any market distortions. Under those assumptions, free trade maximizes the welfare of each country. Indeed, under such conditions, production will be located where its efficiency is highest, as each country will produce the products for which it is relatively best qualified, *i.e.*, in which it has a comparative advantage. Such an efficient pattern of production implies that each country produces the maximum output attainable at the lowest cost possible. Free trade enables each country to trade the products it produces for other products which its consumers prefer. As a consequence, free trade maximizes the welfare of each country and, accordingly, traditional trade theory rejects each type of trade restriction. An anti-dumping duty, being a selective customs duty, is a type of trade restriction. It reduces the country's welfare because the deterioration of the consumers' welfare is not entirely compensated by the improvement in the Community industry's welfare and by the revenue gained by the Community authorities out of the levy of the anti-dumping duty. Accordingly, in case of perfect competition and no market imperfections, anti-dumping duties should be banned.

Figure 15 shows how an anti-dumping duty reduces a country's welfare. It is assumed that only one country imports the products in the Community. Accordingly, that country's supply, S_c in figure 15, represents world supply. S_d represents the supply of the Community industry and D represents Community demand. As there is perfect competition, the intersection between world supply and Community demand determines the price and quantity consumed on the Community market. At that intersection, the price charged will be OP_1 and a quantity of Oq_4 will be consumed in the Community under free trade. It is assumed that the Community consumers will first buy the products manufactured by the Community industry and then resort to the foreign products. Accordingly, given the price OP_1 , the Community industry will offer a quantity Oq_1 and the remaining quantity q_1q_4 will be offered by the exporting country.

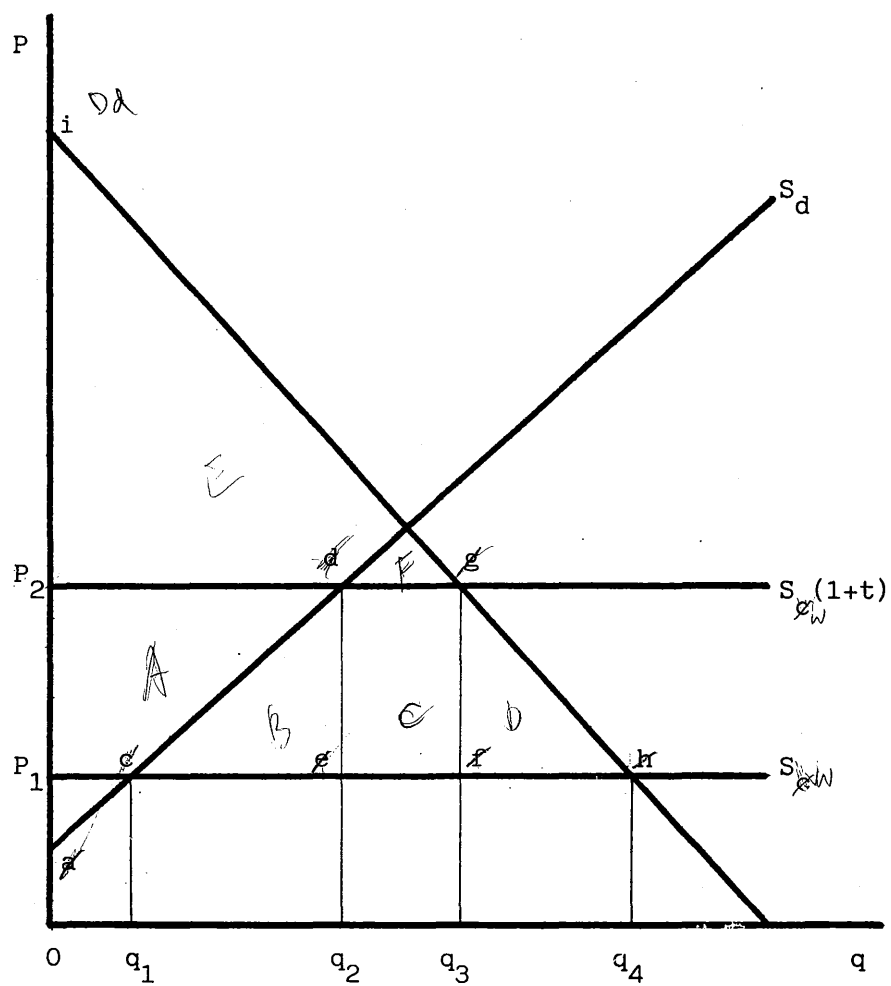
If an anti-dumping duty t is imposed on those imports, the world supply curve will shift upwards to $S_c(1+t)$. As a consequence, the price on the Community market increases up to OP_2 and the total quantity consumed on the Community market drops to Oq_3 . Because of the price increase, the Community industry will increase its output and offer a quantity Oq_2 , whereas the Community will import a lower quantity of q_2q_3 .

Clearly, the anti-dumping t is beneficial to the Community industry. Without anti-dumping duty, their producers' surplus amounted to the area acP_1 . Due to the anti-dumping duty resulting in higher sales by the Community industry, it increases by an amount equal to the area P_1cdP_2 .

However, the anti-dumping duty also affects the Community consumers. Whereas initially their consumer surplus amounted to the area P_1hi , the anti-dumping duty causes it to drop to the area P_2gi . The Community consumers, thus, lose an amount of consumer surplus equal to the area P_1hgP_2 .

Finally, the anti-dumping duty generates revenue for the Community authorities, equal to the area $defg$.

Figure 15



If the government values the welfare of producers and the welfare of consumers to be equally important, the anti-dumping duty causes the welfare of the Community, equal to producers' surplus, consumer surplus and government's revenue, to drop. Indeed, the loss in consumer surplus is not completely offset by the increase in producers' surplus and the revenue of the Community authorities. The redistribution of consumer surplus favouring both the Community industry (area P_1cdP_2) and the Community authorities (area $defg$) does not cover overall loss in consumer surplus. The area's ced and fhg of lost consumer surplus are not compensated, the area fhg representing the loss due to the drop in overall Community consumption and the area ced representing the loss in efficiency of production because the Community industry is cannot offer the same amount as the exporting country at a certain price. Therefore, it may be concluded that an anti-dumping duty causes the Community welfare to decrease and causes a net cost of protection equal to the areas ced and fhg .

2.2.2. Anti-dumping duties under imperfect competition and market imperfections

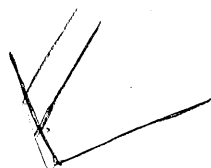
2.2.2.1. The «optimum-tariff» argument

Traditional trade theory only provides one case in which a country may increase its welfare by restricting trade. In that case, it relaxes its assumptions about perfect competition, as it allows for the importing country to enjoy market power on the international market. The importing country is assumed to have the opportunity of influencing the international price of the product it imports by restricting its demand for that product. This opportunity is called «price-makership». The importing country may restrict its demand by imposing a tariff. If that tariff increases the importing country's welfare, that tariff is called «optimum tariff».

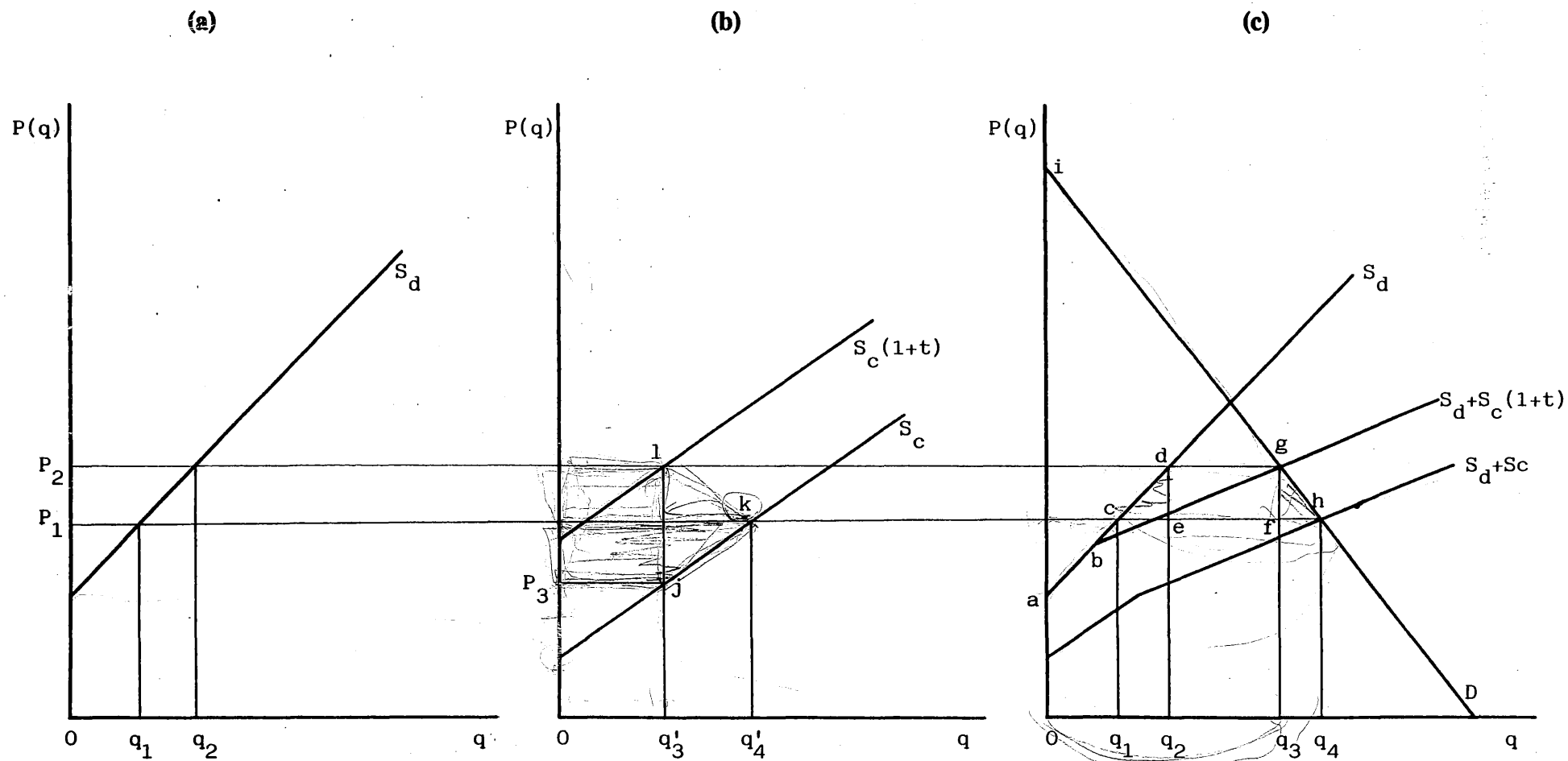
Figure 16 shows how an «optimal tariff» increases a country's welfare. Its assumptions are identical to those in figure 15, but for the price-makership held by the Community. This difference accounts for world supply to be less than perfectly elastic.

In figure 16(a) and (c) the supply curve of the Community industry is represented by the curve S_d . S_c in figure 16(b) represents world supply. As competition on the Community market is assumed to be perfect, the price of the product on the Community market under free trade is determined by the intersection between the curve representing Community demand (curve D in figure 16(c)) and the curve representing the aggregate supply curve (curve $S_d + S_c$ in figure 16(c)). The price OP_1 corresponds to this intersection, i.e., at point h in figure 16(c). At the price OP_1 , a quantity Oq_4 will be consumed on the Community market. Assuming that Community consumers first buy the products supplied by the Community industry, Oq_1 is supplied by the Community industry and q_1q_4 is supplied by the exporting country. Under free trade conditions, the consumer surplus is equal to the area P_1hi and the Community producers' surplus is equal to the area acP_1 in figure 16(c).

Now assume that the Community imposes a tariff t on all products imported. As a consequence, the supply curve of the exporting country shifts upwards to the curve $S_c(1+t)$ in figure 16(b), which also implies a shift of the aggregated supply to the curve $abS_c + S_d(1+t)$. The new aggregated supply curve intersects the demand curve at point g in figure 16(c), implying a price increase from OP_1 to OP_2 . At the new price OP_2 the quantity supplied by the Community industry increases by q_1q_2 to Oq_2 .



2
Figure 16



As a consequence, Community producers' surplus increases by an amount equal to the area P_1cdP_2 , consumer surplus drops by an amount equal to the area P_1hgP_2 and the Community authorities gain revenue from the anti-dumping duty, amounting to the area $defg$. In case of price-takership, the areas ced and fhg are will not be compensated and will represent the net cost of the anti-dumping duty, as shown in figure 15⁹¹⁹.

However, in case of price-makershhip, which is assumed here, the areas ced and fhg will at least partially be compensated, due to the improvement in the terms of trade of the Community caused by the tariff. The terms of trade are improved because the exporters cannot shift the full burden of the tariff to the Community consumers. At the price OP_2 the exporting country offers a quantity Oq_2 in figure 16(b) (which is equal to Oq_3 in figure 16(c)). However, for this quantity Oq_3 the exporters would charge a price OP_3 if no tariff was imposed. Thus, the total burden of the tariff t , which the exporting country has to pay to the Community authority, equals the area P_3jlP_2 . Part of the burden, coinciding with the area P_1klP_2 in figure 16(b) (which is equal to the area $efgd$ in figure 16(c)) corresponds to the price increase of P_1P_2 on the Community market and is, thus, borne by the Community consumers. The other part of the burden, represented by the area P_3jkP_1 in figure 16(b), is borne by the exporters; it coincides with the decrease of the price from OP_1 to OP_3 at which the exporters are willing to offer the quantity Oq_3 . Depending on whether the area P_3jkP_1 is equal, superior or inferior to the sum of the areas $ced + fhg$, the net cost of the anti-dumping duty t to the Community is respectively zero, negative or positive. In other words, the Community welfare respectively remains the same, increases or decreases. If the Community welfare increases, the tariff t is a «optimum tariff».

The «optimum tariff» argument is the only argument under tradional trade theory in favour of trade restrictions. The «optimal tariff»-argument, though, has only a limited application : it holds only in the case of price-makershhip. Thus, if the Community is a price-taker⁹²⁰ in a certain product market, the «optimal tariff»-argument cannot be invoked. In general, though, it seems quite realistic to assume the Community holding price-makershhip in view of the size of the Community market on world level⁹²¹.

If it is true that the Community generally holds price-makershhip, then there is still the problem of the rather low practicability of «optimum tariffs». For the determination of «optimum tariffs» presupposes a close knowledge of the supply and demand of foreign dumping firms, Community producers and Community consumers and their respective elasticities, a knowledge seldom completely available to a country's authorities⁹²².

919 *Supra*, 347-349.

920 Price-takership implies that the Community cannot affect the world price level. For an analysis of the effects of a tariff in case of price-takership - which, in a two-country model (i.e., a model with one importing country (in this case the European Community) and one exporting country (in this case a dumping country)), are identical to the effects of an anti-dumping duty -, see e.g. : GREENAWAY, D., *International Trade Policy. From Tariffs to the New Protectionism*, London, MacMillan, 1983, 47-49.

921 See : BALDWIN, R.E., «Are Economists' Traditional Trade Policy Views Still Valid ?», *Journal of Economic Literature*, 1992, (804), 809-810.

922 BALDWIN, R.E., «Are Economists' Traditional Trade Policy Views Still Valid ?», *Journal of Economic Literature*, 1992, (804), 809-810.

2.2.2.2. Strategic-trade theory

As traditional trade theory assumes perfect competition and no market imperfections, it might not seem quite realistic. Monopolies and oligopolies actually exist and there are many market imperfections, such as economies of scale. Moreover, traditional trade theory could not explain intra-industry trade, *i.e.*, reciprocal trade between countries in the same product. Such trade was not based on comparative advantages, as the countries trading with each other, were all producing the same product and, therefore, enjoyed the same comparative advantages. In order to explain intra-industry trade, economies of scale have been advanced. When an industry is characterized by positive external economies of scale, it will try to increase its production output, as this will result in lower production costs per unit. In order to attain increased output levels, it will have to expand its market and it can do this by exporting its products to foreign markets. In a world characterized by external economies of scale, countries will gain from trade provided that the world scale of increasing returns industries is larger than the national scale of those industries would have been in the absence of trade⁹²³.

During the last decade, traditional trade theory has been completed by the so-called strategic-trade theory. Under that recent theory, models are elaborated, characterized by imperfect competition and market imperfections. As in many of those models, anti-dumping duties and other trade restrictions have been shown to be welfare-improving for the importing country, the strategic-trade theory seems to suggest countries to employ trade restrictions as a strategic tool and, thus, to participate in the strategic games played by monopolists and oligopolists.

2.2.2.2.1. Imperfect competition

Strategic trade theory has shown that tariffs in general may improve the welfare of the importing country, if there is no perfect competition on that country's market. If the Community is the importing country and if there is imperfect competition on the Community market (oligopoly, monopolistic competition), foreign exporters as well as Community producers may earn pure profits. Under such conditions, the Community may increase its overall welfare, by shifting some of the pure profits from the foreign exporters to the Community producers⁹²⁴.

With regard to anti-dumping duties, however, the argument as to the shifting of pure profits usually does not hold. This is quite obvious as, in order for dumping in the sense of price

⁹²³ ETHIER, W., *Modern International Economics*, New York, Norton, 1983, 42-44 ; KRUGMAN, P. and OBSTFELD, M., *International Economics*, Glenview (Ill.), Scott, Foresman and Company, 1988, 126-133.

⁹²⁴ See *e.g.* : BRANDER, J., and SPENCER, B., «Tariff Protection and Imperfect Competition», in *Monopolistic Competition and International Trade*, KIERZKOWSKI, H. (ed.), Oxford, Clarendon Press, 1984, (194), 194-206.

discrimination to occur, the Community market usually must be more competitive than the exporting country's market⁹²⁵. The more competitive the Community market is, the more elastic Community demand will be, and, thus, the higher both the margin of dumping and the anti-dumping duty will be. However, the more competitive the Community market is, the smaller the pure profits the foreign exporters earn on the Community market will be. Accordingly, the pure profits to be shifted towards the Community producers will equally be smaller⁹²⁶. Nevertheless, there may be instances in which anti-dumping duties enhance the Community welfare. However, strategic trade theory explicitly admits that it could be ambiguous for anti-dumping duties to be actually beneficial to the Community, for their welfare effects depend on quite detailed specification of the type of strategic behaviour of the oligopolistic competitors, the specific demand function, production costs and the probability of the detection of dumping⁹²⁷.

2.2.2.2.2. Market imperfections

2.2.2.2.2.1. Economies of scale

As has already been pointed out, external economies of scale may result in international trade and may increase a country's welfare, if the world scale of production under trade is higher than the national scale without trade. Economies of scale are a type of market imperfection. Strategic trade theory focuses on external economies of scale, when demonstrating that trade restrictions too may sometimes improve a country's welfare. By restricting foreign competition on its domestic market, an importing country may help its domestic industry to expand its domestic sales and production and, thus, to reach a higher level of productivity. This increase in productivity may fully offset the traditional net cost of protection (loss in consumption and in production efficiency) and, thus, result in an increase in the importing country's overall welfare.

Strategic trade theory has paid special attention to the combination of economies of scale and anti-dumping duties. Thus, it has demonstrated that an importing country may improve its national welfare by imposing an anti-dumping duty, if its import-competing industry faces positive economies of scale and if the producers show Cournot behaviour (*i.e.*, each producer considers the output of his competitors as given and decides, upon that basis, the quantity he will produce). In that case, the anti-dumping duty will be welfare-improving if there is competition between the import-competing and foreign producers only on the market of the importing country, or if there is competition between the import-competing and foreign producers on both the markets of the

⁹²⁵ *Supra*, 27.

⁹²⁶ DIXIT, A., «Anti-dumping and countervailing duties under oligopoly», *European Economic Review*, 1988/32, (55), 55-68.

⁹²⁷ FISCHER, R.D., «Endogenous probability of protection and firm behavior», *Journal of International Economics*, 1992, (149), 159 and 161-163.

importing country and the exporting countries and only the importing country enforces anti-dumping law. Indeed, in both cases, the foreign producers will have less access to the importing country's market because of the anti-dumping duty. Subsequently, the import-competing producers of the importing country will sell more on their domestic market and, in view of their positive external economies of scale, their efficiency will increase with the size of their production. As they will become more competitive *vis-à-vis* the foreign producers, the sales of the import-competing producers on the importing country's market will further increase. Moreover, in the second case, they will also be able to export to the home market of foreign producers for that market is assumed not to be protected by anti-dumping law⁹²⁸. If, however, the foreign producers' country also enforces anti-dumping law, the importing country will decrease its national welfare by enforcing its anti-dumping law. In such case, the benefits of the positive economies of scale are significantly reduced. Indeed, bilateral anti-dumping enforcement divides the global market into national spheres of influence and, thus, hinders producers in enlarging their scale of production beyond the national one⁹²⁹.

The conclusions of this strategic-trade-policy research into the welfare effects of anti-dumping duties, however, substantially change if the producers adopt another strategic behaviour than Cournot behaviour. It has been shown that, under Stackleberg leadership (*i.e.*, a producer does not consider his competitors' output as given, but correctly perceives any change in their planned response to his actions and, on the basis of that knowledge, determines his output), anti-dumping enforcement exclusively by the importing country will not always improve its national welfare, even if there is only competition on the importing country's market between the import-competing and foreign producers⁹³⁰.

2.2.2.2.2. *Limited market entry and transport costs*

Strategic-trade theory has confirmed that transport costs may cause price discrimination. In particular, it has demonstrated that «reciprocal dumping», *i.e.*, each producer exports to his foreign competitors' market at prices below his domestic prices, may result from the strategic interaction of two oligopolists having identical production costs and a Cournot perception, but located in two spatially separated markets. Strategic-trade theory has further shown that, under free entry, free trade increases the welfare of both countries in which the oligopolists are located.

⁹²⁸ GRUENSPECHT, H.K., «Dumping and Dynamic Competition», *Journal of International Economics*, 1988/25, (225), 237-244 ; WEBB, M., «The Ambiguous Consequences of Anti-Dumping Laws», *Economic Inquiry*, 1992, (437), 440-443.

⁹²⁹ GRUENSPECHT, H.K., «Dumping and Dynamic Competition», *Journal of International Economics*, 1988/25, (225), 237-244.

⁹³⁰ WEBB, M., «The Ambiguous Consequences of Anti-Dumping Laws», *Economic Inquiry*, 1992, (437), 444-447.

Without free entry, however, free trade increases the welfare of both countries only if transport costs are not too high for neutralizing the pro-competitive effect of free trade⁹³¹.

Strategic-trade theory has not yet examined the welfare of anti-dumping duties under such circumstances. At first sight, though, it seems, that anti-dumping duties might be welfare-improving when there is no free entry and transport costs are too high.

2.3. *LEGAL DEFINITION AND ECONOMIC ANALYSIS COMPARED*

As has been pointed out in the analysis of the welfare effects of duties in figures 15 and 16, economic trade theory considers the importing country's welfare to be a conglomerate of the interests of domestic consumers (consumer surplus), of the domestic producers (producers' surplus) and of the importing country's authorities (government revenue generated by the duty) of the importing country. The legal concept of the injury suffered by the Community industry only refers to the interests of the domestic producers. As the European anti-dumping authorities usually do not pay attention to the welfare of other countries, the legal concept of «Community interests» may be said to coincide, to a large extent, with the notion of national welfare (in particular, the welfare of the Community) as used in trade theory. The legal concept, though, takes also account of extra-economic aspects, such as the various policies pursued by the importing country's authorities. Therefore, economic trade theory does not provide a complete answer to the question whether and when anti-dumping duties will be in the Community interests. Nevertheless, the findings of economic trade theory on the welfare effects of anti-dumping duties may be quite helpful in assessing the impact of those duties on the Community interests. For instance, if economic trade theory proved that, under the specific circumstances of an anti-dumping case, an anti-dumping duty would improve the Community's welfare, the European anti-dumping authorities would only have to examine whether the other elements of the Community interests do not oppose the imposition of such a duty. Some conclusions drawn by economic trade theory, moreover, make it possible to assess some of those other elements of the Community interests. For example, strategic-trade theory may be relevant in respect of the Community's antitrust policy, since it has shown that reciprocal dumping under free trade has pro-competitive effects improving the welfare of the importing country. And, if economic trade theory proved that the Community's welfare is enhanced by free trade rather than by trade restrictions such as anti-dumping duties, the European anti-dumping authorities should be extremely meticulous in holding that anti-dumping duties are completely in line with the trade policy they pursue. For, such an argument implies that the Community trade policy is protectionist and that pursuing that

931 BRANDER, J., and KRUGMAN, P., «A 'Reciprocal Dumping' Model of International Trade», *Journal of International Economics*, 1983/15, (313), 313-321.

trade policy requires an increasing number of trade restrictions. Indeed, this argument implies that the protectionist Community trade policy should be complemented by as much trade-restricting anti-dumping measures as possible. Such argument clearly contradicts economic trade theory which shows that the Community welfare requires a minimum of trade restrictions.

With regard to the elements of the legal notion of «injury» and «Community interests» which economic trade theory takes explicitly into account, the comparison between legal definition and economic trade theory provides further important conclusions. Under economic trade theory, the strongest case in favour of anti-dumping duties seems to be the «optimum-tariff» argument. The European anti-dumping authorities, though, have never used or even mentioned the «optimal-tariff» argument. The absence of this argument, though, should not come as a surprise, even if it is actually true that the Community generally upholds price-makership. First, there is the problem, inherent in all kinds of «optimum tariffs» - the «optimal tariff»-argument is not specific to anti-dumping duties, but is valid for all kinds of customs duties -, of its rather low practicability because of the necessary but frequently unavailable information about demand and supply conditions on the Community and world market.

Second, there are a number of problems specific to anti-dumping duties. Probably, the European anti-dumping authorities do not rely on the «optimum-tariff» argument because European anti-dumping law goes against this argument. Indeed, the «optimal-tariff» argument implies that the dumping producer bears part of the burden of the anti-dumping duty. European anti-dumping law, however, stipulates that, where the dumping producer bears partly or entirely the burden of the anti-dumping duty, the anti-dumping duty may be amended in order to compensate for the amount borne by the dumping producer (Article 12 basic EC Regulation), or an additional duty may be imposed to that end (Article 13(11)(a) basic ECSC Decision).

Moreover, the applicability of the «optimum-tariff» argument is limited within the framework of anti-dumping law, because the amount of the anti-dumping duty must not exceed the magnitude of the dumping margin and it is quite possible that the optimal tariff is higher than the dumping margin.

A further complication of the «optimum-tariff» argument in respect of anti-dumping duties is that in most cases not the same general anti-dumping duty on all exporting countries will be imposed. First, there is no obligation to initiate anti-dumping proceedings against all countries dumping on the Community market. Second, not all exporting countries will necessarily be found dumping, or, if they do, they will not all be found to cause injury to the Community industry, nor will the Community interests always be found to call for anti-dumping duties. Third, the dumping margins of the dumping exporting countries will not always be identical. Hence, it is quite probable that in many cases different or selective anti-dumping duties will be imposed in respect

of the various exporting countries found to be dumping and that no anti-dumping duties are imposed on other exporting countries. Selective anti-dumping duties will cause trade diversion not only in favour of the Community industry, but also in favour of the exporting countries subject to no or lower anti-dumping duties⁹³². If there is such trade diversion, the Community producers will not be able to increase their sales to the same extent as under a general anti-dumping duty. As a consequence, the rise in Community producers' surplus will be lower than in case of a general anti-dumping duty (*i.e.*, smaller than area P_1cdP_2 in figure 16(c)). Therefore, a bigger part of the loss in consumer surplus caused by the price rise following the imposition of the anti-dumping duties, will not be compensated. As a result, the net cost of anti-dumping protection will be higher when selective anti-dumping duties are imposed, whereas the probability that it will be compensated by the terms-of-trade effect of the «optimal tariff» declines. The negative effect of trade diversion in favour of third exporting countries on the welfare of the Community has been taken into consideration in some anti-dumping cases, but has only exceptionally been held to be a convincing argument for rejecting anti-dumping relief⁹³³.

As the «optimum-tariff» argument is of marginal relevance to anti-dumping law, only strategic-trade theory provides some arguments in favour of anti-dumping duties. The problem, however, is that strategic-trade theory does not allow to draw general, straightforward conclusions. Its conclusions depend entirely on the assumptions made, such as the existence of imperfect competition and of external economies of scale, whether or not there is free entry and whether or not the pro-competitive effects of free trade are neutralized by too high transport costs. Moreover, strategic-trade theory has shown its conclusions may be completely altered if the producers employ another kind of strategic behaviour (*e.g.*, Stackleberg leadership instead of Cournot behaviour⁹³⁴). Further, strategic trade interventions by an importing country which improve that country's welfare, will normally provoke retaliatory actions by the other countries who perceive the importing country's interventions reducing their welfare or are perhaps not aware that their welfare is not affected negatively. Retaliation will usually undo the welfare effects of the importing country's trade intervention. Though it seems that anti-dumping duties

932 Trade diversion in favour of exporting countries not subjected to anti-dumping relief is considerably higher than trade diversion in favour of the Community producers. As a result of anti-dumping relief granted in the period 1980-1985 the imports from exporting countries not subjected to anti-dumping relief increased by 98.6 % over a five-year period after the imposition of the anti-dumping relief. Intra-Community trade increased with only 24.0 % over the same period. See : MESSERLIN, P., «The EC Antidumping Regulations : A First Economic Appraisal, 1980-85», *Weltwirtschaftliches Archiv*, 1989, (563), 573-575.

933 See : *infra*, 632-636.

934 See also *e.g.*, EATON, J., and GROSSMAN, G.M., «Optimal Trade and Industrial Policy under Oligopoly», *Quarterly Journal of Economics*, 1986, (383), 383-394. In the model of J. EATON and G.M. GROSSMAN it is examined which is the optimal policy for shifting pure profits from foreign to domestic producers. Under Cournot behaviour the optimal policy is an export subsidy, but, under Bertrand behaviour (*i.e.*, a producer considers the prices of his competitors as given and, on the basis of their prices, determines the prices he will charge for his products), the optimal policy is an export tax.

will not provoke any retaliation, as they are allowed under GATT⁹³⁵, the exporting country still may retaliate by enforcing their national anti-dumping laws. Such kind of anti-dumping retaliation has already been shown to prevent the importing country from improving its national welfare by imposing anti-dumping duties. All those assumptions, including the knowledge whether or not the exporting countries will, by way of retaliation, resort to anti-dumping measures, require information which the importing country's authorities cannot be expected to be in a position to obtain⁹³⁶. Moreover, strategic-trade theory only compares the use of (positive and negative) tariffs (or anti-dumping duties) with free trade. It has not yet been examined systematically whether such trade restrictions are first-best policies⁹³⁷. Probably, trade restrictions are not first-best policies because, in the majority of the strategic-trade models, market imperfections are distortions on the domestic market of the importing countries. As a consequence, «internal» intervention, which directly remedies the domestic distortion, will generally be superior to trade restrictions, which usually adjust one distortion at the cost of introducing another. For example, if the domestic scale of production is too low to enjoy the economies of scale, the optimal intervention would be a production subsidy, which, contrary to an anti-dumping duty, does not involve any loss in consumer surplus⁹³⁸.

In view of the high sensitivity of the welfare effects of strategic trade interventions depending on a number of quite specific assumptions which are hard to verify by the authorities of a country, it seems safe to adopt as general policy guideline the rule that anti-dumping duties usually do not raise the welfare of importing countries. Only if there is strong evidence that the conditions under which strategic trade interventions may improve the importing country's welfare, are met, the imposition of anti-dumping relief should be considered.

935 PETERSMANN, E.-U., «Need for Reforming Antidumping Rules and Practices. The Messy World of Fourth-Best Policies», *Aussenwirtschaft*, 1990, (179), 188.

936 BALDWIN, R.E., «Are Economists' Traditional Trade Policy Views Still Valid?», *Journal of Economic Literature*, 1992, (804), 824 ; BHAGWATI, J., *Protectionism*, Cambridge (Mass.), MIT Press, 1988, 106-107.

937 DIXIT, A., «International Trade Policy for Oligopolistic Industries», *Economic Journal - Supplement*, 1984, (1), 4.

938 BALDWIN, R.E., «Are Economists' Traditional Trade Policy Views Still Valid?», *Journal of Economic Literature*, 1992, (804), 821-822 ; GREENAWAY, D., and THARAKAN, P.K.M., «Imperfect Competition, Adjustment Policy, and Commercial Policy», in *Imperfect Competition and International Trade. The Policy Aspects of Intra-Industry Trade*, GREENAWAY, D., and THARAKAN, P.K.M. (eds.), Sussex, Wheatsheaf Books, 1986, (7), 27-28 and 30.

3. UNDERTAKINGS

3.1. LEGAL DEFINITION

Undertakings are agreements between the dumping exporter and the European anti-dumping authorities under which prices are revised or exports cease to the extent that the European anti-dumping authorities are satisfied that either the dumping margin or the injurious effect of the dumping are eliminated (Article 8.1. GATT Anti-dumping Code ; Article 8(1) basic EC Regulation ; Article 10(2)(b) basic ECSC Decision). Though the heading of Article 8 of the GATT Anti-dumping Code treats of price undertakings, price undertakings (setting minimum import prices) as well as quantity undertakings (setting maximum export quantities) are allowed.

European anti-dumping authorities have a wide margin of discretion in choosing between anti-dumping duties and undertakings⁹³⁹. The only limit to their discretionary powers seems to be the principle of non-discrimination⁹⁴⁰. GATT and EC anti-dumping law explicitly underscore the anti-dumping authorities's discretionary powers as they hold that the latter may reject undertakings because of, *inter alia*, reasons of general policy (Article 8.3. GATT Anti-dumping Code ; Article 8(3) basic EC Regulation). Perhaps, due to the European anti-dumping authorities' discretionary power, European anti-dumping case law has paid little attention to an active choice between the different types of anti-dumping relief. The European anti-dumping authorities seem to accept undertakings, whenever undertakings are offered by the dumping exporters⁹⁴¹, unless

⁹³⁹ C.J.E.C., case 240/84, 7 May 1987, *NTN Toyo Bearing Company Limited o.a. v Council*, E.C.R., 1987, (1809), 1858 ; C.J.E.C., case 255/84, 7 May 1987, *Nachi Fujikoshi Company v Council*, E.C.R., 1987, (1861), 1894 ; C.J.E.C., case 256/84, 7 May 1987, *Koyo Seiko Limited v Council*, E.C.R., 1987, (1899), 1918 ; C.J.E.C., case 258/84, 7 May 1987, *Nippon Seiko KK v Council*, E.C.R., 1987, (1923), 1971 ; C.J.E.C., case 260/84, 7 May 1987, *Minebea Company Limited v Council*, E.C.R., 1987, (1975), 2011 ; C.J.E.C., joined cases 294/86 and 77/87, 5 October 1988, *Technointorg v Commission and Council*, E.C.R., 1988, (6077), 6105 and 6117 ; C.J.E.C., joined cases 133/87 and 150/87, 14 March 1990, *Nashua Corporation v Commission and Council*, E.C.R., 1990, I, (719), 763 (Opinion of Advocate-General MISCHO) ; C.J.E.C., case C-323/88, 11 July 1990, *SA Sermes v Directeur des services des douanes de Strasbourg*, E.C.R., 1990, I, (3027), 3041 (Opinion of Advocate General VAN GERVEN).

⁹⁴⁰ In the *Soviet deep freezers case*, the Court of Justice applied the principle of non-discrimination to the rejection of the undertaking offered by the Soviet exporter. In *deep freezers from the USSR, Yugoslavia and the German Democratic Republic*, the Commission has accepted undertakings offered by the exporters from Yugoslavia and the German Democratic Republic, but has found the undertaking offered by the Soviet exporter unacceptable ; as a result, an anti-dumping duty was imposed on imports of deep freezers from the USSR (Commission Regulation (EEC) No 2800/86 of 9 September 1986 imposing a provisional anti-dumping duty on imports of certain deep freezers originating in the USSR, accepting the undertakings in connection with the investigation of imports of certain deep freezers originating in Yugoslavia or in the German Democratic Republic and terminating the investigation, and terminating the proceeding concerning imports of certain deep freezers, O.J., 11 September 1986, No L 259/14 ; Council Regulation (EEC) No 29/87 of 22 December 1986 imposing a definitive anti-dumping duty on imports of certain deep freezers originating in the Soviet Union, O.J., 8 January 1987, No L 6/1). The fact that, contrary to the undertakings given by the Yugoslav and German exporters, the undertaking of the Soviet exporter was not sufficient to remedy the injury caused by the Soviet imports of deep freezers to the Community industry involved that the principle of non-discrimination was not violated (C.J.E.C., joined cases 294/86 and 77/87, 5 October 1988, *Technointorg v Commission and Council*, E.C.R., 1988, (6077), 6118).

⁹⁴¹ See, e.g., *silicon carbide from Poland*, where an anti-dumping duty was imposed because the exporter did not offer an undertaking, despite having been granted the opportunity by the Commission to do so (Council Regulation (EC) No 821/94 of 12 April 1994 imposing a definitive anti-dumping duty on imports of silicon carbide, originating in the People's Republic of China, Poland, the Russian Federation and Ukraine, O.J., 13 April 1994, No L 94/21).

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they consider the undertakings offered to be insufficient to remedy either the dumping or the injury⁹⁴². Indeed, the rejection of undertakings is usually not grounded on a preference for anti-dumping duties to undertakings, but rather on deficiencies of the undertakings themselves⁹⁴³.

⁹⁴² BOUDANT, J., *L'anti-dumping communautaire*, Paris, Economica, 1991, 188, 190 and 272 (according to whom European anti-dumping law favours the acceptance of undertakings); STEGEMANN, K., «EC Anti-Dumping Policy: Are Price Undertakings a Legal Substitute for Illegal Price Fixing», *Weltwirtschaftliches Archiv*, 1990, (268), 268-269; THARAKAN, P.K.M., «The political economy of anti-dumping undertakings in the European Communities», *European Economic Review*, 1991, (1341), 1342-1344; VERMULST, E.A., and GRAAFSMA, F., «A Decade of European Community Anti-Dumping Law and Practice Applicable to Imports from China», *Journal of World Trade*, 1992/3, (5), 12.

⁹⁴³ Indeed, undertakings have been refused because :

- the undertakings put forward were not appropriate to the case in question (Council Regulation (EEC) No 2109/85 of 25 July 1985 imposing a definitive anti-dumping duty on imports of certain kinds of polystyrene sheet originating in Spain, *O.J.*, 30 July 1985, No L 198/1);
- the proposed price levels were unlikely to eliminate either the dumping margin or the injurious effects of the dumping (C.J.E.C., joined cases 294/86 and 77/87, 5 October 1988, *Technintorg v Commission and Council*, *E.C.R.*, 1988, (6077), 6104 and 6117; Commission Regulation (EEC) No 724/82 of 30 March 1982 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0.75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Poland, Romania and the USSR, and terminating the proceeding in respect of imports of said products originating in Hungary, *O.J.*, 31 March 1982, No L 85/9; Council Regulation (EEC) No 3836/91 of 19 December 1991 imposing a definitive anti-dumping duty on imports of dihydrostreptomycin originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty, *O.J.*, 31 December 1991, No 362/1);
- the undertaking was not sufficient to remove the injury (Council Regulation (EEC) No 3540/83 of 14 December 1983 imposing a definitive anti-dumping duty on imports of certain glass textile fibres (rovings) originating in the German Democratic Republic and Czechoslovakia, *O.J.*, 16 December 1983, No L 354/15; Commission Regulation (EEC) No 2865/85 of 14 October 1985 imposing a provisional anti-dumping duty on imports of certain electronic scales originating in Japan and accepting undertakings and terminating the proceeding in respect of certain imports of such products originating in Japan, *O.J.*, 16 October 1985, No L 275/5), since the price of the dumped imports would not be increased to the appropriate level within an acceptable period of time (Commission Regulation (EEC) No 2127/82 of 28 July 1982 imposing a provisional anti-dumping duty on trichloroethylene originating in the German Democratic Republic and Poland and terminating the anti-dumping proceeding in respect of trichloroethylene originating in Czechoslovakia, Romania, Spain and the United States of America, *O.J.*, 31 July 1982, No L 223/76; C.J.E.C., case 260/84, 7 May 1987, *Minebea Company Limited v Council*, *E.C.R.*, 1987, (1975), 2012; C.J.E.C., joined cases 294/86 and 77/87, 5 October 1988, *Technintorg v Commission and Council*, *E.C.R.*, 1988, (6077), 6104 and 6117);
- undertakings offered by importers would have the effect of encouraging them to continue to obtain supplies from outside the Community at dumped prices; in other words, because such undertakings do not result in trade diversion in favour of the Community producers and, thus, do not remedy the injury suffered by the Community industry (C.J.E.C., joined cases 133/87 and 150/87, 14 March 1990, *Nashua Corporation v Commission and Council*, *E.C.R.*, 1990, I, (719), 779; C.J.E.C., case 156/87, 14 March 1990, *Gestetner Holdings plc v Council and Commission*, *E.C.R.*, 1990, I, (781), 826 and 845);
- the undertaking to increase prices immediately did not cover all sales (C.J.E.C., case 260/84, 7 May 1987, *Minebea Company Limited v Council*, *E.C.R.*, 1987, (1975), 2012);
- the undertaking does not imply a uniform sales price on all markets of the Community (C.J.E.C., case 260/84, 7 May 1987, *Minebea Company Limited v Council*, *E.C.R.*, 1987, (1975), 2012);
- the maximum price increase depends on a condition beyond the control of the Commission (C.J.E.C., joined cases 294/86 and 77/87, 5 October 1988, *Technintorg v Commission and Council*, *E.C.R.*, 1988, (6077), 6105 and 6117);
- the extension of the existing undertaking would not give the Community industry sufficient protection (Commission Regulation (EEC) No 1745/88 of 21 June 1988 imposing a provisional anti-dumping duty on imports of paracetamol originating in the People's Republic of China, *O.J.*, 22 June 1988, No L 155/29);
- the features of the Community market of the product in question and the risk of circumvention had to be considered (Council Regulation (EEC) No 2024/83 of 18 July 1983 establishing a definitive anti-dumping duty on 4,4'-isopropylidenediphenol originating in the United States of America, *O.J.*, 22 July 1983, No L 199/4);
- there was a risk that the undertaking would not be respected since the exporter, who was located in a NME country, was not fully autonomous in setting his export prices (Council Regulation (EEC) No 830/92 of 30 March 1992 imposing a definitive anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and collecting definitively the provisional duty, *O.J.*, 3 April 1992, No L 88/1 (corrigendum, *O.J.*, 5 June 1992, No L 153/16); Council Regulation (EC) No 821/94 of 12 April 1994 imposing a definitive anti-dumping duty on imports of silicon carbide, originating in the People's Republic of China, Poland, the Russian Federation and Ukraine, *O.J.*, 13 April 1994, No L 94/21);
- given the general high level of mobility of production factors within the industry concerned, the undertakings were unlikely to contribute to the restoration of fair competitive conditions in the Community market (Council Regulation (EEC) No 1048/90 of 25 April 1990 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 27 April 1990, No L 107/66 (corrigendum, *O.J.*, 24 May 1990, No L 133/92); Commission Regulation (EEC) No 129/91 of 11 January 1991 imposing a provisional anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China, *O.J.*, 19 January 1991, No L 14/31; Council Regulation (EEC) No 2861/93 of 18 October 1993

imposing a definitive anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, and collecting definitively the provisional duty imposed, *O.J.*, 21 October 1993, No L 262/4);

- the fact that effective monitoring of the adherence of companies to the undertaking would not be practicable (Council Regulation (EEC) No 738/92 of 23 March 1992 imposing a definitive anti-dumping duty on imports of cotton yarn originating in Brazil and Turkey, *O.J.*, 27 March 1992, No L 82/1);
- the monitoring and control of the undertaking would be difficult (Commission Decision No 1751/94/ECSC of 15 July 1994 imposing a definitive anti-dumping duty on imports into the Community of hematite pig-iron, originating in Brazil, Poland, Russia and Ukraine, *O.J.*, 16 July 1994, No L 182/37);
- in view of the number of exporters, the number of models exported by them, the number of possible features of the product concerned and the frequent renewal of models, the undertakings offered would be difficult to implement and would require extensive resources to be monitored (Council Regulation (EEC) No 112/90 of 16 January 1990 imposing a definitive anti-dumping duty on imports of certain compact disc players originating in Japan and the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 17 January 1990, No L 13/21; Commission Regulation (EEC) No 129/91 of 11 January 1991 imposing a provisional anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China, *O.J.*, 19 January 1991, No L 14/31);
- in view of the large number of importers, the undertakings offered by them would pose particular difficulties in the effective monitoring of compliance with such undertakings (C.J.E.C., joined cases 133/87 and 150/87, 14 March 1990, *Nashua Corporation v Commission and Council, E.C.R.*, 1990, I, (719), 765 and 779; C.J.E.C., case 156/87, 14 March 1990, *Gestetner Holdings plc v Council and Commission, E.C.R.*, 1990, I, (781), 827 and 845);
- the degree of non-collaboration during the anti-dumping investigation and the rapidity with which model changes were introduced in the industry concerned, would make the observance of the undertakings difficult to verify, while their monitoring would be very costly (Council Regulation (EEC) No 1048/90 of 25 April 1990 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 27 April 1990, No L 107/56 (corrigendum, *O.J.*, 24 May 1990, No L 133/92); Council Regulation (EEC) No 2861/93 of 18 October 1993 imposing a definitive anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, and collecting definitively the provisional duty imposed, *O.J.*, 21 October 1993, No L 262/4);
- in view of the undertaking's special features (not further specified), its implementation could not have been satisfactorily monitored and could have led to controversy (Council Regulation (EEC) No 3306/80 of 18 December 1980 imposing a definitive anti-dumping duty on mechanical alarm clocks (other than travel alarms) originating in the German Democratic Republic and the USSR, *O.J.*, 19 December 1980, No L 344/34; Commission Regulation (EEC) No 2253/84 of 31 July 1984 imposing a provisional anti-dumping duty on certain imports of certain sodium carbonate originating in the United States of America and accepting undertakings in respect of other imports of the same product, *O.J.*, 2 August 1984, No L 206/15; Council Regulation (EEC) No 1877/85 of 4 July 1985 imposing a definitive anti-dumping duty on imports of certain hydraulic excavators originating in Japan, *O.J.*, 6 July 1985, No L 176/1);
- monitoring of price undertakings had been shown in previous cases to be very complex and difficult for the product involved which is imported in forms having different degrees of impurity which should be reflected in different price levels (Council Regulation (EC) No 621/94 of 17 March 1994 imposing a definitive anti-dumping duty on imports of ferro-silicon originating in South Africa and in the People's Republic of China, *O.J.*, 19 March 1994, No L 77/48);
- past experience had shown that, even if generally respected, undertakings did not constitute a satisfactory solution, but seemed likely to cause controversy and were difficult to monitor, thereby requiring a considerable amount of time and expense (Council Regulation (EEC) No 2089/84 of 19 July 1984 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 21 July 1984, No L 193/1);
- the prices cited in the previous undertakings had all systematically been undercut (Council Regulation (EC) No 3359/93 of 2 December 1993 imposing amended anti-dumping measures on imports of ferro-silicon originating in Russia, Kazakhstan, Ukraine, Iceland, Norway, Sweden, Venezuela and Brazil, *O.J.*, 9 December 1993, No L 302/1);
- despite previous undertakings, the dumping exporters continued to dump, contributing to the injury suffered by the Community industry and nullifying the measures taken to defend it (Commission Regulation (EEC) No 1472/91 of 29 May 1991 imposing a provisional anti-dumping duty on imports of oxalic acid originating in India or China and terminating the anti-dumping proceeding in respect of imports of oxalic acid originating in Czechoslovakia, *O.J.*, 1 June 1991, No L 138/62);
- given the breach of the previous undertaking, a renewal of the undertaking would not afford the Community industry sufficient protection (Council Regulation (EEC) No 1531/88 of 31 May 1988 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty imposed on those imports, *O.J.*, 3 June 1988, No L 138/1; Council Regulation (EC) No 2556/94 of 19 October 1994 amending Regulation (EEC) No 2552/93 imposing a definitive anti-dumping duty on imports of artificial corundum originating in the People's Republic of China, the Russian Federation and Ukraine, with the exception of those imports sold for export to the Community by companies whose undertakings have been accepted, and definitively collecting the amounts secured by way of the provisional anti-dumping duty imposed by Commission Regulation (EC) No 1418/94, *O.J.*, 21 October 1994, No L 270/24);
- it was necessary to avoid a situation where an exporter who has violated his undertaking was placed in a more favourable position than those exporters who had fully respected their obligations (Council Regulation (EEC) No 3648/83 of 19 December 1983 imposing a definitive anti-dumping duty on imports of hardboard originating in Czechoslovakia and Poland and definitively collecting the amounts secured by way of a provisional anti-dumping duty on certain imports of hardboard originating in Sweden, *O.J.*, 24 December 1983, No L 361/6; Council Regulation (EEC) No 1825/84 of 28 June 1984 imposing a definitive anti-dumping duty on imports of hardboard originating in the Soviet Union, *O.J.*, 29 June 1984, No L 170/68; Council Regulation (EEC) No 385/90 of 12 February 1990 imposing a definitive anti-dumping duty on imports of potassium

permanganate originating in Czechoslovakia and definitively collecting the provisional anti-dumping duty imposed on those imports, *O.J.*, 16 February 1990, No L 42/1);

- the fact that the undertaking did not correspond to European anti-dumping law, and in particular the possibility of imposing an anti-dumping duty in the case of violation or withdrawal of the undertaking (Council Regulation (EEC) No 738/92 of 23 March 1992 imposing a definitive anti-dumping duty on imports of cotton yarn originating in Brazil and Turkey, *O.J.*, 27 March 1992, No L 82/1).

Conversely, undertakings have been accepted because :

- the undertaking would remedy the injury (see e.g., Council Regulation (EC) No 821/94 of 12 April 1994 imposing a definitive anti-dumping duty on imports of silicon carbide, originating in the People's Republic of China, Poland, the Russian Federation and Ukraine, *O.J.*, 13 April 1994, No L 94/21);
- the undertaking would prevent the recurrence of injury (Commission Decision 82/710/EEC of 18 October 1982 accepting an undertaking in connection with the anti-dumping proceeding concerning imports of thiophen originating in the United States of America and terminating that proceeding, *O.J.*, 21 October 1982, No L 295/35);
- undertakings incorporated the necessary conditions to provide the required flexibility (Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79; corrigendum, *O.J.*, 10 February 1990, No L 38/44));
- it appeared that correct operation of the undertaking can be effectively monitored (Commission Decision 83/649/EEC of 19 December 1983 accepting undertakings in connection with the anti-dumping procedure in respect of certain imports of hardboard originating in Sweden and terminating that procedure, *O.J.*, 24 December 1983, No L 361/47; Commission Decision 85/209/EEC of 26 March 1985 accepting the undertaking given in connection with the anti-dumping investigation concerning imports of plasterboard of Spanish origin into Ireland and Northern Ireland and terminating that investigation, *O.J.*, 29 March 1985, No L 89/65; Commission Decision 85/443/EEC of 23 September 1985 accepting an undertaking given in connection with the anti-dumping investigation concerning imports of container corner fittings of worked cast steel originating in Austria and terminating that investigation, *O.J.*, 27 September 1985, No L 256/44; Commission Decision 86/35/EEC of 21 February 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of fibre building board from Finland and Sweden and terminating the investigation, *O.J.*, 25 February 1986, No L 46/23; Commission Decision 86/36/EEC of 26 February 1986 accepting undertakings entered into in connection with the anti-dumping proceeding concerning imports into Greece of certain categories of glass originating in Turkey, Yugoslavia, Romania, Bulgaria, Hungary and Czechoslovakia and terminating the investigation, *O.J.*, 28 February 1986, No L 51/73; Commission Decision 86/232/EEC of 9 June 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of hardboard originating in Argentina, Switzerland and Yugoslavia and terminating the investigation, *O.J.*, 12 June 1986, No L 157/61; Commission Regulation (EEC) No 2800/86 of 9 September 1986 imposing a provisional anti-dumping duty on imports of certain deep freezers originating in the USSR, accepting the undertakings in connection with the investigation of imports of certain deep freezers originating in Yugoslavia or in the German Democratic Republic and terminating the investigation, and terminating the proceeding concerning imports of certain deep freezers, *O.J.*, 11 September 1986, No L 259/14; Commission Decision 86/589/EEC of 26 November 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of potassium permanganate originating in Czechoslovakia, the German Democratic Republic and the People's Republic of China and terminating the investigation, *O.J.*, 2 December 1986, No L 339/32; Council Decision 87/104/EEC of 9 February 1987 accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China, and terminating the investigation, *O.J.*, 14 February 1987, No L 46/45; Commission Decision 87/210/EEC of 23 March 1987 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of outboard motors originating in Japan and terminating the investigation, *O.J.*, 26 March 1987, No L 82/36; Commission Regulation (EEC) No 2409/87 of 6 August 1987 imposing a provisional anti-dumping duty on imports of ferro-silicon originating in Brazil and accepting undertakings offered by Italmagnesio SA of Brazil and from Promsyrrio-Import of the USSR, *O.J.*, 8 August 1987, No L 219/24; Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79; corrigendum, *O.J.*, 10 February 1990, No L 38/44); Commission Regulation (EEC) No 547/90 of 2 March 1990 imposing a provisional anti-dumping duty on imports of certain glutamic acid and its salts originating in Indonesia, the Republic of Korea, Taiwan and Thailand, and accepting undertakings in connection with imports of certain glutamic acid and its salts originating in these countries, *O.J.*, 3 March 1990, No L 56/23; Commission Decision 90/138/EEC of 16 March 1990 accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of certain diesel engines originating in Finland and Sweden, and terminating the investigation, *O.J.*, 22 March 1990, No L 76/28; Commission Decision 90/241/EEC of 22 May 1990 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of photo albums originating in South Korea and Hong Kong, and terminating the investigation, *O.J.*, 31 May 1990, No L 138/48; Commission Regulation (EEC) No 1937/90 of 4 July 1990 imposing a provisional anti-dumping duty on imports of pure silk typewriter ribbon fabrics originating in the People's Republic of China, and accepting an undertaking offered by the exporter, *O.J.*, 7 July 1990, No L 174/27; Commission Decision 90/478/EEC of 24 September 1990 accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of tungsten ores and concentrates originating in the People's Republic of China and terminating the investigation with regard to these exporters, *O.J.*, 27 September 1990, No L 264/55;

GATT and EC anti-dumping law seem to codify this aspect of European anti-dumping case law, as they hold that undertakings offered need not be accepted if the anti-dumping authorities consider their acceptance impractical, for example, if the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy (Article 8.3. GATT Anti-dumping Code ; Article 8(3) basic EC Regulation).

Indeed, exceptionally, though, the European anti-dumping authorities have made a more active choice between anti-dumping duties and undertakings for reasons of general policy. They have

Commission Decision 90/479/EEC of 24 September 1990 accepting undertakings given by certain exporters in connection with the anti-dumping proceeding concerning imports of tungstic oxide and tungstic acid originating in the People's Republic of China and terminating the investigation with regard to the exporters in question, *O.J.*, 27 September 1990, No L 264/57 ; Commission Decision 90/480/EEC of 24 September 1990 accepting undertakings given by certain exporters in connection with the anti-dumping proceeding concerning imports of tungsten carbide and fused tungsten carbide originating in the People's Republic of China and terminating the investigation with regard to the exporters in question, *O.J.*, 27 September 1990, No L 264/59 ; Council Regulation (EEC) No 3433/91 of 25 November 1991 imposing a definitive anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in Japan, the People's Republic of China, the Republic of Korea and Thailand and definitively collecting the provisional anti-dumping duty, *O.J.*, 28 November 1991, No L 326/1 ; Commission Decision 92/177/EEC of 16 March 1992 accepting an undertaking given by a Japanese producer in connection with the anti-dumping proceeding concerning imports of certain thermal paper originating in Japan, and terminating the investigation with regard to the producer in question, *O.J.*, 26 March 1992, No L 81/22 ; Commission Decision 93/521/EEC of 3 September 1993 accepting undertakings given in connection with the anti-dumping review in respect of imports of binder and baler twine originating in Brazil, terminating the anti-subsidy review proceeding with regard to these imports and terminating the anti-dumping and anti-subsidy review in respect of imports of binder and baler twine originating in Mexico, *O.J.*, 8 October 1993, No L 251/28 ; Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries ; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24 ; Commission Decision 94/825/EC of 12 December 1994 accepting an undertaking offered in connection with the anti-dumping proceeding concerning imports of urea ammonium nitrate solution originating in Bulgaria and Poland, *O.J.*, 31 December 1994, No L 350/115) ;

- the government of the country of origin had offered its assistance in the monitoring of the price undertaking (Commission Decision 83/649/EEC of 19 December 1983 accepting undertakings in connection with the anti-dumping procedure in respect of certain imports of hardboard originating in Sweden and terminating that procedure, *O.J.*, 24 December 1983, No L 361/47 ; Commission Decision 89/376/EEC of 19 June 1989 accepting an undertaking offered in connection with the anti-dumping proceeding concerning imports of video cassettes and video-tape reels originating in the Republic of Korea and Hong Kong and terminating the investigation, *O.J.*, 22 June 1989, No L 174/30 ; Commission Decision 94/202/EC of 9 March 1994 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of silicon carbide originating in the People's Republic of China, Norway, Poland and the former USSR and terminating the proceeding against imports originating in Norway and several republics previously part of the former USSR, *O.J.*, 13 April 1994, No L 94/32 ; Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries ; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24) ;
- only a small number of companies existed (Council Regulation (EEC) No 3121/89 of 16 October 1989 modifying the anti-dumping measures applicable to imports of certain acrylic fibres originating in Mexico by introducing an anti-dumping duty on such imports, other than those from exporters to the Community whose undertakings are accepted, *O.J.*, 19 October 1989, No L 301/1) - a reason undoubtedly closely related to the need for effective monitoring of undertakings ;
- the anti-dumping investigation against imports of the like product of other producers located in the same country was also terminated by the acceptance of identical undertakings (Commission Decision 93/538/EEC of 18 October 1993 accepting an undertaking in connection with the anti-dumping proceeding concerning imports of certain types of electronic micro-circuits known as EPROMs (erasable programmable read only memories) originating in Japan, *O.J.*, 21 October 1993, No L 262/64) ;
- the anti-dumping investigation against imports of the like product originating in third countries was also terminated by the acceptance of undertakings (Commission Decision 86/464/EEC of 17 September 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of artificial corundum originating in Hungary, Poland and the USSR, and terminating the investigation, *O.J.*, 23 September 1986, No L 271/26) ;
- no violations of the previous undertakings were observed (Commission Decision 86/35/EEC of 21 February 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of fibre building board from Finland and Sweden and terminating the investigation, *O.J.*, 25 February 1986, No L 46/23 ; Commission Decision 87/210/EEC of 23 March 1987 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of outboard motors originating in Japan and terminating the investigation, *O.J.*, 26 March 1987, No L 82/36).

subsumed these reasons of general policy under the notion of «Community interests». For instance, they have refused to accept undertakings because «their acceptance would not offer a solution which was as appropriate as the imposition of a definitive anti-dumping duty in the prevention of unfair business practices». No explanation was offered, pointing out why anti-dumping duties were more appropriate⁹⁴⁴. The European anti-dumping authorities, though, when they switch to making an active choice, usually provide more arguments, which concern either trade policy or antitrust policy.

3.1.1. Trade policy

The European anti-dumping authorities have only in very few cases relied upon reasons of trade policy to make a choice between anti-dumping duties and undertakings.

In *hydraulic excavators from Japan*⁹⁴⁵, the Council held that, in the light of «the then prevailing trade relations with Japan», it was not in the interest of the Community to have recourse to price undertakings as an appropriate remedy for the injury resulting from the dumped imports. Instead, the Council imposed a definitive anti-dumping duty. Probably, the wording «the then prevailing trade relations with Japan» refer to the trade deficit of the Community in its trade with Japan.

Though in previous anti-dumping cases concerning Canada, undertakings had been accepted⁹⁴⁶, the Commission, in *vinyl acetate monomer from Canada*⁹⁴⁷, refused to accept the undertakings offered, merely because Canadian legislation did not provide the possibility of suspending or terminating anti-dumping proceedings by way of accepting an undertaking given by dumping exporters.

Since then, no undertakings of Canadian exporters have been accepted. Nevertheless, at the end of the same year in which anti-dumping duties were imposed on vinyl acetate monomer from Canada, the possibility of terminating anti-dumping proceedings by accepting undertakings was incorporated into Canadian anti-dumping law⁹⁴⁸. Indeed,

⁹⁴⁴ Council Regulation (EEC) No 34/89 of 5 January 1989 imposing a definitive anti-dumping duty on imports of serial impact fully formed (SIFF) character printers originating in Japan, *O.J.*, 7 January 1989, No L 5/23.

⁹⁴⁵ Council Regulation (EEC) No 1877/85 of 4 July 1985 imposing a definitive anti-dumping duty on imports of certain hydraulic excavators originating in Japan, *O.J.*, 6 July 1985, No L 176/1.

⁹⁴⁶ See : Commission Decision 81/663/EEC of 24 August 1981 accepting undertakings in connection with the anti-dumping proceedings concerning potato granules originating in Canada, *O.J.*, 26 August 1981, No L 243/16 ; Council Regulation (EEC) No 551/83 of 8 March 1983 imposing a definitive anti-dumping duty on kraftliner paper and board originating in the United States of America and accepting undertakings given in connection with the review of the anti-dumping proceeding on kraftliner paper and board originating in Austria, Canada, Finland, Portugal, the Soviet Union and Sweden, *O.J.*, 10 March 1983, No L 64/25 ; Commission Decision No 702/83/ECSC of 24 March 1983 imposing provisional anti-dumping duties on certain iron or steel coils for re-rolling originating in Argentina, Brazil, Canada and Venezuela and accepting price undertakings from two Canadian exporters, *O.J.*, 29 March 1983, No L 82/9 ; Commission Decision No 2182/83/ECSC of 27 July 1983 imposing definitive anti-dumping duties on imports of certain iron or steel coils originating in Argentina, Brazil, Canada and Venezuela, *O.J.*, 2 August 1983, No L 210/5.

⁹⁴⁷ Commission Regulation (EEC) No 512/84 of 27 February 1984 imposing a provisional anti-dumping duty on imports of vinyl acetate monomer originating in Canada, *O.J.*, 29 February 1984, No L 58/17.

⁹⁴⁸ See : STEGEMANN, K., «Settlement of Anti-Dumping Cases by Price Undertaking : Is the E.C. More Liberal than Canada ?», in *Policy Implications of Antidumping Measures*, THARAKAN, P.K.M. (ed.), Amsterdam, North-Holland, 1991, (219), 219-233.

*pentaerythritol from Canada*⁹⁴⁹, dating a year after *vinyl acetate monomer from Canada*, may give the impression that, if offered by the Canadian exporter, the undertaking might have been accepted. For the Council held that it could not be decided whether or not such an undertaking would have been accepted merely because the Canadian exporter did not offer any undertaking. Instead, the Council imposed a variable anti-dumping duty because the economic effect of that type of anti-dumping duty is the same as that of a price undertaking.

In *roller chains for cycles from the People's Republic of China*⁹⁵⁰, the Council imposed a variable anti-dumping duty on certain imports from the People's Republic of China, in view of the undertakings already accepted in respect of the other imports of roller chains for cycles from the People's Republic of China and from the Soviet Union, subject to the same anti-dumping proceeding. Thereby, the Council aimed at ensuring an equitable treatment of imports at different prices.

In *urea from Trinidad and Tobago*⁹⁵¹ and *acrylic fibres from Mexico*⁹⁵², the acceptance of undertakings, in pursuance of Article 15 of the GATT Anti-dumping Code (which allows a more favourable treatment of developing countries subject to anti-dumping proceedings), was supported by the fact that Trinidad and Tobago as well as Mexico were developing countries. On the other hand, in *standardized multi-phase electric motors from Romania*⁹⁵³, the fact that the proposed price levels were unlikely to eliminate either the dumping margin or the injurious effect of the dumping outweighed the application of Article 15 of the GATT Anti-dumping Code and, as a result, prevented the acceptance of the undertaking offered by the Romanian exporter.

Finally, in *ammonium nitrate from Lithuania and Russia*⁹⁵⁴, the Community was divided into two regional markets. Therefore, the European anti-dumping authorities had to choose between either an anti-dumping duty applicable to the Community as a whole, or an undertaking applicable to the imports into the Member State constituting a regional market (see : Article 4.2. GATT Anti-dumping Code ; Article 4(3) basic EC Regulation ; Articles 4(5) and 13(6) basic ECSC Decision). Though admitting that such a regional undertaking might cause some trade deflection towards other Member States, the European anti-dumping authorities preferred the regional undertaking because a Community-wide anti-dumping duty would be a disproportionate remedy that would grant protection not only to the regional industry, but to the rest of the Community industry, which had not requested such measures. They, moreover, pointed out that such a duty would have to be paid on a large volume of imports for which no injurious dumping had been alleged or established.

⁹⁴⁹ Council Regulation (EEC) No 96/85 of 14 January 1985 imposing a definitive anti-dumping duty on imports of pentaerythritol originating in Canada, *O.J.*, 16 January 1985, No L 13/1 (corrigendum, *O.J.*, 24 January 1985, No L 20/46).

⁹⁵⁰ Council Regulation (EEC) No 338/86 of 14 February 1986 imposing a definitive anti-dumping duty on imports of roller chains for cycles originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty imposed on those imports, *O.J.*, 15 February 1986, No L 40/25.

⁹⁵¹ Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1.

⁹⁵² Council Regulation (EEC) No 3121/89 of 16 October 1989 modifying the anti-dumping measures applicable to imports of certain acrylic fibres originating in Mexico by introducing an anti-dumping duty on such imports, other than those from exporters to the Community whose undertakings are accepted, *O.J.*, 19 October 1989, No L 301/1.

⁹⁵³ Commission Regulation (EEC) No 724/82 of 30 March 1982 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0.75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Poland, Romania and the USSR, and terminating the proceeding in respect of imports of said products originating in Hungary, *O.J.*, 31 March 1982, No L 85/9.

⁹⁵⁴ Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries ; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24.

3.1.2. Antitrust policy

There is but one anti-dumping case in which the European anti-dumping authorities have grounded their choice between anti-dumping duties and undertakings on reasons of antitrust policy.

In *glycine from Japan*⁹⁵⁵, the Council refused to accept the undertakings offered by the two Japanese dumping exporters and instead imposed the same *ad valorem* anti-dumping duty on both exporters though their dumping margins were different, because :

«(i)n a market where only a limited number of companies are competing with each other an alignment of prices resulting from undertakings of the kind offered by the Japanese companies, i.e. to respect the same minimum price, would reduce competition. This effect, it is considered would be less likely to occur as a result of the imposition of the same anti-dumping duty, because existing differences in prices charged in different transactions by the two companies (due among other things to variations resulting from exchange rates, commissions and transport costs) could continue. Furthermore, information with regard to the future role of other Community producers, new entrants or substitute products which could possibly have led to a different conclusion was not available.».

In view of European anti-dumping case law, it may safely be concluded that the European anti-dumping authorities prefer undertakings to anti-dumping duties, unless the undertakings do not provide a waterproof remedy against injurious dumping. Exceptionally, they prefer anti-dumping duties to undertakings, when undertakings would reduce competition on the Community market or when the country of origin of the dumped products is pursuing a trade policy which does not benefit the Community exporters (trade deficit or non-acceptance of undertakings). Otherwise, they prefer undertakings, especially regional undertakings, as well as undertakings offered by exporters from developing countries insofar as those undertakings are liable to remedy either the dumping or the injury. Empirical research, though, does not confirm those conclusions entirely. First, that research shows that the European anti-dumping authorities pursue an active and consistent policy in choosing between anti-dumping duties and undertakings. Second, it shows that deficiencies of undertakings are a less prominent reason for refusing undertakings than has been pointed out by European anti-dumping case law. Third, European anti-dumping authorities do not favour developing countries to the extent they claim : they accept only exceptionally undertakings offered by exporters of developing countries. The empirical research only confirms the importance of the trade relations with the dumping country : short-term trade deficits significantly influence the refusal of undertakings⁹⁵⁶. On the basis of this research, it may be concluded that European anti-dumping law is truly used as an instrument of the Community trade policy.

⁹⁵⁵ Council Regulation (EEC) No 2322/85 of 12 August 1985 imposing a definitive anti-dumping duty on imports of glycine originating in Japan, *O.J.*, 15 August 1985, No L 218/1.

⁹⁵⁶ THARAKAN, P.K.M., «The political economy of anti-dumping undertakings in the European Communities», *European Economic Review*, 1991, (1341), 1341-1359.

3.2. ECONOMIC THEORY

From an economic point of view, there is an important difference between anti-dumping duties and undertakings. In figures 15 and 16⁹⁵⁷, it was shown that the loss in consumer surplus caused by the imposition of an anti-dumping duty was partly compensated by the revenue gained by the Community authorities out of the levy of the anti-dumping duty. If, however, they had accepted a price undertaking, they had not gained any such revenue ; the revenue generated by the price increase caused by the undertaking would have entirely accrued to the dumping exporters. Therefore, the loss in consumer surplus which, under the imposition of an anti-dumping duty is compensated by the revenue gained by the Community authorities, must be added to the net cost of anti-dumping protection, when a price undertaking is accepted. As a result, the net cost of anti-dumping protection is higher when price undertakings are accepted and, from the point of view of Community welfare, anti-dumping duties should be preferred to undertakings. On the other hand, the dumping exporters will be better off with price undertakings than with anti-dumping duties for they, rather than the Community authorities, will benefit from the price increase.

In terms of Community welfare, the European anti-dumping authorities should be indifferent to price and quantity undertakings, since quantity undertakings also result in an increase of the dumping exporters' prices. Indeed, as to quantity undertakings, the dumping exporters, by restricting the quantity they are allowed to export to the Community, will increase their export prices. As a consequence, the net cost of anti-dumping protection of quantity undertakings is identical to that of price undertakings, but ^{higher} ~~lower~~ than that of anti-dumping duties.

However, one exception must be made to this general rule : from a point of view of welfare, the Community authorities should be indifferent to variable anti-dumping duties and undertakings. Indeed, their economic effect is identical. A variable duty implies that the dumping exporter must pay the difference between a minimum price set by the anti-dumping authorities and the price he actually charges. Obviously, an exporter may avoid the payment of a variable duty by increasing his price up to the level of the minimum price. In such case, the Community authorities will not gain any revenue out of the variable duty and the net cost of such an anti-dumping duty will be identical to that of an undertaking.

⁹⁵⁷ *Supra*, 349-351.

Besides their welfare effects, undertakings may also be a device for restricting competition on the Community market by collusion⁹⁵⁸. Indeed, for price undertakings to be workable, it has to be made sure that the price increases agreed upon by the dumping exporters, are more or less in line, and that the Community industry will also increase or at least maintain its current price levels rather than undercutting the prices agreed upon by the exporters⁹⁵⁹. Similarly, quantity undertakings imply that markets are segmented between the exporters and the Community industry, thereby reducing competition between them⁹⁶⁰. The possible anti-competitive effect of undertakings does not imply that all types of anti-dumping duty are better. Indeed, variable anti-dumping duties are in this respect alike for they incorporate the serious risk that a price alignment will take place at or around the minimum price fixed for the application of the variable anti-dumping duty⁹⁶¹. Moreover, as empirical research has pointed out, *ad valorem* anti-dumping duties make Community producers, dumping and non-dumping exporters align their prices. Thereby, they also reduce competition, though their price alignment effect is not as pronounced as that of undertakings⁹⁶². It has even been argued that anti-dumping duties may have more anti-competitive effects than undertakings. Exporters will be less likely to leave the Community market with undertakings, since undertakings permit them to collect more revenue on

⁹⁵⁸ Indeed, it has been shown that undertakings have the effect of stabilizing the prices charged by the Community producers on the Community market. On the other hand, undertakings make the export prices of the dumping exporters go up to the same extent as the prices of the Community producers. Furthermore, the non-dumping exporters were originally obliged to decrease their export prices to the Community, because of the competition of the dumping exporters. However, as from the moment that undertakings offered by the dumping exporters are accepted, the non-dumping exporters may increase their prices. As a consequence, Community producers, dumping and non-dumping exporters align their prices after undertakings have been accepted. Such a price alignment points strongly in the direction of a cartelization process. See: MESSERLIN, P., «The EC Antidumping Regulations: A First Economic Appraisal, 1980-1985», *Weltwirtschaftliches Archiv*, 1989, (563), 578. See also: P.K.M. THARAKAN and J. WAELEBROECK («Antidumping and countervailing duty decisions in the E.C. and in the U.S. An experiment in comparative political economy», *European Economic Review*, 1994, (171), 187), who hold there is cause for concern about the anti-competitive effects of anti-dumping law, because especially Community industries with high concentration and cohesion are successful in obtaining anti-dumping relief.

⁹⁵⁹ STEGEMANN, K., «EC Anti-Dumping Policy: Are Price Undertakings a Legal Substitute for Illegal Price Fixing», *Weltwirtschaftliches Archiv*, 1990, (268), 274 and 276-279; VAN BAEL, I., and BELLIS, J.F., *Anti-Dumping and other Trade Protection Laws of the EEC*, Bicester, CCH Editions, 1990, 171.

⁹⁶⁰ See: KRISHNA, K., «Trade Restrictions as Facilitating Practices», *Journal of International Economics*, 1989/26, (251), 251-270.

⁹⁶¹ MESSERLIN, P., «The EC Antidumping Regulations: A First Economic Appraisal, 1980-85», *Weltwirtschaftliches Archiv*, 1989, (563), 578; VANDOREN, P., «The interface between anti-dumping and competition law and policy in the European Community», *Legal Issues of European Integration*, 1986/2, (1), 9. Therefore, not without reason variable anti-dumping duties have been preferred to other types of anti-dumping duty in European anti-dumping case law because they had the same effect as the undertakings given by other dumping exporters (Council Regulation (EEC) No 96/85 of 14 January 1985 imposing a definitive anti-dumping duty on imports of pentaerythritol originating in Canada, *O.J.*, 16 January 1985, No L 13/1 (corrigendum, *O.J.*, 24 January 1985, No L 20/46); see also: Council Regulation (EEC) No 338/86 of 14 February 1986 imposing a definitive anti-dumping duty on imports of roller chains for cycles originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty imposed on those imports, *O.J.*, 15 February 1986, No L 40/25). For more on variable anti-dumping duties, see: *infra*, 659-670.

⁹⁶² MESSERLIN, P., «The EC Antidumping Regulations: A First Economic Appraisal, 1980-1985», *Weltwirtschaftliches Archiv*, 1989, (563), 578.

their remaining exports⁹⁶³. Empirical research seems to confirm this point of view. Indeed, it shows that undertakings are less likely to be preferred to anti-dumping duties when the Community industry displays a high degree of concentration and, thus, has the cohesion necessary to mount effective lobbying activities. This result may point to the fact that the Community industry, if it has the opportunity, will lobby in favour of the imposition of anti-dumping duties in order to prevent the dumping exporters from using their gains from undertakings to develop better varieties of the product to gain a larger market share in the Community or in third markets⁹⁶⁴. Hence, there is empirical evidence that the Community industry will try to prevent as much as possible competition from the dumping exporters. Conversely, undertakings seem only to be accepted if the Community industry does not lobby sufficiently for anti-dumping duties. Hence, the Community industry apparently regards undertakings and their inherent possibility of collusion only as a second-best remedy against foreign competition.

3.3. *LEGAL DEFINITION AND ECONOMIC ANALYSIS COMPARED*

GATT nor European anti-dumping law provide any order of preference between anti-dumping duties and undertakings. European anti-dumping law only stipulates that the anti-dumping duties imposed and the undertakings accepted must be in the Community interests. The European anti-dumping authorities, however, only exceptionally have relied upon the notion of «Community interests». In their case law, they are consistently preferring undertakings insofar as those undertakings are sufficient to remedy either the dumping or the injury. This general preference in European anti-dumping case law for undertakings over anti-dumping duties sharply contrasts with the lower net welfare cost of anti-dumping duties when compared with undertakings. This sharp contrast is probably caused by the fact that European anti-dumping case law never takes into consideration the net cost of anti-dumping protection when confronted with the choice between anti-dumping duties and undertakings. Nevertheless, European anti-dumping law and, in particular, the notion of «Community interests» allows to take account of the welfare effects in making a choice between the different types of anti-dumping relief.

Exceptionally, though, the European anti-dumping authorities have used this opportunity. Then, they generally prefer anti-dumping duties to undertakings, but this occasional preference for anti-dumping duties is seldom grounded on the less negative effects of duties on Community welfare. Indeed, the European anti-dumping authorities consider anti-dumping duties as a retaliation against

⁹⁶³ STEGEMANN, K., «EC Anti-Dumping Policy : Are Price Undertakings a Legal Substitute for Illegal Price Fixings», *Weltwirtschaftliches Archiv*, 1990, (268), 294.

⁹⁶⁴ THARAKAN, P.K.M., «The political economy of anti-dumping undertakings in the European Communities», *European Economic Review*, 1991, (1341), 1349-1350 and 1355.

protectionist trade policies pursued by the dumping countries. Thus, in fact, the European anti-dumping authorities ground their choice of the form of anti-dumping relief on what is harming the interests of the dumping country, whereas, in view of European anti-dumping law, they should ground their choice on what is in the Community interests. In other words, anti-dumping duties should be preferred to undertakings, because the net cost of anti-dumping duties is lower for the Community than the net cost of undertakings, and not because the net cost of anti-dumping duties is higher for the dumping country than the net cost of undertakings.

The non-acceptance of undertakings for reasons of trade policy (in particular, trade deficit or non-acceptance of undertakings) should also be criticized, because it implies that the more advantageous form of anti-dumping relief for exporters, *i.e.*, undertakings, is refused for circumstances beyond their control⁹⁶⁵. Even worse, exporters may be punished for the protectionist trade policy which their home country pursues (*e.g.*, the trade surplus of their home country may result from the protection of their domestic market against foreign producers) and which they do not benefit from. Indeed, a protectionist trade policy pursued by their home country reduces their export opportunities.

Only when the European anti-dumping authorities take account of the anti-competitive effects of undertakings, their case law seems economically to be correct. Indeed, undertakings may result in collusion between the Community industry and the dumping exporters, but so do anti-dumping duties. Therefore, when making a choice between anti-dumping duties and undertakings, the European anti-dumping authorities, from an economic point of view, should examine, for each type of anti-dumping relief, not only whether it will increase Community welfare (*e.g.*, by remedying market imperfections as suggested by strategic-trade theory), but equally whether it will not distort competition and whether those effects on welfare and competition will, on balance, be beneficial to the Community⁹⁶⁶. The European anti-dumping authorities, however, do not completely nor systematically carry out such investigation. Indeed, there is but one anti-dumping case in which they paid attention to the anti-competitive effects of undertakings in order to explain their preference for anti-dumping duties, but they did not consider the welfare effects of those undertakings. Moreover, they have but once⁹⁶⁷ paid any attention to the anti-competitive effects of anti-dumping duties, though duties too may reduce competition between dumping exporters and Community producers. In that isolated case, the European anti-dumping authorities decided to

⁹⁶⁵ VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities*, Amsterdam, North-Holland, 1987, 222 and 321.

⁹⁶⁶ KRISHNA, K., «Trade Restrictions as Facilitating Practices», *Journal of International Economics*, 1989/26, (251), 268.

⁹⁶⁷ See also : VERMULST, E., and WAER, P., «The Calculation of Injury Margins in EC Anti-Dumping Proceedings», *Journal of World Trade*, 1991/6, (5), 30, who argue that there are two other cases in which the need to prevent price alignments influenced the determination of the amount of the anti-dumping duties. However, the statement of reasons to those anti-dumping decision do not show that the European anti-dumping authorities actually paid any attention to the possible effects of price alignment.

impose a uniform *ad valorem* duty on both dumping exporters. Since each exporter was charging different dumping prices, individual duties calculated on the basis of the difference between the price the Community industry needs to be profitable and the actual dumping prices, would have resulted in a price alignment, which the European anti-dumping authorities considered not appropriate in view of the low number of competitors⁹⁶⁸. However, in all other cases, the European anti-dumping authorities have imposed individual duties calculated on the basis of the amount the prices of each dumping exporter must increase in order to guarantee the Community industry prices which cover its production costs plus a reasonable profit margin. They did not pay any attention to the fact that such duties normally result in price alignments.

~~no~~ acceptance

over

4. CONCLUSION

The sanctions provided under GATT and European anti-dumping law against injurious dumping are anti-dumping duties and undertakings. Anti-dumping duties are specific customs duties, whereas undertakings are agreements between the dumping exporters and the anti-dumping authorities which increase the price of the dumped product or restrict the quantity of the dumped imports. GATT and European anti-dumping law, thus, have opted for trade restrictive measures in order to sanction injurious dumping. They do not provide that either anti-dumping duties be imposed or undertakings be accepted, whenever there is dumping causing injury to the import-competing industry of the importing country. Indeed, GATT anti-dumping law considers it desirable that injurious dumping does not automatically result in anti-dumping enforcement. European anti-dumping law, on the other hand, allows anti-dumping enforcement insofar as the Community interests call for either the imposition of anti-dumping duties or the acceptance of undertakings. As European anti-dumping law defines the concept of «Community interests» at the most in general terms, the European anti-dumping authorities have implemented it as encompassing the interests of the Community industry, the interests of the Community consumers of the dumped product (including the processing industries using the dumped product) and the interests of the Community authorities in pursuing policies on various areas (antitrust, trade policy, national security). In view of the many anti-dumping duties imposed and the many undertakings accepted, the European anti-dumping authorities have, thus, on many occasions, considered anti-dumping relief to be in the Community interests.

⁹⁶⁸ Council Regulation (EEC) No 2322/85 of 12 August 1985 imposing a definitive anti-dumping duty on imports of glycine originating in Japan, O.J., 15 August 1985, No L 218/1

Economic trade theory shows that there may be various instances in which anti-dumping duties increase the importing country's national welfare. An importing country, holding price-makingship, may, by means of an anti-dumping duty, improve its terms of trade. It may also extract (part of) the pure profits gained by foreign monopolists or oligopolists and redistribute them to its domestic import-competing producers. When an industry is characterized by positive external economies of scale, anti-dumping duties may also shelter the import-competing industries from foreign competition on their domestic market and, thus, enable them to increase their production output, in order to attain a higher degree of productivity. Moreover, anti-dumping duties seem to be appropriate to prevent the waste of transport costs inherent in reciprocal dumping cases and, thus, may improve the importing country's welfare, unless the pro-competitive effects of free trade outweigh the prevention of unnecessary transport costs.

Trade theory, thus, seems to provide the European anti-dumping authorities with many reasons to find the Community interests calling for the imposition of anti-dumping duties. This, however, may give a false impression. The European anti-dumping authorities have not yet relied on any of the hypotheses advanced by trade theory as instances involving welfare-improving anti-dumping duties. Nevertheless, the circumstances under which anti-dumping duties may improve an importing country's national welfare are quite realistic : the Community, being a large trader on the world markets, will frequently hold price-makingship, competition will seldom be perfect and various industries will be characterized by positive external economies of scale. The problem with trade theory, however, is the low practicability of its conclusions : for anti-dumping duties to be welfare-improving, several, quite specific conditions must be fulfilled and the anti-dumping authorities will seldom be able to assess whether those conditions are actually met. If one or more conditions is not met, anti-dumping duties will decrease the national welfare of the importing country. As the anti-dumping authorities, in many cases, will probably not be able to assess correctly whether the necessary conditions for welfare-improving anti-dumping duties are present, it seems wise to adopt as a general guideline that anti-dumping duties do not increase the national welfare of the importing country. Only if it can be demonstrated, beyond reasonable doubt, that all the conditions necessary for anti-dumping duties to improve the importing country's welfare, an anti-dumping duty should be legally allowed, at least insofar as the economic notion of «national welfare» covers exactly the legal notion of «Community interests».

The same guideline should apply to undertakings. Indeed, trade theory shows that undertakings cause the national welfare of the importing country to decrease to a larger extent than an anti-dumping duty. Thus, from an economic point of view, anti-dumping duties should be preferred to undertakings. GATT and European anti-dumping law, though, do not provide any order of preference between anti-dumping duties and undertakings. The European anti-dumping authorities, having broad discretionary powers in this area, seem to prefer undertakings to anti-dumping duties, as they accept undertakings whenever they are offered and are sufficient to

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remedy the injurious dumping. They have never explained why they have accepted undertakings, rather than imposing anti-dumping duties which are equally liable to remedy the injurious dumping. However, if they impose anti-dumping duties though undertakings have been offered, they explain the imposition of anti-dumping duties by the need to sanction the dumping country more severely than is usually the case, because of its protectionist trade policy. Exceptionally, they have advanced the prevention of the dumping exporters and the Community producers entering into collusion, which the undertakings would render possible, as reason for imposing anti-dumping duties rather than accepting the undertakings offered. European anti-dumping case law, thus, does exactly the opposite of what trade theory recommends.

This contradiction perhaps results from the legal notion of «Community interests» being broader than the economic notion of «national welfare». Indeed, the economic notion only refers to the interests of producers and consumers, as well as to the revenues of the importing country's authorities generated by the anti-dumping measures, whereas the legal notion, as implemented by the European anti-dumping authorities, encompasses all the aspects of the economic notion, as well as a number of other aspects, such as the policies pursued by the Community on various areas. Those other aspects may overrule the conclusions of trade theory as to the welfare effects of anti-dumping relief, and, perhaps for that reason, the European anti-dumping authorities generally prefer undertakings to anti-dumping duties. The European anti-dumping authorities may, for example, use their discretion with regard to the choice of the type of anti-dumping relief in order to reward or sanction the exporting country's trade policy : by imposing anti-dumping duties, rather than by accepting undertakings, the European anti-dumping authorities may exert pressure on the exporting country's government in order to break through that country's (too) protectionist trade policy. Similarly, the effects of both dumping and anti-dumping relief on competition should be carefully taken into consideration. However, when evaluating those other aspects not included in the economic notion of «national welfare» the European anti-dumping authorities should not ignore the conclusions of trade theory. Trade theory points out that retaliation against another country's protectionism will make all countries worse off and that free trade may have pro-competitive effects. The following chapters will, *inter alia*, examine in detail whether the European anti-dumping authorities take sufficiently account of the conclusions of trade theory, in deciding to grant anti-dumping relief.

CHAPTER V

INJURY

1. INTRODUCTION

Under GATT and European anti-dumping law, dumping must cause injury to the Community industry for anti-dumping relief to be granted (Article VI(1) and (6)(a) GATT ; Article 3 GATT Anti-dumping Code ; Article 3 basic EC Regulation ; Article 4 basic EC legislation)⁹⁶⁹.

⁹⁶⁹ Under European anti-dumping law, the evidence of dumping and injury is considered simultaneously in all stages of the investigation (Article 6(1) basic EC Regulation ; Article 7(1)(c) basic ECSC Decision).

Nevertheless, it is legitimate to terminate anti-dumping proceedings on a finding of no injury without any investigation into dumping (C.J.E.C., case 121/86, 28 November 1989, *Anonymos Etaireia Epicheiriseon Metalleftikon Viomichanikon kai Nafiliakon AE a.o. v Council, E.C.R.*, 1989, (3919), 3936 and 3950-3951). Thus, anti-dumping proceedings have been terminated on a finding of no injury without any attempt to establish whether dumping has occurred (Commission Decision 81/1012/EEC of 17 December 1981 terminating the anti-dumping proceeding concerning imports of certain monochrome portable television sets originating in the Republic of Korea, *O.J.*, 19 December 1981, No L 364/49 ; Commission Decision 82/808/EEC of 25 November 1982 terminating the anti-dumping procedure concerning imports of aluminium foil for household and catering use originating in Austria, the German Democratic Republic, Hungary and Israel, *O.J.*, 1 December 1982, No L 339/58 ; Commission Decision 83/493/EEC of 28 September 1983 terminating the anti-dumping proceeding concerning imports of xanthan gum originating in the United States of America, *O.J.*, 30 September 1983, No L 263/60 ; Commission Decision 83/626/EEC of 12 December 1983 terminating the anti-dumping proceeding concerning imports of saccharin and its salts originating in China, the Republic of Korea and the United States of America, *O.J.*, 15 December 1983, No L 352/49 ; Commission Decision 86/20/EEC of 31 January 1986 terminating the anti-dumping proceeding concerning imports of hammers originating in the People's Republic of China, *O.J.*, 4 February 1986, No L 29/36 ; Council Decision 86/59/EEC of 6 March 1986 terminating the anti-dumping proceeding concerning imports of dead-burned (sintered) natural magnesite originating in the People's Republic of China and North Korea, *O.J.*, 13 March 1986, No L 70/41 ; Commission Decision 88/651/EEC of 23 December 1988 terminating the anti-dumping proceeding concerning imports of certain cellular mobile radio telephones originating in Canada, Hong Kong and Japan, *O.J.*, 30 December 1988, No L 362/59 ; Commission Decision 89/511/EEC of 22 August 1989 terminating the anti-dumping proceeding concerning imports of hydraulic excavators originating in Japan, *O.J.*, 25 August 1989, No L 249/71 ; Commission Decision 89/560/EEC of 17 October 1989 terminating the anti-dumping proceeding concerning imports of polyester film originating in the Republic of Korea, *O.J.*, 21 October 1989, No L 305/31 ; Commission Decision 90/155/EEC of 26 March 1990 terminating the anti-dumping proceeding concerning imports of tungsten metal powder originating in the People's Republic of China or the Republic of Korea, *O.J.*, 30 March 1990, No L 83/124 ; Commission Decision 90/240/EEC of 22 May 1990 terminating the proceeding in connection with a review of anti-dumping measures regarding imports of fibre building-board (hardboard) originating in Finland, Argentina, Switzerland and Yugoslavia and repealing Decisions 86/35/EEC and 86/232/EEC accepting the undertakings given by the exporters concerned, *O.J.*, 31 May 1990, No L 138/44 ; Commission Decision 90/383/EEC of 13 July 1990 terminating the anti-dumping proceeding concerning imports of NPK fertilizers originating in Hungary, Poland, Romania and Yugoslavia, *O.J.*, 20 July 1990, No L 188/63 ; Commission Decision 90/399/EEC of 26 July 1990 terminating an anti-dumping proceeding concerning imports of certain single phase, two-speed electric motors originating in Bulgaria, Romania and Czechoslovakia, *O.J.*, 31 July 1990, No L 202/47 ; Commission Decision 91/303/EEC of 12 June 1991 terminating the anti-dumping proceeding concerning imports of thin polyester film originating in the Republic of Korea, *O.J.*, 15 June 1991, No L 151/89 ; Commission Decision 93/325/EEC of 18 May 1993 terminating the anti-dumping proceeding concerning imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China, *O.J.*, 25 May 1993, No L 127/15 ; Council Regulation (EC) No 3359/93 of 2 December 1993 imposing amended anti-dumping measures on imports of ferro-silicon originating in Russia, Kazakhstan, Ukraine, Iceland, Norway, Sweden, Venezuela and Brazil, *O.J.*, 9 December 1993, No L 302/1 ; Commission Regulation (EC) No 3119/94 of 19 December 1994 imposing a provisional anti-dumping duty on imports of ferro-silico-manganese originating in Russia, Ukraine, Brazil and South Africa, *O.J.*, 21 December 1994, No L 330/15 ; BESELER, J.F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 147 ; VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 627 ; VERMULST, E.A., and GRAAFSMA, F., «A Decade of European Community Anti-Dumping Law and Practice Applicable to Imports from China», *Journal of World Trade*, 1992/3, (5), 28).

The injury determination comprises three elements which are being examined in this chapter. First, in section 2, the concept «Community industry» is set forth, *i.e.*, the range of producers established in the Community who suffer injury. Second, that injury has a three-fold content which is being pointed out in section 3 : actual material injury, threat of material injury and material retardation of the establishment of the Community industry. Third, the required causal relationship between dumping and injury which is being scrutinized section 4.

This present chapter is not confined to a mere legal analysis of the way the injury determination is regulated and its application. First, it also inquires whether either the reglementation or its implementation are conceived to reach findings of injury in cases where the Community industry is not injured by the dumping (*i.e.*, the inquiry into «one-way flexibility»). Second, it is examined whether the dumping exporters can predict whether or not their dumped exports cause injury (*i.e.*, the inquiry into legal certainty). Third, the injury determination is economically analysed in order to ascertain whether its reglementation and implementation are conceived so as to make the right injury determination in the most efficient, effective and transparent way.

2. COMMUNITY INDUSTRY

The dumping should cause injury to a Community industry. A Community industry is defined by two criteria : the product concerned (section 2.1.) and the firms manufacturing that product (section 2.2.).

2.1. PRODUCT COVERAGE

2.1.1. *The standard case : the like product*

2.1.1.1. The concept «like product»

2.1.1.1.1. Legal approach

Article VI GATT does not define the concept «like product». Originally it meant the same product⁹⁷⁰. In its 1959 report, the GATT Group of Experts suggested a less stringent definition. They «agreed that this term should be interpreted as a product which is identical in

⁹⁷⁰ Analytical Index of GATT.

physical characteristics subject, however, to such variations in the presentation which are due to the need to adapt the product to special conditions in the market of the importing country (*i.e.*, to accommodate different tastes or to meet specific legal or statutory requirements)⁹⁷¹. In connection with this definition, the GATT Group of Experts «pointed out that the meaning of "like product" as agreed by them should not be interpreted either too broadly so as to cover products of a different kind with higher prices on the internal market, nor too stringently so as to elude the application of paragraph 1 (a) of Article VI»⁹⁷².

A further step to broaden the concept was taken in the GATT Anti-dumping Code according to which «the term "like product" ("*produit similaire*") shall be interpreted to mean a product which is identical, *i.e.*, alike in all respects to the product under consideration or, in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration» (Article 2.6.). The explicit reference to the vaguer French concept «*produit similaire*» implies that the broader interpretation implied by the French version of Article VI GATT is adopted⁹⁷³.

Though no reference is being made to the French concept «*produit similaire*», a similar definition can be found in European anti-dumping law which defines the concept «like product» as «a product which is identical, *i.e.*, alike in all respects, to the product under consideration, or, in the absence of such a product, another product which has the characteristics closely resembling those of the product under consideration» (Article 1(4) basic EC Regulation ; Article 2(12) basic ECSC Decision).

Contrary to the 1959 report of the GATT Group of Experts, the GATT Anti-dumping Code nor in European anti-dumping law do not specify that the characteristics which are decisive for the like product determination, must be of physical nature. In European anti-dumping case law, therefore, other elements may be⁹⁷⁴ and indeed are taken into account. In *serial impact dot matrix printers from Japan*, a complete synthesis is given of all the elements which are taken into account :

«In order to determine the like product in these proceedings, (...) the Commission had first to examine the physical and technical characteristics of the printers. Secondly, when assessing the closeness to and

⁹⁷¹ B.I.S.D., *Eight Supplement*, Geneva, GATT, 1960, 149, consideration 12.

⁹⁷² B.I.S.D., *Eight Supplement*, Geneva, GATT, 1960, 149, consideration 13.

⁹⁷³ BESELER, J.F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 87.

⁹⁷⁴ *Contra* : VERMULST, E.A., «Dumping in the United States and the European Community : A Comparative Analysis», *Legal Issues of European Integration*, 1984/2, (103), 112.

resemblance of the different products, it had also to take into account their application and use. Thirdly, the Commission took the view that in these proceedings the like product determination cannot be separated from the particularities of the printer market in question and the consumers' perceptions of these products. Finally, with regard to the different types of printer models, the Commission thought it should also consider other factors in order to find whether a clear dividing line exists.⁹⁷⁵

Thus, four different elements will be taken into account: (i) physical and technical characteristics; (ii) application and use of the product; (iii) particularities of the product market and consumer's perceptions; and (iv) other factors. Nevertheless, the physical and technical characteristics prevail. For in *serial impact dot matrix printers from Japan*:

«the Commission took the view that differences in physical and technical characteristics should not be interpreted in such a narrow way as to render products not like each other unless these differences have the effect that the application, use or customer's perception of the products in question are fundamentally different»⁹⁷⁶.

It is but logical that priority is given to the physical and technical characteristics: if products physically and technically are completely identical, the other elements will also coincide, but differences in physical and technical characteristics do not always render the products different from each other. Therefore, the three other elements (application and use of the product, particularities of the product market and consumer's perceptions, and other factors) help to

⁹⁷⁵ Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12.

See also:

- C.J.E.C., joined cases 260/85 and 106/86, 5 October 1988, *Tokyo Electric Company Ltd (TEC) a.o. v Council*, *E.C.R.*, 1988, (5855), 5904 and 5923, where, besides the physical characteristics (weight), the use and application were accepted as an element determining the like product category;
- C.J.E.C., case C-171/87, 10 March 1992, *Canon Inc. v Council*, *E.C.R.*, 1992, I, (1237), 1296-1297, where, notwithstanding differences in physical characteristics (speed and copy volume), the products were considered to be alike because they have identical functions, satisfy the same needs and, in view of the consumers' perception, compete with each other (in the same sense: C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, *E.C.R.*, 1992, I, (1335), 1397; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, *E.C.R.*, 1992, I, (1409), 1480; C.J.E.C., case C-176/87, 10 March 1992, *Konishiroku Photo Industry Co. Ltd v Council*, *E.C.R.*, 1992, I, (1493), 1523-1524; C.J.E.C., case C-177/87, 10 March 1992, *Sanyo Electric Co. Ltd v Council*, *E.C.R.*, 1992, I, (1535), 1565-1566; C.J.E.C., case C-179/87, 10 March 1992, *Sharp Corporation v Council*, *E.C.R.*, 1992, I, (1635), 1677-1678).

⁹⁷⁶ Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12. See also: C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, *E.C.R.*, 1991, I, (2069), 2185; Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7; Commission Regulation (EEC) No 1956/92 of 7 July 1992 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in India and the Republic of Korea, *O.J.*, 16 July 1992, No L 197/25.

determine whether the differences in physical and technical characteristics are essential for rendering the products not alike⁹⁷⁷.

⁹⁷⁷ There are, nevertheless, anti-dumping cases in which products having different physical and technical characteristics are considered to be like products, though it was not made clear why, e.g., on the basis of one of the other three elements used in the like product determination, those differences in physical and technical characteristics were not considered to prevent the products from being considered to be alike :

- in *sensitized paper for colour photographs from Japan*, rolls of different width were considered to be like products (Commission Decision 84/259/EEC of 10 May 1984 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain sensitized paper for colour photographs originating in Japan and terminating that proceeding, *O.J.*, 11 May 1984, No L 124/45) ;
- in *4,4'-Isopropylidenediphenol from the United States of America* and *caustic-burned natural magnesite from the People's Republic of China*, differences in technical characteristics and commercial specifications did not prevent the products from being considered to be alike because they had «at least 'characteristics closely resembling' one another» (Commission Regulation (EEC) No 3541/82 of 22 December 1982 imposing a provisional anti-dumping duty on imports of natural magnesite, caustic-burned, originating in the People's Republic of China, *O.J.*, 30 December 1982, No L 371/21 ; Commission Regulation (EEC) No 3542/82 of 22 December 1982 imposing a provisional anti-dumping duty on imports of natural magnesite, dead-burned (sintered), originating in the People's Republic of China and in North Korea, *O.J.*, 30 December 1982, No L 371/25 ; Commission Regulation (EEC) No 163/83 of 21 January 1983 imposing a provisional anti-dumping duty on 4,4'-Isopropylidenediphenol originating in the United States of America, *O.J.*, 26 January 1983, No L 23/9 ; Council Regulation (EEC) No 2024/83 of 18 July 1983 establishing a definitive anti-dumping duty on 4,4'-isopropylidenediphenol originating in the United States of America, *O.J.*, 22 July 1983, No L 199/4 ; Commission Decision 84/129/EEC of 6 March 1984 terminating the anti-dumping proceeding concerning imports of caustic-burned natural magnesite originating in the People's Republic of China, *O.J.*, 8 March 1984, No L 66/32) ;
- in *ball bearings from Japan and Singapore*, miniature and instrument bearings and standard bearings were considered to be like products merely because «they have the same basic physical characteristics» (Council Regulation (EEC) No 2685/90 of 17 September 1990 amending Regulation (EEC) No 2089/84 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 20 September 1990, No L 256/1 (corrigendum, *O.J.*, 10 January 1991, No L 7/38)) ;
- in *electronic typewriters from Japan* the inclusion of a calculating mechanism into electronic typewriters did not alter the essential character of the machines (Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1) ;
- in *small-screen colour television receivers from Hong Kong and the People's Republic of China*, physical differences, such as the incorporation within the housing of the television receiver of a radio broadcast receiver or a clock, did not materially affect the definition of the like product category (Commission Regulation (EEC) No 129/91 of 11 January 1991 imposing a provisional anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China, *O.J.*, 19 January 1991, No L 14/31) ;
- in *electronic weighing scales from Japan and from Singapore and the Republic of Korea*, the potential use of the product could vary because of differences in physical characteristics. Nevertheless, the products were found to belong to the same like product category because there was no significant difference in basic physical characteristics (Council Regulation (EEC) No 993/93 of 26 April 1993 imposing a definitive anti-dumping duty on imports of certain electronic weighing scales originating in Japan, *O.J.*, 29 April 1993, No L 104/4 ; Commission Regulation (EEC) No 1103/93 of 30 April 1993 imposing a provisional anti-dumping duty on imports into the Community of certain electronic weighing scales originating in Singapore and the Republic of Korea, *O.J.*, 6 May 1993, No L 112/20) ;
- in *serial impact dot matrix printers from Japan*, the mere fact that printers are exclusively designed and manufactured for a computer system, without constituting an integral part of and being imported together with such a computer, was not sufficient to render these printers unlike products (Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12 ; Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 24 November 1988, No L 317/33).

Moreover, without reference being made to the application, use or other factors, the existence of certain differences in physical and technical characteristics was sufficient for the products to be found not alike :

- in the same anti-dumping case concerning *serial impact dot matrix printers from Japan* as mentioned above, printers which constitute an integral part of, and are exclusively dedicated to, a computer system supplied by the manufacturer and/or the exporter of the printer in question, and which are imported and sold within such a computer system, were not considered as being like products (Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12 ; Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 24 November 1988, No L 317/33) ;
- similarly, in *video cassette recorders from Japan and the Republic of Korea*, the Council considered the combination of a video cassette recorder and a television monitor in one housing not to be alike to a video cassette recorder. According to the Council the video cassette recorder does not necessarily determine the character of the whole product for such combinations contain specific elements which impart an additional quality to them (Council Regulation (EEC) No 501/89 of 27 February 1989 imposing a definitive anti-dumping duty on imports of certain video cassette recorders originating in Japan and the Republic of Korea and definitively collecting the provisional duty, *O.J.*, 28 February 1989, No L 57/55). The Commission,

however, did not share the opinion of the Council. For the Commission the combination of a video cassette recorder and a television monitor in one housing does not alter the identity of the video cassette recorder incorporated therein; according to the Commission, such combinations contain a complete video cassette recorder which generally has to be regarded as its major part (Commission Regulation (EEC) No 2684/88 of 26 August 1988 imposing a provisional anti-dumping duty on certain imports of video cassette recorders originating in Japan and the Republic of Korea, *O.J.*, 31 August 1988, No L 240/5. The Commission has expressed a similar opinion in respect of small screen colour television receivers which incorporate further elements within the housing of the television receiver, such as a radio broadcast receiver or a clock (Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1);

- in *linear tungsten halogen lamps from Japan*, so-called JD lamps were considered not to be a like product because they lacked the linear form of LTH lamps, their single cap was not of the type R7s and their wattage was in most cases below 100 watts (Council Regulation (EEC) No 117/91 of 16 January 1991 imposing a definitive anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 19 January 1991, No L 14/1);
- in *gas-fuelled, non-refillable pocket flint lighters from Japan, the People's Republic of China, the Republic of Korea and Thailand*, piezo lighters were not considered to be like products because their technical characteristics are quite different (Commission Regulation (EEC) No 1386/91 of 23 May 1991 imposing a provisional anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in Japan, the People's Republic of China, the Republic of Korea and Thailand, *O.J.*, 28 May 1991, No L 133/20);
- in *glass from Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania, the USSR and Yugoslavia*, «Horticast» glass was not considered to be a like product because it is float glass with a rippled effect obtained by passing the glass through special rollers and, as a result, it is no longer completely transparent, unlike the horticultural glass produced by the other producers (Commission Decision 84/406/EEC of 10 August 1984 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of horticultural glass and certain drawn glass originating in Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania and the USSR, and terminating that proceeding, *O.J.*, 21 August 1984, No L 224/26);
- in *mechanical wrist-watches from the USSR*, quartz watches were not considered to be like products because they use a completely different movement technology in comparison to mechanical watches (Council Regulation (EEC) No 2686/90 of 17 September 1990 repealing Regulation (EEC) No 2347/87 imposing a definitive anti-dumping duty on mechanical wrist-watches originating in the USSR, *O.J.*, 20 September 1990, No L 256/10);
- in *radio-broadcast receivers of a kind used in motor vehicles from South Korea*, car radios which are also capable of receiving radio-telephony or radio-telegraphy, were excluded since they possess different basic features (Commission Regulation (EEC) No 313/92 of 4 February 1992 imposing a provisional anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in South Korea, *O.J.*, 11 February 1992, No L 34/8);
- in *outer rings of tapered roller bearings from Japan*, complete tapered roller bearings were considered to be a different product to outer rings of tapered roller bearings since they have a considerable value added and comprise several more parts than outer rings of tapered roller bearings (Council Regulation (EEC) No 55/93 of 8 January 1993 imposing a definitive anti-dumping duty on imports of outer rings of tapered roller bearings originating in Japan, *O.J.*, 15 January 1993, No L 9/7);
- in *nickel from the Soviet Union*, ferro-nickel, a nickel compound, did not constitute a like product in respect of nickel having a purity of 99 % plus (Council Regulation (EEC) No 2907/83 of 17 October 1983 terminating the anti-dumping proceeding concerning imports of unwrought nickel, not alloyed, in the form of cathodes produced by electrolysis, either uncut or cut into squares, originating in the Soviet Union, *O.J.*, 19 October 1983, No L 286/29);
- in *refined antimony trioxide from the People's Republic of China*, RAT in masterbatch form, i.e., RAT powder mixed with products such as plastic, was considered not to be a like product because, after the compounding process, the RAT takes on the essential characteristics of the compound (Commission Decision 94/389/EC of 6 June 1994 terminating the anti-dumping proceeding regarding imports of refined antimony trioxide originating in the People's Republic of China, *O.J.*, 9 July 1994, No L 176/41);
- in *photo albums from the People's Republic of China*, the non-book bound albums were said to have characteristics sufficiently different which distinguishes them from book bound albums (Commission Regulation (EEC) No 2477/93 of 6 September 1993 imposing a provisional anti-dumping duty on imports of certain photo albums originating in the People's Republic of China, *O.J.*, 9 September 1993, No L 228/16).

As those anti-dumping cases do not explain why identical or similar differences in physical characteristics are not always essential, European anti-dumping case law looks very casuistic. In order to show this, it is sufficient to make a comparison between:

- *nickel from the Soviet Union and caustic-burned natural magnesite from the People's Republic of China*:
 - in *nickel from the Soviet Union*, a nickel compound was not considered to be a like product because it did not have the same degree of purity as nickel (Council Regulation (EEC) No 2907/83 of 17 October 1983 terminating the anti-dumping proceeding concerning imports of unwrought nickel, not alloyed, in the form of cathodes produced by electrolysis, either uncut or cut into squares, originating in the Soviet Union, *O.J.*, 19 October 1983, No L 286/29);
 - in *caustic-burned natural magnesite from the People's Republic of China*, the different chemical composition due to the presence of impurities did not lead to the conclusion that the products were not like products. On the contrary, the products were considered to be alike because they had «at least 'characteristics closely resembling' one another» (Commission Regulation (EEC) No 3541/82 of 22 December 1982 imposing a provisional anti-dumping duty on imports of natural magnesite, caustic-burned, originating in the People's Republic of China, *O.J.*, 30 December 1982, No L 371/21; Commission Regulation (EEC) No 3542/82 of 22 December 1982 imposing a provisional anti-dumping duty on imports of natural magnesite, dead-burned (sintered), originating in the People's Republic of China and in North Korea, *O.J.*, 30 December 1982, No L 371/25; Commission Decision 84/129/EEC of 6 March 1984 terminating the anti-dumping proceeding concerning imports of caustic-burned natural magnesite originating in the People's Republic of

The application and use of the product may be seen as the objective criterion : it indicates the purposes for which the product can be used⁹⁷⁸. The particularities of the product market and the consumer's perception introduce the subjective criterion into the like product determination : this refers to the question how the product is viewed by the consumers and for which purposes they are willing and able to use it. Usually, the objective and subjective criterion coincide⁹⁷⁹. Nevertheless, products may objectively be used for identical purposes, but the consumers may have a different perception of them. In such cases, the products will not be considered to be alike, unless the costs the consumers have to bear for substituting the products is not too high⁹⁸⁰. Consumer's perception, thus, is decisive. Therefore, different product types which

China, *O.J.*, 8 March 1984, No L 66/32) ;

- *photo albums from South Korea and Hong Kong and photo albums from the People's Republic of China :*

- in *photo albums from South Korea and Hong Kong*, book bound and non-book bound photo albums were found to form one and the same like product category because they were said to have the same basic physical characteristics and have all but one single use (Commission Decision 90/241/EEC of 22 May 1990 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of photo albums originating in South Korea and Hong Kong, and terminating the investigation, *O.J.*, 31 May 1990, No L 138/48) ;
- in *photo albums from the People's Republic of China*, book bound and non-book bound photo albums were said to be different products (Commission Regulation (EEC) No 2477/93 of 6 September 1993 imposing a provisional anti-dumping duty on imports of certain photo albums originating in the People's Republic of China, *O.J.*, 9 September 1993, No L 228/16).

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A broad interpretation is placed on the application and use of the product. Thus, a part or component having physical and technical characteristics distinguishing the product from other products, is considered to be a like product, if it is dedicated to the single use of part or component of that product (Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79 ; corrigendum, *O.J.*, 10 February 1990, No L 38/44) ; Council Regulation (EEC) No 2112/90 of 23 July 1990 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan and collecting definitively the provisional duty, *O.J.*, 25 July 1990, No L 193/1 ; Council Regulation (EEC) No 577/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as EPROMs (erasable programmable read only memories) originating in Japan, *O.J.*, 12 March 1991, No L 65/1).

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See e.g., *video cassette recorders from Japan and the Republic of Korea*, where video cassette players were not considered to be a like product : because the absence of a tuner and the recording facility limits the possible uses of a video cassette player, they are not likely to be a substitute for the normal private buyer of a video cassette recorder (Commission Regulation (EEC) No 2684/88 of 26 August 1988 imposing a provisional anti-dumping duty on certain imports of video cassette recorders originating in Japan and the Republic of Korea, *O.J.*, 31 August 1988, No L 240/5).

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See :

- *DRAMs from Japan and EPROMs from Japan*, where different densities of DRAMs and EPROMs were considered to be like products because end-use products were redesigned or conceived to accommodate higher density DRAMs and EPROMs ; nevertheless, it was recognized that different densities of DRAMs and EPROMs are not necessarily interchangeable from a practical point of view (Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79 ; corrigendum, *O.J.*, 10 February 1990, No L 38/44) ; Council Regulation (EEC) No 577/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as EPROMs (erasable programmable read only memories) originating in Japan, *O.J.*, 12 March 1991, No L 65/1) ;
- *4,4'-isopropylidenediphenol from the United States of America*, where a certain commercial specification was considered to be a like product because it could be used for a substantial range of applications without posing difficulties for the end-users, though implying a using cost which varies according to the application and the impurities (Council Regulation (EEC) No 2024/83 of 18 July 1983 establishing a definitive anti-dumping duty on 4,4'-isopropylidenediphenol originating in the United States of America, *O.J.*, 22 July 1983, No L 199/4) ;
- *calcium metal from the People's Republic of China and Russia*, where the two types of the product, having a different degree of purity, were considered to be like products ; nevertheless, as the Community producer admitted, the processing industry

had encountered serious difficulties in carrying out the processing of the Community producer's like product; the European anti-dumping authorities, however, did not agree that there were such difficulties (Commission Regulation (EC) No 892/94 of 21 April 1994 imposing a provisional anti-dumping duty on imports of calcium metal originating in the People's Republic of China and Russia, *O.J.*, 23 April 1994, No L 104/5), or considered those difficulties to be marginal since but one processing producer encountered them (Council Regulation (EC) No 2557/94 of 19 October 1994 imposing a definitive anti-dumping duty on imports of calcium metal originating in the People's Republic of China and Russia, *O.J.*, 21 October 1994, No L 270/27. See also: C.J.E.C., case C-358/89, 11 June 1992, *Extramet Industrie SA v Council*, *E.C.R.*, 1992, I, (3813), 3831 (opinion of Advocate General JACOBS));

- *silicon carbide from the People's Republic of China, Poland, the Russian Federation and Ukraine*, where differences in the use of the various qualities of silicon carbide occurred, but where both the main grades and their different qualities were considered as being one product because one of those grades could technically be replaced by the other (Council Regulation (EC) No 821/94 of 12 April 1994 imposing a definitive anti-dumping duty on imports of silicon carbide, originating in the People's Republic of China, Poland, the Russian Federation and Ukraine, *O.J.*, 13 April 1994, No L 94/21);
- *audio tapes in cassettes from Japan, the Republic of Korea and Hong Kong*, where differences in quality, tape length, coating or design were considered to be outweighed by the similarity of characteristics and functions which gave them a high degree of interchangeability from the consumer's point of view (Commission Regulation (EEC) No 3262/90 of 5 November 1990 imposing a provisional anti-dumping duty on imports of audio tapes in cassettes originating in Japan, the Republic of Korea and Hong Kong, *O.J.*, 13 November 1990, No L 313/5 (corrigendum, *O.J.*, 12 January 1991, No L 9/36));
- *caustic-burned natural magnesite from the People's Republic of China and photo albums from South Korea and Hong Kong*, where the interchangeability was decisive, notwithstanding the preference of some users for certain product specifications (Commission Decision 84/129/EEC of 6 March 1984 terminating the anti-dumping proceeding concerning imports of caustic-burned natural magnesite originating in the People's Republic of China, *O.J.*, 8 March 1984, No L 66/32. See also: Commission Regulation (EEC) No 3541/82 of 22 December 1982 imposing a provisional anti-dumping duty on imports of natural magnesite, caustic-burned, originating in the People's Republic of China, *O.J.*, 30 December 1982, No L 371/21; Commission Regulation (EEC) No 3542/82 of 22 December 1982 imposing a provisional anti-dumping duty on imports of natural magnesite, dead-burned (sintered), originating in the People's Republic of China and in North Korea, *O.J.*, 30 December 1982, No L 371/25; Commission Decision 90/241/EEC of 22 May 1990 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of photo albums originating in South Korea and Hong Kong, and terminating the investigation, *O.J.*, 31 May 1990, No L 138/48);
- *roller chains for cycles from the Soviet Union and the People's Republic of China*, where qualitatively different products were considered to be alike because the quality difference was not significant for the purpose for which the product is normally sold (Commission Regulation (EEC) No 2317/85 of 12 August 1985 imposing a provisional anti-dumping duty on imports of roller chains for cycles originating in the USSR and the People's Republic of China, *O.J.*, 14 August 1985, No L 217/7);
- *tungsten carbide and fused tungsten carbide from the People's Republic of China*, where the Chinese and Community product were, despite some quality differences, considered to be like products because they were generally interchangeable and, therefore, competed in a large part of the market (Council Regulation (EEC) No 2737/90 of 24 September 1990 imposing a definitive anti-dumping duty on imports of tungsten carbide and fused tungsten carbide originating in the People's Republic of China and definitively collecting the provisional duty, *O.J.*, 27 September 1990, No L 264/7 (corrigendum, *O.J.*, 24 October 1990, No L 292/30));
- *artificial corundum from the Soviet Union, Hungary, Poland, Czechoslovakia, the People's Republic of China, Brazil and Yugoslavia*, where «mere quality differences between products which have the same basic physical characteristics and use (were not considered) such as to render these products unlike» (Commission Decision 91/512/EEC of 25 July 1991 accepting undertakings given in connection with the review of anti-dumping measures concerning imports of artificial corundum originating in the Soviet Union, Hungary, Poland, Czechoslovakia and the People's Republic of China and in connection with the anti-dumping proceeding concerning imports of artificial corundum originating in Brazil and Yugoslavia, and terminating the investigation, *O.J.*, 2 October 1991, No L 275/27);
- *compact disc players from Japan and South Korea*, where the differences in features, appearance and quality of musical reproduction were found to be outweighed by the common basic physical characteristics and functions which give to all models of stand-alone CDPs a high degree of interchangeability from the consumer's point of view (Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27)).

Conversely, in *small-screen colour television receivers from the Republic of Korea*, 6-inch models and 14- and 16-inch models were considered not to be like products because, as there were no price differences between them, the consumer's decision to buy the smaller set is clearly conditioned by the radically different usage for which it is intended (Council Regulation (EEC) No 1048/90 of 25 April 1990 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 27 April 1990, No L 107/56 (corrigendum, *O.J.*, 24 May 1990, No L 133/92). See also: Commission Regulation (EEC) No 129/91 of 11 January 1991 imposing a provisional anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China, *O.J.*, 19 January 1991, No L 14/31).

However, in *deep freezers from the German Democratic Republic, Yugoslavia and the Soviet Union*, the cost of substitution was not taken into account. Indeed, upright freezers and chest freezers were not considered to be like products merely because of the fact that the choice of the consumer was influenced by visible physical characteristics. Probably the costs of substitution between upright freezers and chest freezers are not high (Commission Regulation (EEC) No 2800/86 of 9 September 1986 imposing a provisional anti-dumping duty on imports of certain deep freezers originating in the USSR, accepting the undertakings in connection with the investigation of imports of certain deep freezers originating in Yugoslavia or in the German Democratic

are produced for different applications will still be found to be alike if the consumers use the same product type for all those different applications⁹⁸¹. Of course, if different products do not find

Republic and terminating the investigation, and terminating the proceeding concerning imports of certain deep freezers, *O.J.*, 11 September 1986, No L 259/14).

⁹⁸¹ In *small screen colour television receivers from the Republic of Korea and from Hong Kong and the People's Republic of China*, a distinction was made between small-screen colour television receivers and other colour television receivers, because the first ones were generally used as a «second set» and, therefore, did not have to satisfy highly sophisticated technical requirements (Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1 ; ; Commission Regulation (EEC) No 129/91 of 11 January 1991 imposing a provisional anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China, *O.J.*, 19 January 1991, No L 14/31). In *colour television receivers from Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand*, however, the like product category included the whole range of colour television receivers because of a development in consumer behaviour, namely the fact that in an increasing number of households small screen colour televisions had become their «first set» and had become more sophisticated with regard to their featuring ; moreover, consumers' perception was found to be not clearly defined as sometimes low priced, larger screen sizes appeared to be preferred to relatively higher priced, small screen sets (Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50).

In *serial-impact dot-matrix printers from Japan and serial impact fully formed character printers from Japan*, it was found that there are two main applications, either personal or business. However, the then prevailing trend among end-users to use printers destined for business use for their private application was a positive element in the like product determination (Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12 ; Commission Regulation (EEC) No 2005/88 of 5 July 1988 imposing a provisional anti-dumping duty on imports of serial impact fully formed character printers originating in Japan, *O.J.*, 8 July 1988, No L 177/1).

In the *Japanese electronic typewriter case*, the Court of Justice had no problem in finding «compact» and «professional» electronic typewriters to be like products merely «in view of the trend towards the construction of electronic typewriters broadly capable of catering the same needs» (C.J.E.C., joined cases 260/85 and 106/86, 5 October 1988, *Tokyo Electric Company Ltd (TEC) a.o. v Council*, E.C.R., 1988, (5855), 5923).

In *bicycles from the People's Republic of China*, the European anti-dumping authorities pointed out that the different categories of bicycles were, in principle, intended to meet different end-user requirements, but that end-users regularly put a bicycle in a particular category to a variety of uses and applications (Council Regulation (EEC) No 2474/93 of 8 September 1993 imposing a definitive anti-dumping duty on imports into the Community of bicycles originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 9 September 1993, No L 228/1).

In *deadburned (sintered) magnesia from the People's Republic of China and magnesium oxide from the People's Republic of China*, all product types were considered to be alike since consumers used the product of different grades and from different sources of supply for identical purposes (Commission Regulation (EEC) No 2799/92 of 25 September 1992 imposing a provisional anti-dumping duty on imports of deadburned (sintered) magnesia originating in the People's Republic of China, *O.J.*, 26 September 1992, No L 282/15 ; Commission Regulation (EEC) No 2800/92 of 25 September 1992 imposing a provisional anti-dumping duty on imports of magnesium oxide originating in the People's Republic of China, *O.J.*, 26 September 1992, No L 282/23).

See, however : *thermal paper from Japan*, where the like product category was restricted to thermal paper destined to be used in telefax machines. Nevertheless, the investigation had shown that other thermal paper is also capable of being used in such machines since the basic physical characteristics of this paper are identical to thermal paper destined for telefax machines (Commission Regulation (EEC) No 2805/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports into the Community of certain thermal paper originating in Japan, *O.J.*, 26 September 1991, No L 270/15).

identical applications, they will not be considered to be alike, whatever the consumer's perception may be⁹⁸².

The «other factors» criterion is usually put forward to enforce the criteria concerning physical and technical characteristics, application and use, and consumer's perception⁹⁸³. Such other factors are :

- the fact that the products come under the same tariff subheading⁹⁸⁴. However, customs classifications cannot overrule the other three criteria⁹⁸⁵. Therefore, like products may

⁹⁸² For that reason, attention was only paid to the application and use of the product in *glass from Turkey, Yugoslavia, Romania, Bulgaria, Hungary and Czechoslovakia*. In that case, drawn glass and float glass were not considered to be like products because, contrary to float glass, drawn glass cannot be used for most modern industrial outlets, such as double glazing, mirrors, motor vehicle glass, technical glass etc. (Commission Decision 86/36/EEC of 26 February 1986 accepting undertakings entered into in connection with the anti-dumping proceeding concerning imports into Greece of certain categories of glass originating in Turkey, Yugoslavia, Romania, Bulgaria, Hungary and Czechoslovakia and terminating the investigation, *O.J.*, 28 February 1986, No L 51/73).

Similarly, in *serial impact dot matrix printers from Japan* and in *serial impact fully formed character printers from Japan*, special purpose printers designed for a single application such as printing automated teller machine receipts, bank books, cash-registers receipts, were not covered by the anti-dumping proceeding (Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12 ; Commission Regulation (EEC) No 2005/88 of 5 July 1988 imposing a provisional anti-dumping duty on imports of serial impact fully formed character printers originating in Japan, *O.J.*, 8 July 1988, No L 177/1).

Conversely, if the impossibility of using different product types for the same application cannot be shown, these products types will be considered to be like products. See : *glycine from Japan*, where all glycine (pyrogene-free and other) was considered to be a like product because it was not shown that it had to be pyrogene-free only for pharmaceutical uses, and not for other applications (Commission Regulation (EEC) No 997/85 of 18 April 1985 imposing a provisional anti-dumping duty on imports of glycine originating in Japan, *O.J.*, 19 April 1985, No L 107/8 ; Council Regulation (EEC) No 2322/85 of 12 August 1985 imposing a definitive anti-dumping duty on imports of glycine originating in Japan, *O.J.*, 15 August 1985, No L 218/1).

⁹⁸³ The «other factors» criterion has not yet overruled the other criteria (see e.g. : C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council, E.C.R.*, 1992, I, (1335), 1397).

⁹⁸⁴ Commission Decision 84/129/EEC of 6 March 1984 terminating the anti-dumping proceeding concerning imports of caustic-burned natural magnesite originating in the People's Republic of China, *O.J.*, 8 March 1984, No L 66/32 ; Council Regulation (EEC) No 3308/90 of 15 November 1990 imposing a definitive anti-dumping duty on imports of woven polyolefin sacks originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty on such imports, *O.J.*, 17 November 1990, No L 318/2.

Conversely, products falling within different tariff subheadings can be considered to be unlike each other (Council Regulation (EEC) No 1812/91 of 24 June 1991 imposing a definitive anti-dumping duty on imports of espadrilles originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty, *O.J.*, 28 June 1991, No L 166/1 ; Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/60).

⁹⁸⁵ Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79 ; corrigendum, *O.J.*, 10 February 1990, No L 38/44).

come under different tariff subheadings⁹⁸⁶ and, conversely, different products may come under the same tariff subheading⁹⁸⁷ ;

- the absence of a clear dividing line between the different product types making each classification complex, arbitrary, open to circumvention and probably unworkable⁹⁸⁸ ;

⁹⁸⁶ In *electronic typewriters from Japan*, the product coverage was extended to another tariff subheading because it was not clear whether a certain type of the product, which was considered to be a like product, come under the subheading mentioned in the notice of initiation of the anti-dumping proceeding and the provisional assessment (Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1). See also : C.J.E.C., joined cases 260/85 and 106/86, 5 October 1988, *Tokyo Electric Company Ltd (TEC) a.o. v Council, E.C.R.*, 1988, (5855), 5904 (Opinion of Advocate-General Sir G. SLYNN).

⁹⁸⁷ In *titanium mill products from Japan and the United States of America*, the Japanese and American products fell within the same subheading. Nevertheless, they were not considered like products because the Japanese product was destined for chemical applications, whereas the American product was destined for use in the aerospace industry (Commission Decision 85/252/EEC of 23 April 1985 terminating the anti-dumping proceeding concerning imports of certain titanium mill products originating in Japan and the United States of America, *O.J.*, 26 April 1985, No L 113/30).

⁹⁸⁸ C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council, E.C.R.*, 1991, I, (2069), 2102-2103 (Report for the Hearing : conclusions of the Council), 2185 and 2191 ; C.J.E.C., case C-171/87, 10 March 1992, *Canon Inc. v Council, E.C.R.*, 1992, I, (1237), 1296 ; C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council, E.C.R.*, 1992, I, (1335), 1397 ; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council, E.C.R.*, 1992, I, (1409), 1479-1480 ; C.J.E.C., case C-176/87, 10 March 1992, *Konishiroku Photo Industry Co. Ltd v Council, E.C.R.*, 1992, I, (1493), 1523-1524 ; C.J.E.C., case C-177/87, 10 March 1992, *Sanyo Electric Co. Ltd v Council, E.C.R.*, 1992, I, (1535), 1565-1566 ; C.J.E.C., case C-179/87, 10 March 1992, *Sharp Corporation v Council, E.C.R.*, 1992, I, (1635), 1677 ; Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1 ; Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5 ; Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12 ; Commission Regulation (EEC) No 2005/88 of 5 July 1988 imposing a provisional anti-dumping duty on imports of serial impact fully formed character printers originating in Japan, *O.J.*, 8 July 1988, No L 177/1 ; Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 24 November 1988, No L 317/33 ; Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79 ; corrigendum, *O.J.*, 10 February 1990, No L 38/44) ; Council Regulation (EEC) No 577/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as EPROMs (erasable programmable read only memories) originating in Japan, *O.J.*, 12 March 1991, No L 65/1 ; Commission Regulation (EEC) No 313/92 of 4 February 1992 imposing a provisional anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in South Korea, *O.J.*, 11 February 1992, No L 34/8 ; Commission Regulation (EEC) No 1956/92 of 7 July 1992 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in India and the Republic of Korea, *O.J.*, 16 July 1992, No L 197/25 ; Commission Regulation (EEC) No 2799/92 of 25 September 1992 imposing a provisional anti-dumping duty on imports of deadburned (sintered) magnesia originating in the People's Republic of China, *O.J.*, 26 September 1992, No L 282/15 ; Commission Regulation (EEC) No 2800/92 of 25 September 1992 imposing a provisional anti-dumping duty on imports of magnesium oxide originating in the People's Republic of China, *O.J.*, 26 September 1992, No L 282/23 ; Council Regulation (EEC) No 3017/92 of 19 October 1992 modifying the anti-dumping duties following the review of the anti-dumping measures applicable to imports of synthetic polyester fibres originating in Romania, Taiwan, Turkey and the Republics of Serbia and of Montenegro and the former Yugoslav Republic of Macedonia and terminating the said review in respect of imports of synthetic polyester fibres originating in Mexico and the United States of America, *O.J.*, 22 October 1992, No L 306/1 (corrigendum, *O.J.*, 6 February 1993, No L 30/68) ; Commission Regulation (EEC) No 550/93 of 5 March 1993 imposing a provisional anti-dumping duty on imports of bicycles originating in the People's Republic of China, *O.J.*, 11 March 1993, No L 58/12 ; Council Regulation (EEC) No 993/93 of 26 April 1993 imposing a definitive anti-dumping duty on imports of certain electronic weighing scales originating in Japan, *O.J.*, 29 April 1993, No L 104/4 ; Council Regulation (EEC) No 1189/93 of 14 May 1993 imposing definitive anti-dumping duties on imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in Hungary, Poland and the Republic of Croatia and definitively collecting provisional anti-dumping duties, *O.J.*, 15 May 1993, No L 120/34 ; Commission Decision 93/325/EEC of 18 May 1993 terminating the anti-dumping proceeding concerning imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China, *O.J.*, 25 May 1993, No L 127/15 ; Commission Decision 93/376/EEC of 16 June 1993 terminating the review of anti-dumping measures adopted under Council Regulation (EEC) 1698/85 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 29 June 1993, No L 157/76 ; Council Regulation (EEC) No 2474/93 of 8 September 1993 imposing a definitive anti-dumping duty on imports into the Community of bicycles originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 9 September 1993, No L 228/1 ; Commission Regulation (EC) No

- the price equivalence between different product types⁹⁸⁹, though the existence of price differences is not sufficient to prove that the products are not alike⁹⁹⁰ ;
- the fact that the products, which introduce qualitative technical changes, are still at a development stage and are not available to the public, may result in those products being excluded from the like product category⁹⁹¹.

2.1.1.1.2. Economic approach

2.1.1.1.2.1. Demand and supply substitutability

In European anti-dumping case law, the like product determination relies upon demand substitutability, *i.e.*, whether consumers consider products to be fairly (*i.e.*, without too high

2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50.

Conversely, when a clear distinction may be made, the distinct products will not be considered to be alike (Council Regulation (EEC) No 55/93 of 8 January 1993 imposing a definitive anti-dumping duty on imports of outer rings of tapered roller bearings originating in Japan, *O.J.*, 15 January 1993, No L 9/7).

⁹⁸⁹ Council Regulation (EEC) No 2382/87 of 5 August 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Yugoslavia, *O.J.*, 7 August 1987, No L 218/2 ; Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1.

⁹⁹⁰ In *plain paper photocopiers from Japan*, the Commission rejected on the basis of the rapid technological evolution, a dividing line based on the purchase price, besides technical features of the product, such as copy speed and copy volume (Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5).

In *deep freezers from the Soviet Union* the existence of different categories of buyers with different purchasing power and, thus, able and willing to pay different prices, was not considered to prove the existence of two markets, a luxury market and a market for ordinary products (Council Regulation (EEC) No 29/87 of 22 December 1986 imposing a definitive anti-dumping duty on imports of certain deep freezers originating in the Soviet Union, *O.J.*, 8 January 1987, No L 6/1).

In *brushes from the People's Republic of China*, it was held that a new market (and thus a different product) is not created by simply selling an established product at less than half the price at which it is normally sold in the market (Council Decision 87/104/EEC of 9 February 1987 accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China, and terminating the investigation, *O.J.*, 14 February 1987, No L 46/45).

In *ferro-chrome from Kazakhstan, Russia and Ukraine*, the Commission established that the different grades the product were sufficiently alike to constitute one single product in view of their interchangeability irrespective of the price differences. Nevertheless, the Commission admitted that the price difference was not caused by a difference in the cost of production, but represents a premium for the producer's know-how and reflects the cost savings for the consumer of the product, since the use of ferro-chrome with a higher carbon content requires further treatment of the product (Commission Regulation (EEC) No 797/93 of 30 March 1993 imposing a provisional anti-dumping duty on imports of ferro-chrome with a carbon content by weight of max. 0,5 % (low carbon ferro-chrome) originating in Kazakhstan, Russia and Ukraine, *O.J.*, 2 April 1993, No L 80/8 ; Council Regulation (EEC) No 2717/93 of 28 September 1993 imposing a definitive anti-dumping duty on imports of ferro-chrome with a carbon content by weight of maximum 0,5 % (low carbon ferro-chrome), originating in Kazakhstan, Russia and Ukraine, *O.J.*, 2 October 1993, No L 246/1).

⁹⁹¹ Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50.

transaction costs of switching from one product to another) interchangeable. Indeed, if there is no identity of physical and technical characteristics, the consumer's perception is decisive. In this

respect, the interchangeability⁹⁹² and the competition between products⁹⁹³ are positive

⁹⁹² In several anti-dumping cases the fact that the products were (almost) interchangeable, was a decisive element in the like product determination (Council Regulation (EEC) No 2907/83 of 17 October 1983 terminating the anti-dumping proceeding concerning imports of unwrought nickel, not alloyed, in the form of cathodes produced by electrolysis, either uncut or cut into squares, originating in the Soviet Union, *O.J.*, 19 October 1983, No L 286/29; Council Regulation (EEC) No 2382/87 of 5 August 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Yugoslavia, *O.J.*, 7 August 1987, No L 218/2; Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1; Commission Regulation (EEC) No 550/93 of 5 March 1993 imposing a provisional anti-dumping duty on imports of bicycles originating in the People's Republic of China, *O.J.*, 11 March 1993, No L 58/12; Commission Regulation (EEC) No 797/93 of 30 March 1993 imposing a provisional anti-dumping duty on imports of ferro-chrome with a carbon content by weight of max. 0,5 % (low carbon ferro-chrome) originating in Kazakhstan, Russia and Ukraine, *O.J.*, 2 April 1993, No L 80/8; Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5; Commission Regulation (EEC) No 2463/93 of 1 September 1993 imposing a provisional anti-dumping duty on imports of fluorspar originating in the People's Republic of China, *O.J.*, 7 September 1993, No L 226/3; Council Regulation (EEC) No 2474/93 of 8 September 1993 imposing a definitive anti-dumping duty on imports of bicycles originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 9 September 1993, No L 228/1; Commission Regulation (EEC) No 2477/93 of 6 September 1993 imposing a provisional anti-dumping duty on imports of certain photo albums originating in the People's Republic of China, *O.J.*, 9 September 1993, No L 228/16; Commission Regulation (EEC) No 2581/93 of 20 September 1993 imposing provisional anti-dumping duties on imports of ferro-silicon originating in South Africa and the People's Republic of China, *O.J.*, 22 September 1993, No L 237/2; Council Regulation (EEC) No 2717/93 of 28 September 1993 imposing a definitive anti-dumping duty on imports of ferro-chrome with a carbon content by weight of maximum 0,5 % (low carbon ferro-chrome), originating in Kazakhstan, Russia and Ukraine, *O.J.*, 2 October 1993, No L 246/1; Commission Regulation (EEC) No 2720/93 of 28 September 1993 imposing a provisional anti-dumping duty on imports of isobutanol originating in the Russian Federation, *O.J.*, 2 October 1993, No L 246/12; Council Regulation (EC) No 3359/93 of 2 December 1993 imposing amended anti-dumping measures on imports of ferro-silicon originating in Russia, Kazakhstan, Ukraine, Iceland, Norway, Sweden, Venezuela and Brazil, *O.J.*, 9 December 1993, No L 302/1; Council Regulation (EC) No 3386/93 of 6 December 1993 imposing a definitive anti-dumping duty on imports of dead-burned (sintered) magnesite originating in the People's Republic of China, *O.J.*, 11 December 1993, No L 306/16; Council Regulation (EC) No 229/94 of 1 February 1994 imposing definitive anti-dumping duties on imports into the Community of ethanolamine originating in the United States of America, and collecting definitively the provisional anti-dumping duties, *O.J.*, 2 February 1994, No L 28/40; Commission Decision 94/82/EC of 10 January 1994 terminating the anti-dumping proceeding concerning imports of gum rosin originating in the People's Republic of China, *O.J.*, 12 February 1994, No L 41/50; Council Regulation (EC) No 486/94 of 4 March 1994 imposing definitive anti-dumping duties on imports of fluorspar originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 5 March 1994, No L 62/1; Commission Regulation (EC) No 1076/94 of 6 May 1994 imposing a provisional anti-dumping duty on imports of certain watch movements originating in Malaysia and Thailand, *O.J.*, 11 May 1994, No L 120/3; Commission Decision 94/389/EC of 6 June 1994 terminating the anti-dumping proceeding regarding imports of refined antimony trioxide originating in the People's Republic of China, *O.J.*, 9 July 1994, No L 176/41; Commission Decision No 1751/94/ECSC of 15 July 1994 imposing a definitive anti-dumping duty on imports into the Community of hematite pig-iron, originating in Brazil, Poland, Russia and Ukraine, *O.J.*, 16 July 1994, No L 182/37; Commission Regulation (EC) No 1783/94 of 18 July 1994 imposing a provisional anti-dumping duty on imports of furfuraldehyde originating in the People's Republic of China, *O.J.*, 21 July 1994, No L 186/11; Council Regulation (EC) No 2557/94 of 19 October 1994 imposing a definitive anti-dumping duty on imports of calcium metal originating in the People's Republic of China and Russia, *O.J.*, 21 October 1994, No L 270/27).

Likewise, in *caustic-burned natural magnesite from the People's Republic of China*, the interchangeability was decisive, notwithstanding the preference of some users for certain product specifications (Commission Decision 84/129/EEC of 6 March 1984 terminating the anti-dumping proceeding concerning imports of caustic-burned natural magnesite originating in the People's Republic of China, *O.J.*, 8 March 1984, No L 66/32. See also: Commission Regulation (EEC) No 3541/82 of 22 December 1982 imposing a provisional anti-dumping duty on imports of natural magnesite, caustic-burned, originating in the People's Republic of China, *O.J.*, 30 December 1982, No L 371/21; Commission Regulation (EEC) No 3542/82 of 22 December 1982 imposing a provisional anti-dumping duty on imports of natural magnesite, dead-burned (sintered), originating in the People's Republic of China and in North Korea, *O.J.*, 30 December 1982, No L 371/25).

Products which are not interchangeable, will not be considered to be like products. For example, in *video cassette recorders from Japan and the Republic of Korea*, video cassette players were not considered to be a like product because the absence of a tuner and the recording facility limits the possible uses of a video cassette player and, therefore, video cassette players are not likely to be a substitute for the normal private buyer of a video cassette recorder (Commission Regulation (EEC) No 2684/88 of 26 August 1988 imposing a provisional anti-dumping duty on certain imports of video cassette recorders originating in Japan and the Republic of Korea, *O.J.*, 31 August 1988, No L 240/5). See also: Commission Decision No 67/94/ECSC of 12 January 1994 imposing a provisional anti-dumping duty on imports into the Community of hematite pig iron, originating in Brazil, Poland, Russia and Ukraine, *O.J.*, 15 January 1994, No L 12/5.

elements in the like product determination.

The like product determination shows great resemblance to the determination of the relevant product market in antitrust law⁹⁹⁴: they both delineate the scope of the proceeding in product terms. In European antitrust law the determination of the relevant product market is based not only on demand substitutability, but also on supply substitutability⁹⁹⁵, *i.e.*, whether producers can readily switch their resources to the production of demand-substitutable products.

As in antitrust law⁹⁹⁶, both demand and supply substitutability should be taken into account within the framework of the injury determination⁹⁹⁷. If supply substitutability is disregarded,

⁹⁹³ In several anti-dumping cases, different product types were held to be like products because they competed with each other (Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5; Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12; Commission Regulation (EEC) No 550/93 of 5 March 1993 imposing a provisional anti-dumping duty on imports of bicycles originating in the People's Republic of China, *O.J.*, 11 March 1993, No L 58/12; Council Regulation (EEC) No 2474/93 of 8 September 1993 imposing a definitive anti-dumping duty on imports into the Community of bicycles originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 9 September 1993, No L 228/1; Commission Regulation (EEC) No 2477/93 of 6 September 1993 imposing a provisional anti-dumping duty on imports of certain photo albums originating in the People's Republic of China, *O.J.*, 9 September 1993, No L 228/16).

In the same way, the degree of competition, together with the similarity concerning the physical characteristics, was decisive in the like product determination concerning *polyester yarns from Mexico, South Korea, Taiwan and Mexico, synthetic fibres of polyesters originating in Yugoslavia, Mexico, Romania, Taiwan, Turkey and the United States of America and urea from Hungary, Malaysia, Austria, Romania, Venezuela and the United States of America* (Commission Regulation (EEC) No 1695/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of polyester yarn originating in Mexico, South Korea, Taiwan and Turkey, *O.J.*, 17 June 1988, No L 151/39 (corrigendum, *O.J.*, 18 June 1988, No L 152/58); Commission Regulation (EEC) No 1696/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 June 1988, No L 151/47; Commission Regulation (EEC) No 2623/88 of 24 August 1988 imposing a provisional anti-dumping duty on imports of urea originating in Austria, Hungary, Malaysia, Romania, the USA and Venezuela, *O.J.*, 25 August 1988, No L 235/5).

Conversely, the absence of competition made two qualitatively different products unlike each other in *ball bearings and tapered roller bearings from Poland, Romania and the Soviet Union* (Commission Decision 86/100/EEC of 15 April 1986 terminating the anti-dumping proceeding concerning imports of ball bearings and tapered roller bearings originating in Poland, Romania and the Soviet Union, *O.J.*, 18 April 1986, No L 102/31).

⁹⁹⁴ A relevant product market must be determined under antitrust law, in order to lay down whether a company holds a dominant position in that market, see: BADEN FULLER, C.W., «Article 86 EEC: Economic Analysis of the Existence of a Dominant Position», *European Law Review*, 1979, (423), 425; BELLAMY, C., and CHILD, G.D., *Common Market Law of Competition*, London, Sweet & Maxwell, 1987, 391, §§ 8-005; VAN GERVEN, W., MARESCEAU, M., en STUYCK, J., *Handels- en mededingsrecht. Deel 2. Mededingsrecht & Kartelrecht (Belgisch en Europees)*, in *Beginnelsen van Belgisch Privaatrecht*, DILLEMANS, R., en VAN GERVEN, W. (eds.), XIII, Gent, Story-Scientia, 1985, 309-311, No 272, and 311, No 275.

⁹⁹⁵ BELLAMY, C., and CHILD, G.D., *Common Market Law of Competition*, London, Sweet & Maxwell, 1987, 391-397, §§ 8-006 - 8-016; GYSELEN, L., and NICHOLAS, K., «Article 86 EEC: The Monopoly Power Measurement Issue Revisited», *European Law Review*, 1986, (134), 138-140.

⁹⁹⁶ POSNER, R.A., *Antitrust Law. An Economic Perspective*, Chicago, The University of Chicago Press, 1976, 124-128. See also: LANDES, W.M., and POSNER, R.A., «Market Power in Antitrust Cases», *Harvard Law Review*, 1980-1981, (937), 962-963.

⁹⁹⁷ Supply substitutability is irrelevant for the determination of the dumping. For it is impossible to determine whether producers who are able to switch to the production of demand-substitutable products, will practise dumping if they start to produce and export those products. Moreover, if they start to produce and export a product subject to anti-dumping relief, the anti-dumping measures will normally also apply to their exports. Indeed, if anti-dumping relief is granted, usually a residual anti-dumping duty is imposed on all exports of the like product originating in the dumping country which are not subject to either an individual anti-dumping duty or an undertaking. See: *infra*, 684-686.

the injury caused by the dumping to producers who, due to the dumping practices, are driven out of the market and who would re-enter the market if the dumping stopped, will not be taken into account.

As the definition of «Community industry» refers to the Community producers as a whole of the like product or to those of them whose collective output of the products constitutes a major proportion of the total Community production (Article 4.1. GATT Anti-dumping Code ; 4(1) basic EC Regulation ; Article 4(5) basic ECSC Decision), the concept seems only to refer to Community producers who actually manufacture the like product. Potential producers of the like product thus, seem to be excluded. Therefore, one could have the impression that it is legally impossible to take into account supply substitutability. However, the injury requirement is met not only if actual injury (or a threat to that effect) is inflicted upon the Community industry actually producing the like product, but also if the establishment of a Community industry which will produce the like product as soon as it is established, is retarded as a result of the dumping (Article VI(1) and (6)(a) GATT ; Note 1 *ad* Article 3 GATT Anti-dumping Code ; Article 3(1) basic EC Regulation ; Article 4(1) basic ECSC Decision). Accordingly, the Community industry may only encompass potential producers of the like product insofar as they do not produce the like products (anymore) because of the dumping⁹⁹⁸.

Even in an actual injury finding, supply substitutability may play a part. An actual injury finding may be based on the evolution in the production of the Community industry (Article 3.4. GATT Anti-dumping Code ; Article 3(5) basic EC Regulation ; Article 4(2)(c) basic ECSC Decision).

⁹⁹⁸ See : *outboard motors from Japan*, where certain imported products were excluded not only because there had been no Community production of those products, but also because there was no sufficiently convincing factual evidence that the establishment of such an industry was envisaged. In this anti-dumping case, the Community producers had argued that those products were not manufactured in the Community because of the dumping (Commission Regulation (EEC) No 1500/83 of 9 June 1983 imposing a provisional anti-dumping duty on imports of outboard motors originating in Japan, *O.J.*, 10 June 1983, No L 152/18).

The complainants successfully raised the same argument in :

- *polyester yarn from the United States of America*, where the Commission replied that it «was satisfied by information supplied by the Community producers that the yarns concerned were currently being produced by, had been produced by or could be produced by a Community producer» (Council Regulation (EEC) No 407/83 of 21 February 1983 amending Regulation (EEC) No 3439/80 imposing a definitive anti-dumping duty on imports of certain polyester yarn originating in the United States of America, *O.J.*, 23 February 1983, No L 50/1) ;
- *DRAMs from Japan*, the Commission answered «that, on the one hand, it could be reasonably argued that an industry which has the necessary production facilities, equipment and technological know-how and which has produced DRAMs albeit not on a commercial basis, should be regarded as being established. (...) On the other hand, if commercial production is to be a condition *sine qua non* for determining establishment, the Commission would have to consider whether the complainant companies constituted a nascent industry». Though the Commission did not make clear whether commercial production is the dividing line, it is not required for a Community industry to be established ; it may be a nascent industry (Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79 ; corrigendum, *O.J.*, 10 February 1990, No L 38/44)).

Through a broad interpretation, that factor holds the complete⁹⁹⁹ or potential¹⁰⁰⁰ abandonment of production and the shutdown of plants¹⁰⁰¹. The decision not to set up a new plant has also been taken into account¹⁰⁰². As the fact that the product is not produced anymore or is not yet produced in the Community, has proved to play a decisive role in actual injury findings, the Community industry may include potential producers, even in an actual injury finding.

⁹⁹⁹ Commission Regulation (EEC) No 2005/88 of 5 July 1988 imposing a provisional anti-dumping duty on imports of serial impact fully formed character printers originating in Japan, *O.J.*, 8 July 1988, No L 177/1 ; Commission Decision 90/241/EEC of 22 May 1990 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of photo albums originating in South Korea and Hong Kong, and terminating the investigation, *O.J.*, 31 May 1990, No L 138/48.

¹⁰⁰⁰ Council Decision 87/104/EEC of 9 February 1987 accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China, and terminating the investigation, *O.J.*, 14 February 1987, No L 46/45 (the diversification into manufacturing related products); Council Regulation (EEC) No 341/90 of 5 February 1990 accepting undertakings and imposing a definitive anti-dumping duty on imports of ferro-silicon originating in Iceland, Norway, Sweden, Venezuela or Yugoslavia, except those sold for export to the Community by companies whose undertakings have been accepted, *O.J.*, 10 February 1990, No L 38/1 (the specialization in certain products).

¹⁰⁰¹ Commission Regulation (EEC) No 511/78 of 7 March 1978 imposing a provisional anti-dumping duty on kraft liner paper and board originating in the United States of America, *O.J.*, 11 March 1978, No L 69/9 ; Council Regulation (EEC) No 2133/78 of 8 September 1978 imposing a definitive anti-dumping duty on kraft liner paper and board originating in the United States of America, *O.J.*, 9 September 1978, No L 247/22 ; Commission Regulation (EEC) No 2297/80 of 29 August 1980 imposing a provisional anti-dumping duty on imports of certain polyester yarn originating in the United States of America, *O.J.*, 2 September 1980, No L 231/5 ; Commission Regulation (EEC) No 1337/81 of 18 May 1981 imposing a provisional anti-dumping duty on imports of certain textured polyester fabrics originating in the United States of America, *O.J.*, 20 May 1981, No L 133/17 ; Commission Regulation (EEC) No 171/82 of 25 January 1982 imposing a provisional anti-dumping duty on imports of oxalic acid originating in China and Czechoslovakia, *O.J.*, 27 January 1982, No L 19/26 (corrigendum, *O.J.*, 9 February 1982, No L 34/11) ; Commission Regulation (EEC) No 250/82 of 29 January 1982 imposing a provisional anti-dumping duty on certain welded iron or steel tubes originating in Romania, *O.J.*, 3 February 1982, No L 26/5 ; Commission Regulation (EEC) No 1631/83 of 15 June 1983 imposing a provisional anti-dumping duty on imports of certain glass textile fibres (rovings) originating in Czechoslovakia, the German Democratic Republic and Japan, accepting a price undertaking from one Japanese exporter and terminating the proceeding in respect of imports of certain glass textile fibres (mats), originating in Czechoslovakia and the German Democratic Republic, *O.J.*, 18 June 1983, No L 160/18 ; Commission Regulation (EEC) No 2681/84 of 18 September 1984 imposing a provisional anti-dumping duty on imports of pentaerythritol originating in Canada and accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of pentaerythritol originating in Sweden and terminating that proceeding, *O.J.*, 22 September 1984, No L 254/5 ; Commission Regulation (EEC) No 595/85 of 7 March 1985 imposing a provisional anti-dumping duty on imports of certain hydraulic excavators originating in Japan, *O.J.*, 8 March 1985, No L 68/13 ; Commission Decision 86/36/EEC of 26 February 1986 accepting undertakings entered into in connection with the anti-dumping proceeding concerning imports into Greece of certain categories of glass originating in Turkey, Yugoslavia, Romania, Bulgaria, Hungary and Czechoslovakia and terminating the investigation, *O.J.*, 28 February 1986, No L 51/73 ; Council Regulation (EEC) No 1244/86 of 28 April 1986 imposing a definitive anti-dumping duty on imports of copper sulphate originating in Yugoslavia, *O.J.*, 30 April 1986, No L 113/4 ; Council Decision 87/66/EEC of 19 January 1987 accepting undertakings given in connection with imports of binder and baler twine originating in Brazil and Mexico, and terminating the investigations, *O.J.*, 5 February 1987, No L 34/55 ; Commission Decision 88/305/EEC of 27 May 1988 accepting undertakings given in connection with the anti-dumping investigation concerning imports of inner tubes and new tyre cases for bicycles originating in the Republic of Korea and Taiwan and terminating the investigation, *O.J.*, 31 May 1988, No L 134/61 ; Council Regulation (EEC) No 176/89 of 23 January 1989 imposing a definitive anti-dumping duty on imports of copper sulphate originating in Bulgaria or the Soviet Union, *O.J.*, 27 January 1989, No L 23/1 ; Council Regulation (EEC) No 725/89 of 20 March 1989 imposing a definitive anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty on such imports, *O.J.*, 22 March 1989, No L 79/24.

¹⁰⁰² Council Regulation (EEC) No 96/85 of 14 January 1985 imposing a definitive anti-dumping duty on imports of pentaerythritol originating in Canada, *O.J.*, 16 January 1985, No L 13/1 (corrigendum, *O.J.*, 24 January 1985, No L 20/46).

2.1.1.1.2.2. Cross elasticity of demand and supply

European anti-dumping case law does not provide information as to the method used to determine the interchangeability or the degree of competition between products. Only the result, *i.e.*, whether or not the products are substitutes, is published. Therefore, it is difficult or even impossible to examine whether the like product determination is made on the basis of economically relevant considerations, *i.e.*, whether the like products are truly substitutes.

In economics, the cross elasticity of demand (or supply) is used for measuring demand (and respectively supply) substitutability¹⁰⁰³. The cross elasticity of demand (or supply) (ϵ_{ij}) measures the effect of a price change of a product j (P_j) on the quantity demanded (or supplied) of another product i (q_i) :

$$\epsilon_{ij} = \frac{\delta x_i}{\delta P_j} \cdot \frac{P_j}{x_i} \quad (1)$$

Any pair of goods for which $\epsilon_{ij} < 0$, are called complements and any pair of goods for which $\epsilon_{ij} > 0$, are called substitutes¹⁰⁰⁴. As a consequence, for like products, at least $\epsilon_{ij} > 0$ must hold.

However, the use of the cross elasticity of demand poses some problems. First, if only a positive elasticity of demand is required, the like product category will probably be too wide. For it will cover also inferior substitutes, *i.e.*, products with a very low cross elasticity. Moreover, even high values of cross elasticities may be misleading. Indeed, if the price of product j is high enough, consumers and potential producers will be more willing to switch from product j to product i . As a consequence, the cross elasticity of product i increases as the price of product j

¹⁰⁰³ POSNER, R.A., *Antitrust Law. An Economic Perspective*, Chicago, The University of Chicago Press, 1976, 124-128. See also : LANDES, W.M., and POSNER, R.A., «Market Power in Antitrust Cases», *Harvard Law Review*, 1980-1981, (937), 960-963.

Because there may be practical problems for determining cross elasticity, the similarity of price movements has been proposed as alternative measure. That measure is based on the assumption that the prices of substitute products show the same development in time. If the price of a product increases, consumers will switch to another, substitute product. Consequently, demand for and, thus, the price of that substitute product will rise. The higher price of the first product will also induce other producers to enter the market with a substitute product. That substitute product will also be sold at a higher price because the demand for that product will also go up as a result of the price rise of the first product. However, also the method based on parallel movements is not without practical problems. It is, for example, possible that a parallel price movement of different products is caused by the same, but external cause (*e.g.*, inflation). See : AREEDA, P., «Market Definition and Horizontal Restraints», *Antitrust Law Journal*, 1983, (553), 566-576 ; HOROWITZ, I., «Market Definition in Antitrust Analysis : A Regression-Based Approach», *Southern Economic Journal*, 1981-1982, (1), 1-16 ; STIGLER, G.J., and SHERWIN, R.A., «The Extent of the Market», *Journal of Law and Economics*, 1985, (555), 555-585.

¹⁰⁰⁴ KOHLER, H., *Intermediate Microeconomics. Theory and Applications*, Glenview, Scott, Foresman and Company, 1986, 81-96 ; LAYARD, P.R.G., and WALTERS, A.A., *Micro-Economic Theory*, New York, McGraw-Hill, 1978, 141.

gets higher¹⁰⁰⁵. In the end, all other products may become substitutes with rather high values for their cross elasticity with respect to product *j*. Conversely, if the price of product *j* is extremely low, it will have hardly any substitutes.

A second problem regarding the use of cross elasticity pertains to the cross elasticities of all products *i* being spread over a sliding scale, in which there are seldom marked gaps¹⁰⁰⁶. As a consequence, the determination of a certain value of cross elasticity as dividing line between substitute and non-substitute products may only be drawn on a purely discretionary basis. Therefore, no general threshold value of cross elasticity can be determined above which products are considered to be substitutes and below which products are not considered to be like products.

Notwithstanding those problems, the cross elasticity of demand (and of supply if GATT and European anti-dumping law allow for supply substitutability) should be used for the like product determination because it would render it more transparent. Indeed, in each anti-dumping case, the European anti-dumping authorities will have to put forth why a certain value of cross elasticity is being chosen as the threshold above which the products are not considered to be substitutes (*e.g.*, the price of the product is very low so that a high threshold is being chosen). As a consequence, it would become harder to determine the like product category without providing a sufficient explanation and, thus, without any means of control.

2.1.1.2. Like product and Community industry

In GATT and European anti-dumping law, the concept «like product» plays a crucial role in the injury determination : dumping may only be sanctioned, if it causes material injury to the Community industry manufacturing the like product (Article 3.1. GATT Anti-dumping Code ; Article 3(1) basic EC Regulation ; Article 4(5) basic ECSC Decision). Therefore, if the like (type of) product is not produced in the Community, the injury requirement can never be met, as there is then no Community industry¹⁰⁰⁷. Moreover, the like product category limits the scope of the injury determination. Only the injury inflicted upon Community producers manufacturing the

¹⁰⁰⁵ The relationship between high (low) prices and high (low) rates of cross elasticity also turns up in European anti-dumping case law. See : *compact disc players from Japan and South Korea*, where it was held that the attraction a model holds for the consumer, is based essentially on his evaluation of price/brand/features, in whatever order, but that a drastic price decrease for a specific model could still profoundly alter its attraction compared with another directly competitive model (Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27)).

¹⁰⁰⁶ SCHMALENSEE, R., «Another Look at Market Power», *Harvard Law Review*, 1981-1982, (1789), 1799.

¹⁰⁰⁷ BOUDANT, J., *L'anti-dumping communautaire*, Paris, Economica, 1991, 144.

When Community production of the like product is discontinued, the anti-dumping proceeding will be terminated without anti-dumping relief (Commission Decision 93/519/EEC of 28 September 1993 terminating the anti-dumping proceeding concerning imports of unwrought manganese containing more than 96 % by weight of manganese originating in the People's Republic of China, *O.J.*, 30 September 1993, No L 244/32).

like product may be taken into account. Thus, the Community industry must be confined to the producers or to their producing facilities manufacturing the like product. In view of the importance of the like product determination, «one-way flexibility» may crop up, *i.e.*, the like product category may be determined so as to find an injured Community industry.

At first sight, it seems right to argue that, if the product coverage is defined too restrictively, it will be easier to demonstrate that the Community industry suffers injury, and that, conversely, if the product coverage is defined too broadly, it becomes quite difficult to establish that the Community industry has been injured¹⁰⁰⁸.

For example, in *outboard motors from Japan*¹⁰⁰⁹, a complaint was lodged against the whole assortment of outboard motors. After having determined that there had been no European production of outboard motors above 85 hp, but without having investigated whether outboard motors below and those above 85 hp are like products, the Commission restricted the anti-dumping proceeding to outboard motors below 85 hp. However, both the dumping exporters and the Community producers considered outboard motors like products independent of their output. Moreover, they thought that, if there is no Community production of the whole assortment of the like product, no Community industry exists¹⁰¹⁰.

In *photo albums from the People's Republic of China*, the proceeding was restricted to book bound photo albums not only because they were said to form a specific category of product within the general photo album product range, but also because the market supply of the Community industry of these albums was insufficient¹⁰¹¹. Compared to *photo albums from South Korea and Hong Kong*, only the latter reason was decisive as, in this case, the general range of photo albums was considered to form the like product category. In *photo albums from South Korea and Hong Kong*, anti-dumping relief was granted only in respect of book bound photo albums, since the Community industry was not able to meet the Community demand for the other types of photo albums¹⁰¹².

¹⁰⁰⁸ BESELER, J.F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 150; VAN BAEL, I., and BELLIS, J.-F., *Anti-Dumping and other Trade Protection Laws of the EEC*, Bicester, CCH Editions, 1990, 114.

¹⁰⁰⁹ Commission Regulation (EEC) No 1500/83 of 9 June 1983 imposing a provisional anti-dumping duty on imports of outboard motors originating in Japan, *O.J.*, 10 June 1983, No L 152/18.

¹⁰¹⁰ In the same sense: Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1; Commission Decision 86/36/EEC of 26 February 1986 accepting undertakings entered into in connection with the anti-dumping proceeding concerning imports into Greece of certain categories of glass originating in Turkey, Yugoslavia, Romania, Bulgaria, Hungary and Czechoslovakia and terminating the investigation, *O.J.*, 28 February 1986, No L 51/73; Commission Decision 87/210/EEC of 23 March 1987 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of outboard motors originating in Japan and terminating the investigation, *O.J.*, 26 March 1987, No L 82/36; Council Regulation (EEC) No 1305/87 of 11 May 1987 imposing a definitive anti-dumping duty on certain imports of outboard motors originating in Japan, *O.J.*, 13 May 1987, No L 124/1; Commission Decision 89/537/EEC of 27 September 1989 terminating the anti-dumping proceeding concerning imports of mica originating in Japan, *O.J.*, 3 October 1989, No L 284/45; Commission Regulation (EEC) No 547/90 of 2 March 1990 imposing a provisional anti-dumping duty on imports of certain glutamic acid and its salts originating in Indonesia, the Republic of Korea, Taiwan and Thailand, and accepting undertakings in connection with imports of certain glutamic acid and its salts originating in these countries, *O.J.*, 3 March 1990, No L 56/23.

¹⁰¹¹ Commission Regulation (EEC) No 2477/93 of 6 September 1993 imposing a provisional anti-dumping duty on imports of certain photo albums originating in the People's Republic of China, *O.J.*, 9 September 1993, No L 228/16.

¹⁰¹² Commission Decision 90/241/EEC of 22 May 1990 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of photo albums originating in South Korea and Hong Kong, and terminating the investigation, *O.J.*, 31 May 1990, No L 138/48.

Thus, by restricting the like product category, a Community industry which suffers injury may be established. Indeed, the like product category is confined to the like product types manufactured within the Community, whereas the like product category should define the scope of the injury determination.

In order to seek anti-dumping relief, it is often safe to restrict the like product category to those products for which it is certain that their Community production is injured if one wants to obtain anti-dumping relief¹⁰¹³. For there being a Community industry, the like product category may have to be extended, though, by including the products manufactured by Community producers which are not exported by the dumping exporters to the Community¹⁰¹⁴.

In *plain paper photocopiers from Japan*¹⁰¹⁵, an injury finding seemed to require an enlarged like product category. On the basis of the classification, published by a research agency, Dataquest, the market of plain paper photocopiers was divided into 7 segments (personal copiers and segments 1 up to 6). The Japanese nor the Community producers manufactured products of segment 6. The Japanese producers/exporters were mainly active in the segment of personal copiers and the segments 1, 2, 3 and 4. For a large part of their production, the Community producers were active in segment 5. Therefore, if product coverage of the anti-dumping proceeding would have been confined to the segments 1, 2, 3 and 4 and the segment of personal copiers, it was very likely that no (significant) Community industry would have been found to exist. Such an outcome was prevented by including the photocopiers of segment 5 in the anti-dumping proceeding. The inclusion of segment 5 was explained by there being cross-segment competition so that a clear dividing line between the different segments did not exist. Thus far, this anti-dumping case seems to be in line with GATT anti-dumping law which does not allow the possibility of granting anti-dumping relief to individual lines of production of a particular industry¹⁰¹⁶. Nevertheless, it is difficult to undo the impression that segment 5 was included in the like product category so that a Community industry could be established¹⁰¹⁷.

¹⁰¹³ *Infra*, 578-586.

¹⁰¹⁴ VAN BAEL, I., and BELLIS, J.-F., *Anti-Dumping and other Trade Protection Laws of the EEC*, Bicester, CCH Editions, 1990, 114.

¹⁰¹⁵ Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5; Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12; C.J.E.C., case C-171/87, 10 March 1992, *Canon Inc. v Council*, *E.C.R.*, 1992, I, (1237), 1295-1297; C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, *E.C.R.*, 1992, I, (1335), 1395-1397; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, *E.C.R.*, 1992, I, (1409), 1478-1481; C.J.E.C., case C-176/87, 10 March 1992, *Konishiroku Photo Industry Co. Ltd v Council*, *E.C.R.*, 1992, I, (1493), 1523-1525 and 1527-1528; C.J.E.C., case C-177/87, 10 March 1992, *Sanyo Electric Co. Ltd v Council*, *E.C.R.*, 1992, I, (1535), 1565-1566 and 1569; C.J.E.C., case C-179/87, 10 March 1992, *Sharp Corporation v Council*, *E.C.R.*, 1992, I, (1635), 1677-1678 and 1681.

¹⁰¹⁶ See : *B.I.S.D.*, Thirty-second Supplement, Geneva, GATT, 1986, 68.

¹⁰¹⁷ When a Japanese exporter of plain paper photocopiers claimed that the like product category be limited to the low segment photocopiers, Advocate General MISCHO had the impression that the reasons behind this claim only derived from the finding that it was only in the market for large photocopiers that any significant Community industry existed and that Japanese photocopiers predominated only in the market of small photocopiers (C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, *E.C.R.*, 1992, I, (1335), 1374 (Opinion of Advocate General MISCHO)).

See also : *small-screen colour television receivers from Hong Kong and the People's Republic of China*, where the higher range of SCTVs produced and sold in the Community, having such features as flat square screens, teletext modules, and digital chassis, came under the like product category, though they were not exported from Hong Kong and the People's Republic of China to the Community (Commission Regulation (EEC) No 129/91 of 11 January 1991 imposing a provisional anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China, *O.J.*, 19 January 1991, No L 14/31).

This impression is all the more stronger, since market segmentation was possible in respect of the examination of injury : the good economic performance of the Community producers in segment 5 being left out of consideration (there could not be any injury as there were no such imports from Japan), it could not compensate their bad economic performance in the lower segments. Needless to say that such considerations must not prevail in determining the like product category¹⁰¹⁸ and that they infringe upon GATT anti-dumping law¹⁰¹⁹.

An anti-dumping proceeding may also be initiated against a product which the dumping country does not export. Then, the proceeding will be broadened by including the product exported by the dumping country. Yet, the product which the dumping exporter does not export, will still be included and will be considered to be akin to the product exported by the dumping country. As the dumping country was a NME country, this product was probably included in order to find a reference country.

In *fluorspar from the People's Republic of China*, the anti-dumping proceeding covered at the start only fluorspar in powder form¹⁰²⁰. During the proceeding, the scope was extended to fluorspar in filter cake form¹⁰²¹. They were said to be like products as the only difference between them is the moisture content which for reasons of transport is not fully eliminated in the filter cake form¹⁰²². Finally, the European anti-dumping authorities stated that the dumping country exports only fluorspar in filter cake form and that the reference country sells only fluorspar in powder form on its domestic market¹⁰²³.

The like product category is also extended so as to encompass products exported by dumping exporters to the Community which are not manufactured by Community producers, and by future products which are not produced by dumping exporters nor by Community producers. As a consequence, Community producers may be found to suffer injury from products which they do not produce and which are even not imported.

1018 C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, E.C.R., 1992, I, (1335), 1374 (Opinion of Advocate General MISCHO).

1019 See : *B.I.S.D.*, Thirty-second Supplement, Geneva, GATT, 1986, 68.

1020 Notice of initiation of an Anti-dumping proceeding concerning imports of fluorspar originating in the People's Republic of China, *O.J.*, 25 April 1992, No C 105/23.

1021 Notice relating to the anti-dumping proceeding concerning imports of fluorspar originating in the People's Republic of China, *O.J.*, 4 August 1993, No C 210/6.

1022 Commission Regulation (EEC) No 2463/93 of 1 September 1993 imposing a provisional anti-dumping duty on imports of fluorspar originating in the People's Republic of China, *O.J.*, 7 September 1993, No L 226/3.

1023 Commission Regulation (EEC) No 2463/93 of 1 September 1993 imposing a provisional anti-dumping duty on imports of fluorspar originating in the People's Republic of China, *O.J.*, 7 September 1993, No L 226/3.

Thus, in *DRAMs from Japan*¹⁰²⁴ and *EPROMs from Japan*¹⁰²⁵, the like product category included DRAMs and EPROMs having a density of more than one megabit as well. The Community producers did not produce such high-density DRAMs and EPROMs, whereas the dumping exporters did not produce all kinds of them. High-density DRAMs and EPROMs were probably included because increasingly higher densities are the result of a continuous learning process and refinements in technology. Moreover, the introduction of higher densities of DRAMs and EPROMs depresses the prices of lower densities. Anti-dumping relief granted against all densities will probably enable the Community producers to switch to the category of higher densities. It is that very category which generates higher prices and, probably, higher profits¹⁰²⁶.

Once the like product category is determined, injury will be examined in respect of the Community industry's production of the whole range of like products, provided that the dumping exporters export all the product types and irrespective of whether or not the Community industry suffers injury in respect of a specific product type¹⁰²⁷. However, if the dumping exporters do not export a specific product type, a separate examination of injury for each product type will sometimes be made. Evidently, no injury will be found in respect of the product type which is not exported to the Community, though there may be injury with regard to the rest of the like product category¹⁰²⁸. Apparently, the like product category will only be divided if it does not affect the factual scope of the anti-dumping relief to be granted: granting anti-dumping relief against a product type which is not exported has actually the same effect as not granting such anti-dumping relief. Conversely, the like product category will be split up if it may result in an extension of the scope of the anti-dumping relief eventually granted: if the Community industry's production of a specific product type does not suffer injury, anti-dumping relief will still be granted against imports of that product type as the like product category has been considered as a whole. Moreover, the degree of injury found may also be depressed by taking into account the

¹⁰²⁴ Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79; corrigendum, *O.J.*, 10 February 1990, No L 38/44); Council Regulation (EEC) No 2112/90 of 23 July 1990 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan and collecting definitively the provisional duty, *O.J.*, 25 July 1990, No L 193/1.

¹⁰²⁵ Council Regulation (EEC) No 541/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of barium chloride originating in the People's Republic of China, *O.J.*, 7 March 1991, No L 60/1.

¹⁰²⁶ See also: Commission Regulation (EEC) No 2686/92 of 16 September 1992 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea, *O.J.*, 17 September 1992, No L 272/13; Council Regulation (EEC) No 611/93 of 15 March 1993 imposing a definitive anti-dumping duty on imports into the Community of certain electronic microcircuits known as DRAMs originating in the Republic of Korea and exported by companies not exempted from this duty, and collecting definitively the provisional anti-dumping duty, *O.J.*, 18 March 1993, No L 66/1.

¹⁰²⁷ Council Regulation (EEC) No 1473/93 of 14 June 1993 imposing a definitive anti-dumping duty on imports of magnesium oxide originating in the People's Republic of China, *O.J.*, 17 June 1993, No L 145/1; Council Regulation (EC) No 3386/93 of 6 December 1993 imposing a definitive anti-dumping duty on imports of dead-burned (sintered) magnesia originating in the People's Republic of China, *O.J.*, 11 December 1993, No L 306/16.

¹⁰²⁸ Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5; Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12.

whole range of like products : a product which is not dumped on the Community market, will not injure the Community industry ; if the Community industry is doing well in the field of that product type, its good economic performance in this field will wholly or partly neutralise the injury it suffers from the dumping.

Sometimes, however, the like product category is not manipulated in order to obtain a positive injury finding. Instead, the injury inflicted upon Community producers manufacturing a non-like product is taken into account.

In *caravans for camping and parts thereof from Yugoslavia*¹⁰²⁹, an anti-dumping proceeding was initiated against two separate like product categories : caravans for camping, on the one hand, and parts of such caravans, on the other hand¹⁰³⁰. The relevant Community industry was defined as «the Community manufacturing industry producing rigid caravans for camping», without any reference being made to the production of parts of such caravans. The injury investigation did only pay attention to the imports of caravans. The figures as to the volume of those imports, however, included the volume of caravans, assembled by a Yugoslav subsidiary established in the Community which used a substantial quantity of dumped parts in its assembly operations. Consequently, caravans, as well as parts thereof, were found to have been inflicting injury upon the Community industry.

The assembly of caravans in the Community in which a substantial quantity of dumped parts was being used, was probably¹⁰³¹ considered to be a good measure for the imports of parts of caravans. If such is the case, the European anti-dumping authorities accepted that a Community industry of a specific product (caravans) may be injured by imports of a different product (parts of caravans). It is, indeed, rather unlikely that caravans and parts thereof are like products¹⁰³². The European anti-dumping authorities did not even investigate whether they actually were like products, but treated them separately in the dumping investigation.

In *ball bearings and tapered roller bearings from Poland, Romania and the Soviet Union*¹⁰³³, the European anti-dumping authorities clearly suggested that the dumping of a product may injure the Community industry of another, not a like product. Indeed, lower-quality ball bearings and tapered roller bearings were found not to be part of the like product category of higher-quality ball bearings and tapered roller bearings. No Community producer was found

¹⁰²⁹ Commission Decision 83/428/EEC of 26 August 1983 accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of caravans for camping and parts thereof originating in Yugoslavia and terminating that proceeding, *O.J.*, 30 August 1983, No L 240/12.

¹⁰³⁰ See, however : *EPROMs from Japan*, where parts were considered to be like products in respect to the finished product because the parts had all physical and technical characteristics which distinguish the finished product from other products and the only use of which was their function in the finished product (Council Regulation (EEC) No 577/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as EPROMs (erasable programmable read only memories) originating in Japan, *O.J.*, 12 March 1991, No L 65/1).

¹⁰³¹ Though it was not pointed out explicitly, it is quite likely that the assembly of caravans in the Community, using a substantial quantity of dumped parts, was applied as a measure for the imports of dumped parts of caravans. The assembly of caravans in the Community was probably not considered to be equivalent to the imports of caravans. Indeed, European anti-dumping law requires the injury suffered by the Community industry to be caused by dumped imports (Article 3 basic EC Regulation ; Article 4(1) basic ECSC Decision). Not the caravans assembled in the Community, but most of their parts were being imported and dumped. Moreover, if the caravans assembled in the Community had been considered identical to the caravans imported and dumped on the Community market, the European antidumping authorities would not have investigated whether the dumping of the parts of caravans had caused injury to the Community industry and, consequently, could not have granted anti-dumping relief against the dumping of those parts.

¹⁰³² Perhaps, there is supply substitutability, but it is quite unlikely that there is demand substitutability between them.

¹⁰³³ Commission Decision 86/100/EEC of 15 April 1986 terminating the anti-dumping proceeding concerning imports of ball bearings and tapered roller bearings originating in Poland, Romania and the Soviet Union, *O.J.*, 18 April 1986, No L 102/31.

to be active in the market of lower-quality ball bearings and tapered roller bearings. Nevertheless, it was concluded that «even if these imports (of lower-quality ball bearings and tapered roller bearings) have caused injury, this injury cannot be regarded as significant under the current market conditions for the product in question».

In polyester yarns from Taiwan, Indonesia, India, the People's Republic of China, Turkey and the Republic of Korea sewing thread was found not to be a like product. However, the proceeding against imports of sewing thread was terminated not because it was not a like product, but because the complainant Community producers represented only a minimal share of total Community output of sewing thread¹⁰³⁴. It might be wondered how the proceeding would have evolved should the complainant Community producers have represented a major proportion of total Community output.

The injury caused by the imports of a like product to Community producers of a non-like product is not the injury required by GATT and European anti-dumping law. GATT and European anti-dumping law are straightforward : only the injury inflicted upon the Community industry, *i.e.*, the Community producers manufacturing the like product, may be taken into account (Article VI(1) and (6)(a) GATT ; Articles 3.1. and 4.1. GATT Anti-dumping Code ; Article 4(1) basic EC Regulation ; Article 4(1) and (5) basic ECSC Decision)¹⁰³⁵. Thus, in order to find injurious dumping, a double «one-way flexibility» is incorporated into European anti-dumping case law : first, the like product category is defined to measure the Community industry, and, second, injury

¹⁰³⁴ Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7. With regard to the requirement that the complainant Community producers must represent a major part of the total Community output of the like product, see : *infra*, 403-409.

¹⁰³⁵ VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 660, note 17.

GATT and European anti-dumping law has been correctly applied in :

- *kraftliner paper and board from the United States of America, Austria, Canada, Finland, Portugal, the Soviet Union and Sweden*, where the complainant claimed that the Community producers of kraftliner paper and board as well of testliner had suffered injury. The injury investigation was, however, confined to the production in the Community of the like product being only kraftliner paper and board (Council Regulation (EEC) No 551/83 of 8 March 1983 imposing a definitive anti-dumping duty on kraftliner paper and board originating in the United States of America and accepting undertakings given in connection with the review of the anti-dumping proceeding on kraftliner paper and board originating in Austria, Canada, Finland, Portugal, the Soviet Union and Sweden, *O.J.*, 10 March 1983, No L 64/25) ;
- *serial-impact dot-matrix printers from Japan*, where it was noted that injury should only be assessed in relation to the Community production of the like product - being in this case serial-impact dot-matrix printers. Therefore, it was refused to determine injury with regard to the larger companies of which the manufacturing and sales operations concerning serial-impact dot-matrix printers were only part of (Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12) ;
- *hardboard from Czechoslovakia, Poland, the USSR, Romania, Brazil and Sweden*, where no injury was found with regard to certain varieties because there was hardly any European production of these varieties (Council Regulation (EEC) No 1786/89 of 19 June 1989 terminating the proceeding in connection with a review of anti-dumping measures concerning imports of fibre building board (hardboard) originating in Czechoslovakia, Poland and the USSR, confirming the expiry of the definitive anti-dumping duties imposed on imports from Czechoslovakia and Poland, and repealing the definitive anti-dumping duty imposed on imports from the USSR, *O.J.*, 23 June 1989, No L 176/1 ; Commission Decision 89/377/EEC of 19 June 1989 terminating the proceeding in connection with a review of anti-dumping measures concerning imports of fibre building board (hardboard) originating in Romania, Brazil and Sweden, confirming the expiry of the undertakings given by Romanian, Brazilian and certain Swedish exporters, and repealing the undertaking given by another Swedish exporter, *O.J.*, 23 June 1989, No L 176/51).

to the Community industry is enlarged in order to comprise injury to Community producers manufacturing a non-like product.

2.1.2. The exception : product lines

In cases where the Community production of the like product has no separate identity, the effect of the dumped imports must be assessed in relation to the production of the narrowest group or range of production which includes the like product - so-called «product lines» - for which the necessary information may be found (Article 3.6. GATT Anti-dumping Code ; Article 3(8) basic EC Regulation ; Article 4(4) basic ECSC Decision). Product lines have been taken into

consideration in several anti-dumping cases¹⁰³⁶. In many of these cases the inaccuracy inherent to the use of product lines was underscored.

Nevertheless, in other anti-dumping cases, the injurious effect of the dumping is assessed on the basis of the facts available (Article 6.8. GATT Anti-dumping Code ; Article 18 basic EC Regulation ; Article 7(7)(b) basic ECSC Decision), as there were separate data for the like

1036 Product lines are used in order to determine :

- consumption on the Community market and, subsequently, market shares of the various sellers (Commission Regulation (EEC) No 2464/84 of 24 August 1984 imposing a provisional anti-dumping duty on imports of certain shovels originating in Brazil, *O.J.*, 29 August 1984, No L 231/29) ;
- the volume of dumped imports (Commission Decision 80/783/EEC of 27 August 1980 accepting undertakings in connection with the anti-dumping proceedings concerning imports of studded welded-link chain, originating in Spain and Sweden and terminating those proceedings, *O.J.*, 2 September 1980, No L 231/10 ; Commission Regulation (EEC) No 3669/84 of 21 December 1984 imposing a provisional anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan, *O.J.*, 28 December 1984, No L 340/37) ;
- the rate of capacity utilization (Commission Regulation (EC) No 1076/94 of 6 May 1994 imposing a provisional anti-dumping duty on imports of certain watch movements originating in Malaysia and Thailand, *O.J.*, 11 May 1994, No L 120/3) ;
- employment (Commission Recommendation No 112/78/ECSC of 18 January 1978 imposing a provisional anti-dumping duty on imports of iron or steel coils for re-rolling, originating in Czechoslovakia and South Korea, *O.J.*, 21 January 1978, No L 17/27 ; Commission Recommendation No 118/78/ECSC of 18 January 1978 imposing a provisional anti-dumping duty on certain galvanized steel sheets and plates originating in Poland and Spain, *O.J.*, 24 January 1978, No L 19/3 ; Commission Recommendation No 119/78/ECSC of 18 January 1978 imposing a provisional anti-dumping duty on wire rod originating in Czechoslovakia, *O.J.*, 24 January 1978, No L 19/5 ; Commission Recommendation No 120/78/ECSC of 18 January 1978 imposing a provisional duty on certain sheets and plates, of iron or steel, originating in Czechoslovakia, *O.J.*, 24 January 1978, No L 19/7 ; Commission Recommendation No 121/78/ECSC of 18 January 1978 imposing a provisional anti-dumping duty on certain sheets and plates, of iron or steel, originating in Bulgaria, Czechoslovakia and Japan, *O.J.*, 24 January 1978, No L 19/9 ; Commission Recommendation No 159/78/ECSC of 27 January 1978 imposing a provisional anti-dumping duty on certain angles, shapes and sections, of iron and steel, not further worked than hot-rolled or extruded, originating in Spain, *O.J.*, 28 January 1978, No L 23/31 ; Commission Recommendation No 160/78/ECSC of 27 January 1978 imposing a provisional anti-dumping duty on certain sheets and plates, of iron or steel, originating in the German Democratic Republic, Romania and Spain, *O.J.*, 28 January 1978, No L 23/33 ; Commission Recommendation No 161/78/ECSC of 27 January 1978 imposing a provisional anti-dumping duty on certain sheets and plates, of iron or steel, originating in Japan, *O.J.*, 28 January 1978, No L 23/35 ; Commission Recommendation No 245/78/ECSC of 2 February 1978 imposing a provisional anti-dumping duty on imports of iron or steel coils for re-rolling originating in Japan and Bulgaria, *O.J.*, 7 February 1978, No L 37/13 ; Commission Recommendation No 262/78/ECSC of 7 February 1978 imposing a provisional anti-dumping duty on certain sheets and plates, of iron or steel, originating in Poland, *O.J.*, 9 February 1978, No L 39/13 ; Commission Recommendation No 263/78/ECSC of 7 February 1978 imposing a provisional anti-dumping duty on certain angles, shapes and sections, of iron or steel, not further worked than hot-rolled or extruded, originating in Japan, *O.J.*, 9 February 1978, No L 39/15 ; Commission Recommendation No 307/78/ECSC of 14 February 1978 imposing a provisional anti-dumping duty on imports of iron or steel coils for re-rolling originating in Australia, *O.J.*, 16 February 1978, No L 45/17 ; Commission Recommendation No 790/78/ECSC of 19 April 1978 imposing a definitive anti-dumping duty on iron or steel coils for re-rolling originating in South Korea, *O.J.*, 20 April 1978, No L 106/21 ; Commission Recommendation No 811/78/ECSC of 21 April 1978 imposing a definitive anti-dumping duty on certain sheets and plates, of iron or steel, originating in Bulgaria, the German Democratic Republic and Romania, *O.J.*, 22 April 1978, No L 108/26 ; Commission Recommendation No 1006/78/ECSC of 18 May 1978 imposing a definitive anti-dumping duty on certain galvanized sheets and plates originating in the German Democratic Republic, *O.J.*, 19 May 1978, No L 131/8 ; Commission Recommendation No 1704/78/ECSC of 19 July 1978 imposing a definitive anti-dumping duty on certain sheets and plates, of iron or steel, originating in Czechoslovakia, Japan, Poland and Spain, *O.J.*, 20 July 1978, No L 195/17 ; Commission Recommendation No 1715/78/ECSC of 20 July 1978 imposing a definitive anti-dumping duty on certain galvanized sheets and plates originating in Japan, *O.J.*, 22 July 1978, No L 198/1 ; Commission Recommendation No 1758/78/ECSC of 26 July 1978 imposing a definitive anti-dumping duty on certain angles, shapes and sections of iron or steel, originating in Spain, *O.J.*, 27 July 1978, No L 203/28 ; Commission Recommendation No 259/83/ECSC of 27 January 1983 imposing a definitive anti-dumping duty on broad-flanged beams originating in Spain, *O.J.*, 1 February 1983, No L 30/61 (corrigendum, *O.J.*, 8 February 1983, No L 36/10) ; Commission Recommendation No 376/83/ECSC of 14 February 1983 imposing a provisional anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Brazil, *O.J.*, 17 February 1983, No L 45/14 ; Commission Decision No 702/83/ECSC of 24 March 1983 imposing provisional anti-dumping duties on certain iron or steel coils for re-rolling originating in Argentina, Brazil, Canada and Venezuela and accepting price undertakings from two Canadian exporters, *O.J.*, 29 March 1983, No L 82/9).

product¹⁰³⁷. It is argued that these cases are a breach of GATT and European anti-dumping law¹⁰³⁸, since, if available data do not permit separate identification, European anti-dumping authorities must consider the information regarding the product line. European anti-dumping authorities do not have the discretionary power to choose freely between either products lines (Article 3.6. GATT Anti-dumping Code ; Article 3(8) basic EC Regulation ; Article 4(4) basic ECSC Decision) or facts available which permit separate identification (Article 6.8. GATT Anti-dumping Code ; Article 18 basic EC Regulation ; Article 7(7)(b) basic ECSC Decision).

This is not a conclusive argument. The provisions regarding product lines and facts available are complementary. The provision as to product lines determines a hierarchy between the facts available. As it stipulates «(t)he effect of the dumped (...) imports shall be assessed in relation to the Community production of the like product when *available data* permit its separate identification» (Article 3.6. GATT Anti-dumping Code ; Article 3(8) basic EC Regulation ; Article 4(4) basic ECSC Decision) (emphasis added), it obliges to exhaust all data available which allowing a separate identification. Only if no such data are available, it imposes the use of the data available on product lines. Consequently, the cases in which separate data are used on the basis of the facts available, are not necessarily illegal. On the contrary, if they had relied on

¹⁰³⁷ Commission Regulation (EEC) No 451/80 of 22 February 1980 imposing a provisional anti-dumping duty on imports of standardized electric multi-phase motors having an output of more than 0.75 kW but not more than 75 kW, originating in the USSR, *O.J.*, 27 February 1980, No L 53/15 ; Commission Decision 80/252/EEC of 22 February 1980 accepting undertakings given by exporters in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and Romania in connection with the anti-dumping proceeding concerning imports of standardized electric multi-phase motors having an output of more than 0.75 kW but not more than 75 kW, originating in those countries, and terminating the procedure in respect of them, *O.J.*, 27 February 1980, No L 53/21 ; Commission Decision 80/410/EEC of 10 April 1980 accepting undertakings given in connection with the anti-dumping proceedings concerning certain filament lamps for lighting exceeding 28 volts, originating in Czechoslovakia, the German Democratic Republic, Hungary and Poland, and terminating those proceedings, *O.J.*, 15 April 1980, No L 97/59 ; Council Regulation (EEC) No 1560/80 of 20 June 1980 concerning the definitive collection of the provisional anti-dumping duty imposed on imports of standardized electric multi-phase motors having an output of more than 0.75 kW but not more than 75 kW, originating in the USSR, *O.J.*, 21 June 1980, No L 153/45 ; Commission Decision 80/599/EEC of 19 June 1980 accepting undertakings in connection with the anti-dumping proceeding concerning imports of standardized electric multi-phase motors having an output of more than 0.75 kW but not more than 75 kW, originating in the USSR and terminating that proceeding, *O.J.*, 21 June 1980, No L 153/48 ; Commission Decision 81/366/EEC of 18 May 1981 accepting an undertaking given in connection with the anti-dumping proceedings concerning louvre doors originating in Malaysia and Singapore and terminating the proceedings, *O.J.*, 22 May 1981, No L 135/33 ; Commission Decision 82/398/EEC of 14 June 1982 accepting undertakings given in connection with the anti-dumping procedure concerning cylinder vacuum cleaners originating in Czechoslovakia, the German Democratic Republic and Poland and terminating the procedure, *O.J.*, 18 June 1982, No L 172/47 ; Commission Regulation (EEC) No 2317/85 of 12 August 1985 imposing a provisional anti-dumping duty on imports of roller chains for cycles originating in the USSR and the People's Republic of China, *O.J.*, 14 August 1985, No L 217/7 ; Commission Regulation (EEC) No 2064/90 of 17 July 1990 imposing a provisional anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 20 July 1990, No L 188/10 (corrigendum, *O.J.*, 21 November 1990, No L 321/19).

¹⁰³⁸ VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 638-639.

product lines when separate data were available, they would have been illegal¹⁰³⁹. Accordingly, GATT and European anti-dumping law, in many cases, are biased in favour of positive findings of injury. Taking into account product lines instead of the like product indeed broadens the scope of the injury investigation and may often diminish the probability of finding injury, as it dilutes the impact of the dumping¹⁰⁴⁰.

2.2. PRODUCER COVERAGE

2.2.1. *The standard case : the Community producers as a whole or a major proportion of total Community production*

The concept «Community industry» refers to «the Community producers as a whole of the like product or those of them whose collective output of the products constitutes a major proportion of the total Community production of those products» (Article 4(1) basic EC Regulation ; Article 4(5) basic ECSC Decision). It coincides with the definition of the concept «domestic industry» in GATT anti-dumping law (Article 4.1. GATT Anti-dumping Code), which, in its turn, goes back to the interpretation placed by the GATT Group of Experts, in its 1959 report, on the concept «domestic industry» which is used but not defined in Article VI(1) GATT. Indeed, the Group

«agreed that, even though individual cases would obviously give rise to particular problems, as a general guiding principle judgements of material injury should be related to total national output of the like commodity concerned or a significant part thereof. The Group agreed that the use of anti-dumping duties to

¹⁰³⁹ See : *serial-impact dot-matrix printers from Japan*, where the provision about product lines (Article 3(8) basic EC Regulation ; Article 4(4) basic ECSC Decision) was advanced as the legal basis for determining injury with regard to the manufacturing and sales operations concerning serial-impact dot-matrix printers and not with regard to the larger companies which these like product operations were part of (Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12).

See also : *deep freezers from the Soviet Union*, where the Council held that it was not shown that the dumped products and those of the Community industry were not like products. Subsequently, the Council concluded that «in accordance with Article 4(4) of (the former basic EC Regulation (now : Article 3(8) basic EC Regulation)), the effect of the imports covered by the investigation (had) to be assessed in relation to production of deep freezers in the Community» (Council Regulation (EEC) No 29/87 of 22 December 1986 imposing a definitive anti-dumping duty on imports of certain deep freezers originating in the Soviet Union, *O.J.*, 8 January 1987, No L 6/1).

¹⁰⁴⁰ *Infra*, 578-586.

offset injury to a single firm within a large industry (unless that firm were an important or significant part of the industry¹⁰⁴¹) would be protectionist in character¹⁰⁴².

«One-way flexibility» will be introduced into the definition of the Community industry either by placing a restrictive interpretation on the concept «Community production» or by placing a broad interpretation on the concept «major proportion». Indeed, if, by providing a restrictive interpretation, the concept «Community production» were not to comprise all production of the like product in the Community or if less than half of the overall Community production might represent a major proportion, the complainant Community producers would more rapidly represent a major proportion of it.

¹⁰⁴¹ Thus, the Community industry may consist of only one producer (see : Council Regulation (EEC) No 191/80 of 29 January 1980 imposing a definitive anti-dumping duty on lithium hydroxide originating in the United States of America and the Soviet Union, *O.J.*, 30 January 1980, No L 23/19 (corrigendum, *O.J.*, 8 February 1980, No L 31/23) ; Commission Decision 80/1116/EEC of 4 December 1980 accepting undertakings offered by the exporters of saccharin and its salts originating in China and the United States of America and terminating the proceedings concerning imports of saccharin and its salts from China, Japan and the United States of America, *O.J.*, 9 December 1980, No L 331/41 ; Commission Regulation (EEC) No 84/82 of 14 January 1982 imposing a provisional anti-dumping duty on mechanical wrist-watches originating in the USSR, *O.J.*, 16 January 1982, No L 11/14 ; Commission Decision 90/154/EEC of 26 March 1990 terminating the anti-dumping proceeding concerning imports of ammonium paratungstate originating in the People's Republic of China and the Republic of Korea, *O.J.*, 30 March 1990, No L 83/117 ; Commission Regulation (EEC) No 2054/91 of 11 July 1991 imposing a provisional anti-dumping duty on imports of dihydrostreptomycin originating in the People's Republic of China, *O.J.*, 13 July 1991, No L 187/23 ; Commission Regulation (EC) No 1648/94 of 6 July 1994 imposing a provisional anti-dumping duty on imports of furazolidone originating in the People's Republic of China, *O.J.*, 8 July 1994, No L 174/4 ; Commission Regulation (EC) No 1783/94 of 18 July 1994 imposing a provisional anti-dumping duty on imports of furfuraldehyde originating in the People's Republic of China, *O.J.*, 21 July 1994, No L 186/11). Only the condition that this sole producer represents a major proportion of Community production must be fulfilled (*Contra* : EHLE, D., «Basic Aspects of the Anti-Dumping Regulations of the Common Market», *International Lawyer*, 1968-1969, (490), 498. D. EHLE holds that the producer with the largest output can constitute a Community industry, but he does not require that the output of such a producer must represent a major proportion of total Community production. However, there is a vast difference between producing a major proportion of total Community production and being the producer with the largest output. For example, if all the other Community producers produce each of them only 5 % of total Community production, the Community producer producing 10 % will be the producer with the largest output. However, it is quite doubtful whether he will also represent a major proportion of total Community production).

On the other hand, if several Community producers are active, the Community industry must not comprise the main producer ; it is sufficient for the remaining producers to constitute a major proportion of the Community production (Commission Decision 82/398/EEC of 14 June 1982 accepting undertakings given in connection with the anti-dumping procedure concerning cylinder vacuum cleaners originating in Czechoslovakia, the German Democratic Republic and Poland and terminating the procedure, *O.J.*, 18 June 1982, No L 172/47 ; Commission Decision 82/543/EEC of 6 August 1982 accepting an undertaking given in connection with the anti-dumping proceeding concerning paracetamol (INN) crystals or powder originating in China and terminating the proceeding, *O.J.*, 11 August 1982, No L 236/23).

See also : *serial impact fully formed character printers from Japan* in which it was noted that only two Community producers existed. Because one of them was particularly affected by circumstances outside the Community, the Commission restricted the injury determination to the other Community producer, without enquiring whether the latter represented a major proportion of Community production (Commission Regulation (EEC) No 2005/88 of 5 July 1988 imposing a provisional anti-dumping duty on imports of serial impact fully formed character printers originating in Japan, *O.J.*, 8 July 1988, No L 177/1).

¹⁰⁴² *B.I.S.D.*, Eight Supplement, Geneva, GATT, 1960, 150, consideration 18.

As no restrictive interpretation is placed on the concept «Community production», «one-way flexibility» is not present. It comprises total actual and potential production¹⁰⁴³ of the like product, in principle, originating in the Community¹⁰⁴⁴ during the investigation

¹⁰⁴³ Council Regulation (EEC) No 407/83 of 21 February 1983 amending Regulation (EEC) No 3439/80 imposing a definitive anti-dumping duty on imports of certain polyester yarn originating in the United States of America, *O.J.*, 23 February 1983, No L 50/1; Commission Regulation (EEC) No 1500/83 of 9 June 1983 imposing a provisional anti-dumping duty on imports of outboard motors originating in Japan, *O.J.*, 10 June 1983, No L 152/18; Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79; corrigendum, *O.J.*, 10 February 1990, No L 38/44); Council Regulation (EEC) No 577/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as EPROMs (erasable programmable read only memories) originating in Japan, *O.J.*, 12 March 1991, No L 65/1.

Potential producers are producers who have committed themselves in some way to future production of the like product. It is not sufficient that they are technically capable of producing the like product (Council Regulation (EEC) No 577/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as EPROMs (erasable programmable read only memories) originating in Japan, *O.J.*, 12 March 1991, No L 65/1; see also : *supra*, 389-391).

By considering both actual and potential production, the evolution in the composition of the Community industry is also taken into account. Thus, it is possible to determine the injurious effects of dumping over a period in which the actual Community producers do not yet exist, but in which other firms established within the Community produce the like product. Thereby, it is necessary to show that the former Community producers are no longer able to produce the like product because of the dumping. European anti-dumping law, indeed, takes into account the injurious effects of the dumping caused in a period before the present Community producers were established, but it does not investigate why the former Community producers are not active anymore. Indeed, in *glycine from Japan*, the dumping investigation concerned the period from 1 April 1984 to 30 September 1984. During this period, the Community industry consisted of one producer who had only started producing glycine in January 1984. The exporters argued that their «exports prior to 1984 were irrelevant because Article 4(1) (former basic EC legislation (now : Article 3(1) basic EC Regulation and Article 4(1) basic ECSC Decision)) requires that injury determinations be made in relation to an established Community industry». The Commission did not agree and determined the injurious effect of the dumped imports during the period from 1980 to September 1984 because it was established «that a Community industry has been in existence since 1970 at least» (Commission Regulation (EEC) No 997/85 of 18 April 1985 imposing a provisional anti-dumping duty on imports of glycine originating in Japan, *O.J.*, 19 April 1985, No L 107/8). However, in this anti-dumping case, no further explanation was given, nor was it noted why the other Community producers were obliged to close down their glycine production plants, an observation which is frequently made in European anti-dumping case law (*infra*, 391 and 478-479). On the other hand, in *ammonium paratungstate from the People's Republic of China and the Republic of Korea*, the Commission held that a Community producer who had closed down his shop, should be excluded from the Community industry, but that his particular situation could be regarded as part of the economic context relevant to the injury assessment, as long as he was willing to be used as a «reference» (Commission Decision 90/154/EEC of 26 March 1990 terminating the anti-dumping proceeding concerning imports of ammonium paratungstate originating in the People's Republic of China and the Republic of Korea, *O.J.*, 30 March 1990, No L 83/117).

¹⁰⁴⁴ It is not necessary for the product to be manufactured for 100 % within the Community. It is only required that the product is of Community origin, as defined by Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (Commission Regulation (EEC) No 1500/83 of 9 June 1983 imposing a provisional anti-dumping duty on imports of outboard motors originating in Japan, *O.J.*, 10 June 1983, No L 152/18; BESELER, J.F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 150). Thus, the producer must carry out a major part of the total production in the Community, e.g., that part during which all essential technical characteristics of the finished product are incorporated (Commission Regulation (EEC) No 2686/92 of 16 September 1992 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea, *O.J.*, 17 September 1992, No L 272/13). Independent assemblers may also be considered to be part of total Community production, and will be included in the Community industry if they support the anti-dumping complaint (Commission Regulation (EEC) No 3262/90 of 5 November 1990 imposing a provisional anti-dumping duty on imports of audio tapes in cassettes originating in Japan, the Republic of Korea and Hong Kong, *O.J.*, 13 November 1990, No L 313/5 (corrigendum, *O.J.*, 12 January 1991, No L 9/36)).

See also :

- *DRAMs from Japan, ball bearings from Japan and Singapore and EPROMs from Japan*, where the question whether companies performing only assembly and testing operations belong to the Community industry, was raised, but not resolved because the company performing only assembly and testing operations could not be part of the Community industry on account of its relationship with the dumping exporters, see : *infra*, 410-415) (Council Regulation (EEC) No 2112/90 of 23 July 1990 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan and collecting definitively the provisional duty, *O.J.*, 25 July 1990, No L 193/1; Council Regulation (EEC) No 2685/90 of 17 September 1990 amending Regulation (EEC) No 2089/84 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 20 September

period¹⁰⁴⁵, regardless of the nationality of the ownership of, or the control over the

1990, No L 256/1 (corrigendum, *O.J.*, 10 January 1991, No L 7/38); Council Regulation (EEC) No 577/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as EPROMs (erasable programmable read only memories) originating in Japan, *O.J.*, 12 March 1991, No L 65/1);

- *plain paper photocopiers from Japan*, where the question whether a company assembling certain types of the like product from parts imported from the dumping country, was raised, but not resolved mainly because the other types of the like product it produced were of Community origin (Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12).

Nevertheless, as the concept «origin» is flexible (see : *supra*, 115-120), a restrictive interpretation may be placed on the concept «Community production» through a «one-way flexible» interpretation of the concept «origin». Although no evidence can be found of such an interpretation in European anti-dumping case law, the door may have been left opened. For European anti-dumping authorities have stated that «no threshold has been specified in either Community legislation or in previous (anti-dumping) cases for the minimum value added [i.e., the criterion in European anti-dumping case law to determine the origin of products, see : *supra*, 118-120] that must be respected in order for a producer to qualify as part of Community industry» (Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12). Though this statement supports an broad interpretation as it concerns a complainant producer whose assembly operations created only a low value added (20 to 35 %), it may result in a restrictive interpretation when it concerns a non-complainant producer : as no general minimum value added is determined, the European anti-dumping authorities may implement it on a case-by-case basis.

In respect of the definition of the Community industry, the European anti-dumping authorities will retain their full discretion as to the implementation of the notion of origin under the new GATT Agreement on Rules of Origin drafted in 1994 which explicitly excludes from its scope the definition of the domestic industry (Note *ad* Article 1.2.). Thus, under GATT law, it will be possible to include assemblers generating only a low value added in the Community industry.

1045 In *woven polyolefin bags from the People's Republic of China*, «(t)he Commission observed that the producers on whose behalf the complaint had been made, who had cooperated with the Commission and produced the (bags) in question *during the investigation period*, manufactured a major share of the Community's total output of like products during the period» (Commission Regulation (EEC) No 2051/90 of 17 July 1990 imposing a temporary anti-dumping duty on imports of woven polyolefin bags originating in the People's Republic of China, *O.J.*, 19 July 1990, No L 187/36 (corrigendum, *O.J.*, 20 September 1990, No L 256/38)) (emphasis added).

Exceptionally, however, the Community industry also refers production before or after the investigation period :

- in *serial-impact dot-matrix printers from Japan* the sales figures of two undertakings which ceased activity prior to the investigation period, were taken into account. The Court of Justice found this interpretation acceptable because, even without taking account of these figures, the remaining Community producers lost market share (C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, E.C.R., 1991, I, (2069), 2193). For the Council, the cessation of activity by those two undertakings could be taken into account for the purpose of determining the loss of market of the Community industry (C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, E.C.R., 1991, I, (2069), 2104 (Report for the Hearing : conclusions of the Council). See also : *ibidem*, 2159-2160 (Opinion of Advocate General LENZ) ;

- in *Portland cement from the German Democratic Republic, Poland and Yugoslavia* the investigation period with regard to dumping and price undercutting (the latter being an element of the injury determination) was 1 October 1984 to 31 March 1985, while, with regard to injury and threat of injury, facts which occurred after 31 March 1985 were generally not taken into account. However, with regard to the situation of the Community industry, the Commission referred to «the situation of the producers in the Community as constituted on 31 December 1985» (Commission Decision 86/344/EEC of 17 July 1986 terminating the anti-dumping proceeding concerning imports of Portland cement originating in the German Democratic Republic, Poland and Yugoslavia, *O.J.*, 25 July 1986, No L 202/43). Consequently, the injury determination was not limited to the Community industry, as it was constituted during the investigation period, with regard to dumping and price undercutting.

production facilities established in the Community¹⁰⁴⁶.

Nevertheless, foreign-owned or foreign-controlled production facilities do not carry as much weight in determining whether the complainant Community producers constitute a major proportion of Community production. Indeed, in *small screen colour television receivers from the Republic of Korea*¹⁰⁴⁷, in which 50 % of total Community production, including the output of

¹⁰⁴⁶ The production by production facilities established in the Community, but controlled by non-dumping foreigners is included in total Community production (Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1 ; Council Regulation (EEC) No 1048/90 of 25 April 1990 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 27 April 1990, No L 107/56 (corrigendum, *O.J.*, 24 May 1990, No L 133/92) ; Commission Regulation (EEC) No 129/91 of 11 January 1991 imposing a provisional anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China, *O.J.*, 19 January 1991, No L 14/31 ; Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries ; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24).

See also : *video cassette recorders from Japan and the Republic of Korea*, where the anti-dumping proceeding was initiated against all Korean exports, but only against two Japanese exporters. The other Japanese exporters had built up their own production or assembly facilities within the Community. For assessing the impact of the dumping on the Community industry, the Japanese production and assembly within the Community were included in the overall development of production and assembly in the Community (Commission Regulation (EEC) No 2684/88 of 26 August 1988 imposing a provisional anti-dumping duty on certain imports of video cassette recorders originating in Japan and the Republic of Korea, *O.J.*, 31 August 1988, No L 240/5).

With regard to production facilities controlled by dumping exporters, see : *infra*, 408-415

P. MESSERLIN holds that European anti-dumping case law is inconsistent as to foreign owned plants located in the Community (MESSERLIN, P., «Anti-Dumping Regulations or Pro-Cartel Law ? The EC Chemical Cases», *World Economy*, 1990, (465), 477). European anti-dumping case law, though, is rather straightforward : plants owned by foreign producers not subject to the anti-dumping proceeding, are included in the Community industry, whereas (non-complainant) plants owned by the dumping exporters are excluded.

Conversely, the output of Community controlled production facilities established outside the Community is excluded (Council Regulation (EEC) No 113/86 of 20 January 1986 amending Regulation (EEC) No 1698/85 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 23 January 1986, No L 17/2 ; Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1 ; Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5). See also :

- *unwrought nickel from the Soviet Union*, where the claim of the dumping exporter that there was no substantial Community industry and that extra-Community production had been taken into account, was rejected because «the assessment of injury was based on production of the established Community industry in the Community» (Council Regulation (EEC) No 2907/83 of 17 October 1983 terminating the anti-dumping proceeding concerning imports of unwrought nickel, not alloyed, in the form of cathodes produced by electrolysis, either uncut or cut into squares, originating in the Soviet Union, *O.J.*, 19 October 1983, No L 286/29) ;
- *small-screen colour television receivers from Hong Kong and the People's Republic of China*, where total Community industry sales (i.e., sourced from both Community and extra-Community production capacities) were taken into account, in order to ascertain whether the Community industry did not replace its sales sourced from Community production facilities by sales sourced from its extra-Community facilities. This investigation sought to establish to what extent the dumped imports were accounted for the decline in the Community sales sourced from Community production facilities. Thus, the sales sourced from extra-Community production facilities were taken into account as another factor which, besides the dumped imports, might have caused injury to the Community production facilities (Commission Regulation (EEC) No 129/91 of 11 January 1991 imposing a provisional anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China, *O.J.*, 19 January 1991, No L 14/31).

¹⁰⁴⁷ Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1. See also : Commission Regulation (EEC) No 129/91 of 11 January 1991 imposing a provisional anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China, *O.J.*, 19 January 1991, No L 14/31.

foreign-owned and foreign-controlled production facilities established in the Community was found to constitute a major proportion of total Community production, it was noted that :

«(i)n the first place, the cooperating complainant companies still represented, as recently as 1985, some 68 % of total Community output. Second, the proportion of 50 % calculated in 1987 takes account of the rapid change in the composition of Community SCTV production capacity which took place between 1985 and 1987 - under pressure originating mainly from non-Community competition. Without this change, the cooperating producers would still have represented approximately the same share of Community output in 1987 as in 1985. The rapid reduction in the percentage between 1985 and 1987 can be explained by the higher proportion of non-Community, mainly Japanese, controlled production which has moved into the Community, as well as by the Community controlled production which has been relocated outside the Community (...).».

Thus, 50 % of total Community production may constitute a major proportion. However, the Community authorities were apparently not that sure, for they found it necessary to qualify the different components of total Community production by providing that foreign-owned or foreign-controlled production facilities carried less weight. However, by doing so, they made way for an extremely large interpretation of the concept «major proportion». However, when, in a particular case, the Community industry represented only 40 % of total Community production, the European anti-dumping authorities contacted other Community producers in order to widen the basis of the injury investigation¹⁰⁴⁸. European anti-dumping authorities, thus, seem hesitant about accepting a representativeness below 50 %. Hence, - insofar as numerical information about the proportion of the complainant Community producers to the overall Community production is given - there has been no anti-dumping case in which the Community industry represented less than 50 % of total Community output¹⁰⁴⁹, but it is still conceivable that amounts of less than 50 % may be considered as a major proportion. Within GATT it is, indeed, recognized that the complainant producers should not necessarily represent 50 % of total production¹⁰⁵⁰. Also Community officials have stated *ex officio* that the threshold would seem to be 25 %¹⁰⁵¹. This threshold of 25 % of overall production has been adopted in the new GATT Anti-dumping Code (Article 5.4.) and in the new EC anti-dumping legislation (Article 5(4)), in combination with

¹⁰⁴⁸ Council Regulation (EEC) No 2474/93 of 8 September 1993 imposing a definitive anti-dumping duty on imports into the Community of bicycles originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 9 September 1993, No L 228/1.

¹⁰⁴⁹ In *household cooking ware from South Korea* Community producers representing only 16 % of total Community production were not considered to constitute a Community industry (Commission Decision 86/86/EEC of 18 March 1986 terminating the anti-dumping proceeding concerning imports of stainless steel household cooking ware originating in South Korea, *O.J.*, 19 March 1986, No L 74/33).

¹⁰⁵⁰ GATT Doc. No. COMAD/W/83, 17 November 1978.

¹⁰⁵¹ VAN BAELE, I., and BELLIS, J.-F., *Anti-Dumping and other Trade Protection Laws of the EEC*, Bicester, CCH Editions, 1990, 118; VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 631.

Contra : BOUDANT, J., *L'anti-dumping communautaire*, Paris, Economica, 1991, 145, according to whom «a major proportion» refers to 50 % or more of overall Community production.

a threshold of 50 % of the production of Community producers expressing their support for or their opposition to the anti-dumping complaint. It might be agreed that 25 % is still a major proportion, but it should be wondered why GATT and European anti-dumping law require only a major proportion instead of the majority (more than 50 %) of total production. The question might, indeed, be raised why the rest of the Community producers, constituting a much larger proportion of 75 %, does not complain about the dumping.

2.2.2. *The exceptions*

GATT and European anti-dumping law allow that, under certain conditions, certain producers established in the Community are not included in the Community industry. Hence, the Community industry does not include Community producers related to dumping exporters, nor Community producers who import the dumped product. The Community industry may also be divided into several regional markets ; the Community producers exclusively active in one of these markets may constitute the Community industry, whereas the other Community producers are disregarded. European anti-dumping case law also disregards integrated Community producers. European anti-dumping authorities do not accept other reasons for excluding Community producers¹⁰⁵².

The interpretation of these conditions is important because it determines whether or not the complainant producers represent a major proportion of overall Community production. The exclusion of a non-complainant producer will reduce total Community production¹⁰⁵³ and, thus, increase the share of the complainant producers in overall Community production. Thus, the exclusion of a non-complainant producer will increase the probability that the complainant producers represent a major part of total Community production¹⁰⁵⁴. Conversely, the inclusion of a non-complainant producer will reduce the probability of the complainant producers constituting a major proportion of Community production. On the other hand, the inclusion or

¹⁰⁵² For example, the capital holding by the State is irrelevant to the definition of the Community industry (Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5).

¹⁰⁵³ See : Council Regulation (EEC) No 2861/93 of 18 October 1993 imposing a definitive anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, and collecting definitively the provisional duty imposed, *O.J.*, 21 October 1993, No L 262/4.

¹⁰⁵⁴ The Court of Justice ignores the importance of the definition of the Community industry in arguing that the possibly illegal inclusion of a Community producer in the Community industry is of no importance when that producer is not taken into consideration either in assessing the injury suffered or in determining the rate of the anti-dumping duty (C.J.E.C., case 156/87, 14 March 1990, *Gestetner Holdings plc v Council and Commission*, *E.C.R.*, 1990, I, (781), 824 and 840). The Court thereby ignores that the upholding of the anti-dumping proceedings depends on there being a Community industry or not. If the complainant Community producers do not represent a major proportion of overall Community production, the anti-dumping proceeding must be terminated without any anti-dumping relief being granted. However, the unlawful inclusion of complainant Community producers increases the proportion of the complainant Community producers in overall Community output and, thus, the probability of finding a Community industry.

exclusion of a complainant producer will increase, respectively reduce the probability that a major proportion of overall Community production will have filed the anti-dumping complaint. Indeed, if a complainant producer is included (excluded), the absolute quantity produced by the complainant producers increases (decreases) relatively more than overall Community production.

This section investigates whether the exceptions to the general definition of the concept «Community industry» are biased through «one-way flexibility», *i.e.*, whether complainant producers are included rather than excluded and whether non-complainant producers are excluded rather than included.

2.2.2.1. Community producers related to dumping exporters

In principle, the Community industry comprises all Community producers, including those related to the dumping exporters or importers, unless the European anti-dumping authorities decide to exclude them (Article 4.1.(i) GATT Anti-dumping Code ; Article 4(1)(i) basic EC Regulation ; Article 4(5) basic ECSC Decision). Producers are only held to be related to the exporters or importers, if one of them directly or indirectly controls the other, or if both of them are directly or indirectly controlled by a third party, or if, together, they directly or indirectly control a third party, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers (Note 2 *ad* Article 4.1.(i) GATT Anti-dumping Code ; Article 4(2) basic EC Regulation). This definition only sets a limit to the interpretation of the concept «related», but does not impose that such a related producer should automatically be excluded.

Hence, GATT and European anti-dumping law grant the European anti-dumping authorities a broad margin of discretion as to exclude related producers¹⁰⁵⁵. In the exercise of their discretionary powers, the European anti-dumping authorities claim to have adopted the constant practice to decide the exclusion of such Community producers on a case-by-case basis, on reasonable and equitable grounds, and by taking into consideration all the legal and economic aspects involved¹⁰⁵⁶. It is, they claim, their general practice to exclude related producers when the latter either participated in the dumping practices, are shielded from their effects, benefit

¹⁰⁵⁵ C.J.E.C., case 156/87, 14 March 1990, *Gestetner Holdings plc v Council and Commission*, E.C.R., 1990, I, (781), 820 and 839 ; C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, E.C.R., 1992, I, (1335), 1377 (Opinion of Advocate General MISCHO) and 1400 ; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, E.C.R., 1992, I, (1409), 1483 ; C.J.E.C., case C-176/87, 10 March 1992, *Konishiroku Photo Industry Co. Ltd v Council*, E.C.R., 1992, I, (1493), 1527 ; C.J.E.C., case C-177/87, 10 March 1992, *Sanyo Electric Co. Ltd v Council*, E.C.R., 1992, I, (1535), 1569 ; C.J.E.C., case C-179/87, 10 March 1992, *Sharp Corporation v Council*, E.C.R., 1992, I, (1635), 1681.

¹⁰⁵⁶ Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, O.J., 21 April 1993, No L 95/5 ; Commission Decision 93/376/EEC of 16 June 1993 terminating the review of anti-dumping measures adopted under Council Regulation (EEC) 1698/85 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, O.J., 29 June 1993, No L 157/76.

unduly from them, or where they cannot be considered any longer as being committed to production in the Community¹⁰⁵⁷. They also admit that, in respect of complainant producers, there must be good reasons showing that the relationship necessitates an exclusion because such producers, by supporting the anti-dumping complaint, consider themselves entitled to anti-dumping protection¹⁰⁵⁸. This may be a rather convincing explanation, though, to cover a «one-way flexible» case law, securing that the complainant producers represent a major proportion of total Community production, as it announces to exclude less complainant than non-complainant producers from the Community industry.

2.2.2.1.1. Complainant related producers

The definition of the concept «related» is applied correctly in European anti-dumping case law with regard to complainant Community producers¹⁰⁵⁹. In several anti-dumping cases, the

¹⁰⁵⁷ Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5 ; Commission Decision 93/376/EEC of 16 June 1993 terminating the review of anti-dumping measures adopted under Council Regulation (EEC) 1698/85 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 29 June 1993, No L 157/76.

¹⁰⁵⁸ C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, *E.C.R.*, 1992, I, (1335), 1351 (Report for the Hearing : conclusions of the Council) ; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, *E.C.R.*, 1992, I, (1409), 1434 (Report for the Hearing : conclusions of the Council) ; C.J.E.C., case C-176/87, 10 March 1992, *Konishiroku Photo Industry Co. Ltd v Council*, *E.C.R.*, 1992, I, (1493), 1501 (Report for the Hearing : conclusions of the Council) ; C.J.E.C., case C-177/87, 10 March 1992, *Sanyo Electric Co. Ltd v Council*, *E.C.R.*, 1992, I, (1535), 1543 (Report for the Hearing : conclusions of the Council) ; C.J.E.C., case C-179/87, 10 March 1992, *Sharp Corporation v Council*, *E.C.R.*, 1992, I, (1635), 1649 (Report for the Hearing : conclusions of the Council).

¹⁰⁵⁹ In *plain paper photocopiers from Japan* a minority share of 19 % and an option to purchase an additional 30 % of the company's stock, was considered not to affect the Community producer's position (Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12).

Similarly, in *urea from Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia* certain Community producers related to an importer of the dumped products were not excluded merely because they held substantially less than 50 % of the shares of this importer (Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia, *O.J.*, 9 May 1987, No L 121/11). It was not explained whether the relationship had any bearing on the behaviour of the Community producer. In view of the anti-dumping case concerning *plain paper photocopiers from Japan* mentioned above, the underlying reasoning may be that a minority shareholding relationship is assumed not to affect the behaviour of the Community producer.

In several anti-dumping cases, the existence of a relationship between producers established within the Community and dumping exporters did not rule out the decision to consider those producers being part of the Community industry, because the European anti-dumping authorities held them to act as autonomous economic entities (Commission Regulation (EEC) No 1695/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of polyester yarn originating in Mexico, South Korea, Taiwan and Turkey, *O.J.*, 17 June 1988, No L 151/39 (corrigendum, *O.J.*, 18 June 1988, No L 152/58) ; Commission Regulation (EEC) No 1696/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 June 1988, No L 151/47 ; Council Regulation (EEC) No 3905/88 of 12 December 1988 imposing a definitive anti-dumping duty on imports of polyester yarn originating in Mexico, South Korea, Taiwan and Turkey, *O.J.*, 16 December 1988, No L 347/10 ; Council Regulation (EEC) No 3946/88 of 16 December 1988 imposing a definitive anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 December 1988, No L 348/49 ; Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27) ; Council Regulation (EEC) No 1189/93 of 14 May 1993 imposing definitive anti-dumping duties on imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in Hungary, Poland and the Republic of Croatia and definitively collecting provisional anti-dumping duties, *O.J.*, 15 May 1993, No L 120/34).

concept «related» is being interpreted more restrictively. Indeed, only related producers showing a *substantially* different behaviour than non-related producers are excluded¹⁰⁶⁰, whereas the definition of the concept «related» does not require that the difference in the related producers' behaviour is substantial. Moreover, indirect links carry less weight than direct links and the fact that related Community producers are not protected against the dumping of other exporters might account for including related Community producers in the Community industry¹⁰⁶¹. Hence, only in very rare cases, producers related to the dumping exporters are excluded¹⁰⁶².

¹⁰⁶⁰ In *compact disc players from Japan*, a Community producer having a 50 % share in a dumping company, whereas the remaining 50 % was spread over several companies established in the dumping country, has been included within the Community industry, because no indication was found that the existence of the dumping exporter had any substantial influence on the general industrial and commercial behaviour of the Community producer (Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27)).

See also : *polyester yarn from Mexico, South Korea, Taiwan and Turkey* and *synthetic fibres of polyesters from Mexico, Romania, Taiwan, Turkey, the United States of America and Yugoslavia*, where certain Community producers were included in the Community industry because they «behave to a great extent as autonomous economic agents» (Commission Regulation (EEC) No 1695/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of polyester yarn originating in Mexico, South Korea, Taiwan and Turkey, *O.J.*, 17 June 1988, No L 151/39 (corrigendum, *O.J.*, 18 June 1988, No L 152/58); Commission Regulation (EEC) No 1696/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 June 1988, No L 151/47).

¹⁰⁶¹ Council Regulation (EEC) No 3905/88 of 12 December 1988 imposing a definitive anti-dumping duty on imports of polyester yarn originating in Mexico, South Korea, Taiwan and Turkey, *O.J.*, 16 December 1988, No L 347/10 ; Council Regulation (EEC) No 3946/88 of 16 December 1988 imposing a definitive anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 December 1988, No L 348/49.

¹⁰⁶² Nevertheless, in several anti-dumping cases producers have been excluded because :

- they are related to the dumping exporters (Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5 ; Council Regulation (EEC) No 2112/90 of 23 July 1990 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan and collecting definitively the provisional duty, *O.J.*, 25 July 1990, No L 193/1) ;
- they have links with the dumping exporters (Commission Regulation (EEC) No 163/83 of 21 January 1983 imposing a provisional anti-dumping duty on 4,4'-Isopropylidenediphenol originating in the United States of America, *O.J.*, 26 January 1983, No L 23/9 ; Commission Regulation (EEC) No 757/84 of 22 March 1984 imposing a provisional anti-dumping duty on imports of certain electronic scales originating in Japan, *O.J.*, 24 March 1984, No L 80/9 (corrigendum, *O.J.*, 17 April 1984, No L 104/26) ; Council Regulation (EEC) No 1058/86 of 8 April 1986 imposing a definitive anti-dumping duty on imports of certain electronic scales originating in Japan, *O.J.*, 12 April 1986, No L 97/1) ;
- they are subsidiaries of the dumping exporters (Commission Decision 83/428/EEC of 26 August 1983 accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of caravans for camping and parts thereof originating in Yugoslavia and terminating that proceeding, *O.J.*, 30 August 1983, No L 240/12 ; Commission Regulation (EEC) No 744/84 of 19 March 1984 imposing a provisional anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 23 March 1984, No L 79/8 (corrigendum, *O.J.*, 29 March 1984, No L 86/31) ; Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5 ; Commission Regulation (EEC) No 3262/90 of 5 November 1990 imposing a provisional anti-dumping duty on imports of audio tapes in cassettes originating in Japan, the Republic of Korea and Hong Kong, *O.J.*, 13 November 1990, No L 313/5 (corrigendum, *O.J.*, 12 January 1991, No L 9/36)).

However, the above-mentioned anti-dumping cases provide no further information about the relationship between the Community producers and the dumping exporters. It is possible that only the result of the investigation is mentioned. Thus, it is not clear which interpretation was placed on the concept «related» nor whether the 1981 understanding has been respected. As a result, there are no clear examples in European anti-dumping law of cases in which a broad interpretation is placed on the concept «related» in respect of complainant producers.

Such a restrictive interpretation of the concept «related» cannot be challenged from a legal point of view. Indeed, as a general rule, exceptions should be interpreted strictly. Through this legal interpretation, European anti-dumping authorities though increase the probability that the complainant producers constitute a major proportion of Community production.

2.2.2.1.2. Non-complainant related producers

In respect of non-complainant producers, the European anti-dumping authorities do not apply the exception to exclude related producers in the same restrictive way as with regard to complainant producers. In some instances, their case law may even be said to be at variance with GATT and European anti-dumping law.

In a limited number of cases, the European anti-dumping authorities had good reasons to exclude non-complainant producers from the Community industry. In these cases, the related Community producer clearly participated in the dumping practices : he and his dumping parent company sold their products through the same corporate sales channels in the Community, and the prices of the Community-produced products were aligned to those of the dumped products as the dumping parent company controlled the price behaviour on the Community market for both products ; through a policy of transfer prices, the related Community producer was, moreover, not only shielded from the effects of the dumping, but even benefited from them¹⁰⁶³. Although the exclusion of the non-complainant related producers seems quite reasonable, those cases, however, contrast with the inclusion of the main complainant Community producer in another case who had concluded a pluri-annual contract for supplying the like product to the importer of the dumped product¹⁰⁶⁴. Indeed, like the non-complainant producers, this Community producer might also be said to be benefiting from the dumping.

However, in most cases, the European anti-dumping authorities have excluded non-complainant producers for less decisive reasons. First, non-complainant producers are excluded when they are wholly-owned or majority-owned by the dumping exporters. These producers are said to benefit

¹⁰⁶³ Commission Regulation (EEC) No 1613/90 of 13 June 1990 imposing a provisional anti-dumping duty on imports of ball bearings with a greatest external diameter not exceeding 30 mm originating in Thailand, *O.J.*, 16 June 1990, No L 152/24 ; Council Regulation (EEC) No 577/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as EPROMs (erasable programmable read only memories) originating in Japan, *O.J.*, 12 March 1991, No L 65/1 ; Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5.

¹⁰⁶⁴ Commission Regulation (EEC) No 985/83 of 26 April 1983 imposing a provisional anti-dumping duty on imports of barium chloride originating in the People's Republic of China and the German Democratic Republic, *O.J.*, 27 April 1983, No L 110/11 ; Council Regulation (EEC) No 2370/83 of 19 August 1983 imposing a definitive anti-dumping duty on imports of barium chloride originating in the People's Republic of China and in the German Democratic Republic, *O.J.*, 20 August 1983, No L 228/28.

from the dumping of their parent companies, without any further explanation¹⁰⁶⁵. However, even if they did benefit from the dumping, this is not an indication that they actually behaved differently from non-related Community producers. Perhaps, the fact that they did not support the anti-dumping complaint was seen as a behaviour different from that of the complainant, though unrelated Community producers. Indeed, the evidence of a joint venture between a non-complainant Community producer and a dumping exporter, along with their refusal to cooperate with the European anti-dumping authorities, was advanced to exclude the Community producer from the Community industry¹⁰⁶⁶. However, it was not investigated whether the related producer refused to cooperate because of his relationship with a dumping exporter nor whether such a refusal is considered a behaviour sufficiently relevant to exclude a Community producer from the Community industry.

Second, the European anti-dumping authorities exclude non-complainant related producers when the complainant producers already represent a major proportion of overall Community production, regardless of the non-complainant producers being included or not, and irrespective of the exclusion of non-complainant producers affecting the outcome of the injury examination or not¹⁰⁶⁷. Even if their exclusion does not actually affect the outcome of the injury investigation in a particular anti-dumping case - and in some cases the effect of their exclusion on the outcome of the injury investigation is not at all examined -, this case law indicates that in respect of non-complainant producers a broad interpretation is placed on the exception which allows to exclude related producers. For it does not investigate whether, because of their relationship with the dumping exporters, the related producers behave differently from non-related producers. As exceptions should be interpreted restrictively, such a broad interpretation goes against GATT and European anti-dumping law. A restrictive interpretation, at least, requires that Community producers must be included, unless it is shown that they fulfill all conditions for

¹⁰⁶⁵ Council Regulation (EEC) No 2849/92 of 28 September 1992 modifying the definitive anti-dumping duty on imports of ball bearings with a greatest external diameter exceeding 30 mm originating in Japan imposed by Regulation (EEC) No 1739/85, *O.J.*, 1 October 1992, No L 286/2 (corrigendum, *O.J.*, 25 March 1993, No L 72/36).

¹⁰⁶⁶ Commission Regulation (EEC) No 1451/92 of 2 June 1992 imposing a provisional anti-dumping duty on imports into the Community of certain large electrolytic aluminium capacitors originating in Japan, *O.J.*, 4 June 1992, No L 152/22 (corrigendum, *O.J.*, 17 June 1992, No L 163/27).

¹⁰⁶⁷ Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12.

In the same anti-dumping case, a complaining producer with a 50 % share-holding in one of the dumping foreign firms was included merely because injury was found whether or not that Community producer was included (Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5 ; C.J.E.C., case 156/87, 14 March 1990, *Gestetner Holdings plc v Council and Commission*, *E.C.R.*, 1990, I, (781), 842), while a Community producer which withdrew his support to the anti-dumping complaint after having been taken over by a Japanese dumping exporter, was excluded without further explanation (Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12).

exclusion. One of the said conditions is the possible influence the relationship might have on the behaviour of related Community producers.

Third, non-complainant producers are excluded, if they are related to a dumping exporter who is not involved in the anti-dumping proceeding¹⁰⁶⁸. This exclusion is undoubtedly legal as GATT and European anti-dumping law require that the exporter to whom the Community producer is related, is subject to the anti-dumping proceeding¹⁰⁶⁹.

Finally, probably in view of the case law as described above, the European anti-dumping authorities consider it their consistent practice to exclude non-complainant related producers. Indeed, they have excluded the manufacturing subsidiaries of the dumping exporters established in the Community, merely because their exclusion was in accordance with their consistent practice¹⁰⁷⁰. Whether their claim that this exclusion did also comply with European anti-dumping law¹⁰⁷¹, is correct, may be doubted as their consistent practices sometimes involves breaches of European, as well as of GATT anti-dumping law.

The difference in treatment between complainant and non-complainant related producers is clear evidence of a «one-way flexible» case law aimed at securing that the complainant producers represent a major proportion of total Community production. As, in many cases, this case law involves a violation of GATT and European anti-dumping law, the argument of the European anti-dumping authorities that the support of the anti-dumping complaint shows that the complainant producers do not benefit from the dumping, though tempting, cannot, from a legal point of view, be accepted. Moreover, also from an economic point of view, it should be rejected since, as each instance of «one-way flexibility», it increases the probability of anti-dumping relief and, thus, of trade restrictions.

¹⁰⁶⁸ Commission Regulation (EEC) No 1613/90 of 13 June 1990 imposing a provisional anti-dumping duty on imports of ball bearings with a greatest external diameter not exceeding 30 mm originating in Thailand, *O.J.*, 16 June 1990, No L 152/24 ; Council Regulation (EEC) No 577/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as EPROMs (erasable programmable read only memories) originating in Japan, *O.J.*, 12 March 1991, No L 65/1 ; Commission Regulation (EC) No 534/94 of 9 March 1994 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, *O.J.*, 11 March 1994, No L 68/5.

¹⁰⁶⁹ See : Article 4.1.(i) GATT Anti-dumping Code, Article 4(1)(i) basic EC Regulation and Article 4(5), first indent, basic ECSC Decision («producers related to the exporters or importers (...) of the *allegedly dumped* (...) product» (emphasis added)).

Compare with : *electronic typewriters from Japan*, where a Community producer importing the product of a producer established in the dumping country, was not excluded because that foreign producer was not subject to the anti-dumping proceeding (Commission Decision 93/376/EEC of 16 June 1993 terminating the review of anti-dumping measures adopted under Council Regulation (EEC) 1698/85 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 29 June 1993, No L 157/76).

¹⁰⁷⁰ Council Regulation (EEC) No 2347/93 of 24 August 1993 repealing Regulation (EEC) No 112/90 imposing anti-dumping measures concerning imports of certain compact disc players originating in Japan and the Republic of Korea, *O.J.*, 25 August 1993, No L 215/4.

¹⁰⁷¹ Council Regulation (EEC) No 2347/93 of 24 August 1993 repealing Regulation (EEC) No 112/90 imposing anti-dumping measures concerning imports of certain compact disc players originating in Japan and the Republic of Korea, *O.J.*, 25 August 1993, No L 215/4.

2.2.2.2. Community producers importing the dumped product

In principle, Community producers importing the allegedly dumped product are included into the Community industry, unless the European anti-dumping authorities decide otherwise (Article 4.1.(i) GATT Anti-dumping Code ; Article 4(1)(i) basic EC Regulation ; Article 4(5) basic ECSC Decision)¹⁰⁷². As GATT and European anti-dumping law do not provide many criteria for such exclusion, European anti-dumping authorities have a broad discretionary power¹⁰⁷³. They have made ample use of that discretionary power in defining the concept «allegedly dumped product» and in elaborating the conditions under which Community producers importing the dumped product are excluded.

2.2.2.2.1. The concept «allegedly dumped product»

European anti-dumping law does not define the concept «allegedly dumped product». At first sight, the concept only pertains to the product subject to the anti-dumping proceeding. According to the European anti-dumping authorities, it also comprises parts of the dumped product, the assembly of which into the like product only involves a low value added¹⁰⁷⁴. If the parts imported only represent a minor part of all the components of the like product, their imports will not be considered as being identical to the imports of the dumped product¹⁰⁷⁵. This

¹⁰⁷² Community producers importing the dumped products are not automatically excluded from the Community industry (Commission Decision 85/143/EEC of 18 February 1985 terminating the anti-dumping proceeding concerning imports of certain boots with fitted ice skates originating in Czechoslovakia, Yugoslavia, Romania and Hungary, *O.J.*, 22 February 1985, No L 52/48 ; Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12).

¹⁰⁷³ C.J.E.C., case 156/87, 14 March 1990, *Gestetner Holdings plc v Council and Commission*, *E.C.R.*, 1990, I, (781), 820 and 839 ; C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, *E.C.R.*, 1991, I, (2069), 2190-2191 ; C.J.E.C., case C-16/90, 22 October 1991, *Eugen Nölle v Hauptzollamt Bremen-Freihafen*, *E.C.R.*, 1991, I, (5163), 5193-5194 (Opinion of Advocate General VAN GERVEN) ; C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, *E.C.R.*, 1992, I, (1335), 1377 (Opinion of Advocate General MISCHO) and 1400 ; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, *E.C.R.*, 1992, I, (1409), 1483 ; C.J.E.C., case C-176/87, 10 March 1992, *Konishiroku Photo Industry Co. Ltd v Council*, *E.C.R.*, 1992, I, (1493), 1527 ; C.J.E.C., case C-177/87, 10 March 1992, *Sanyo Electric Co. Ltd v Council*, *E.C.R.*, 1992, I, (1535), 1569 ; C.J.E.C., case C-179/87, 10 March 1992, *Sharp Corporation v Council*, *E.C.R.*, 1992, I, (1635), 1681 ; Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12.

¹⁰⁷⁴ Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12.

See also : *caravans for camping and parts thereof from Yugoslavia*, where the production by the Yugoslavian subsidiary established in the Community of caravans with a substantial quantity of dumped parts from Yugoslavia was added to the dumped imports (Commission Decision 83/428/EEC of 26 August 1983 accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of caravans for camping and parts thereof originating in Yugoslavia and terminating that proceeding, *O.J.*, 30 August 1983, No L 240/12). As a consequence, the assembly of caravans by the Yugoslavian subsidiary is not considered as Community production.

¹⁰⁷⁵ Council Regulation (EEC) No 2474/93 of 8 September 1993 imposing a definitive anti-dumping duty on imports into the Community of bicycles originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 9 September 1993, No L 228/1.

interpretation can be accepted because it recognizes that producers also use foreign components, but, at the same time, prevents Community producers from benefiting from the dumping by importing and assembling cheap parts, while complaining about the dumping.

2.2.2.2.2. The conditions for excluding producers importing the dumped product

The European anti-dumping authorities have applied their discretionary power with regard to the exclusion of producers importing the dumped product in the same way as with regard to related producers. Indeed, they decide on the exclusion of producers importing the dumped product on a case-by-case basis, on reasonable and equitable grounds and in the light of all relevant facts¹⁰⁷⁶ and it is their general practice to exclude such importers only when the latter have either participated in the dumping practices, are shielded from the effect of the dumped imports, draw undue benefits from them or import such quantities in relation to their own production that they no longer can be considered as being committed to production in the Community¹⁰⁷⁷. They also require strong evidence of this in order to exclude complainant producers importing the dumped product because they hold that such producers, by supporting the anti-dumping

¹⁰⁷⁶ Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5 ; Commission Regulation (EEC) No 1451/92 of 2 June 1992 imposing a provisional anti-dumping duty on imports into the Community of certain large electrolytic aluminium capacitors originating in Japan, *O.J.*, 4 June 1992, No L 152/22 (corrigendum, *O.J.*, 17 June 1992, No L 163/27) ; Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5 ; Commission Decision 93/376/EEC of 16 June 1993 terminating the review of anti-dumping measures adopted under Council Regulation (EEC) 1698/85 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 29 June 1993, No L 157/76 ; Council Regulation (EC) No 643/94 of 21 March 1994 amending Regulation (EEC) No 3068/92 in respect of definitive anti-dumping duties on imports of potassium chloride originating in Belarus, Russia and Ukraine, *O.J.*, 24 March 1994, No L 80/1. See also : C.J.E.C., case 156/87, 14 March 1990, *Gestetner Holdings plc v Council and Commission*, *E.C.R.*, 1990, I, (781), 839 ; C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, *E.C.R.*, 1991, I, (2069), 2190-2191 ; C.J.E.C., case C-16/90, 22 October 1991, *Eugen Nölle v Hauptzollamt Bremen-Freihafen*, *E.C.R.*, 1991, I, (5163), 5195 (Opinion of Advocate General VAN GERVEN).

¹⁰⁷⁷ Council Regulation (EEC) No 3482/92 of 30 November 1992 imposing a definitive anti-dumping duty on imports of certain large electrolytic aluminium capacitors originating in Japan and collecting definitively the provisional anti-dumping duty, *O.J.*, 3 December 1992, No L 353/1 (corrigendum, *O.J.*, 28 January 1993, No L 19/34) ; Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5 ; Council Regulation (EEC) No 1189/93 of 14 May 1993 imposing definitive anti-dumping duties on imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in Hungary, Poland and the Republic of Croatia and definitively collecting provisional anti-dumping duties, *O.J.*, 15 May 1993, No L 120/34 ; Commission Decision 93/376/EEC of 16 June 1993 terminating the review of anti-dumping measures adopted under Council Regulation (EEC) 1698/85 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 29 June 1993, No L 157/76 ; Council Regulation (EC) No 643/94 of 21 March 1994 amending Regulation (EEC) No 3068/92 in respect of definitive anti-dumping duties on imports of potassium chloride originating in Belarus, Russia and Ukraine, *O.J.*, 24 March 1994, No L 80/1.

Conversely, they will include a Community producer in the Community industry, when his imports of the dumped products are part of normal and sound business practice (Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12 ; Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27)).

complainant, consider themselves entitled to anti-dumping relief¹⁰⁷⁸. Hence, they also announce a «one-way flexible» case law in which complainant producers importing the dumped product are seldom excluded.

2.2.2.2.2.1. Complainant producers importing the dumped product

European anti-dumping case law is indeed «one-way flexible» as the European anti-dumping authorities have found many reasons why complainant Community producers should not be excluded from the Community industry. Indeed, producers importing the dumped product will be included if :

- their imports of the dumped product do not have a detrimental effect on the other Community producers¹⁰⁷⁹ ;

¹⁰⁷⁸ Commission Regulation (EEC) No 1451/92 of 2 June 1992 imposing a provisional anti-dumping duty on imports into the Community of certain large electrolytic aluminium capacitors originating in Japan, *O.J.*, 4 June 1992, No L 152/22 (corrigendum, *O.J.*, 17 June 1992, No L 163/27) ; Council Regulation (EEC) No 3482/92 of 30 November 1992 imposing a definitive anti-dumping duty on imports of certain large electrolytic aluminium capacitors originating in Japan and collecting definitively the provisional anti-dumping duty, *O.J.*, 3 December 1992, No L 353/1 (corrigendum, *O.J.*, 28 January 1993, No L 19/34).

If the dumping exporters do not substantiate their request for excluding Community producers from the Community industry because of their importing the dumped product, their request will be rejected (Council Regulation (EC) No 229/94 of 1 February 1994 imposing definitive anti-dumping duties on imports into the Community of ethanolamine originating in the United States of America, and collecting definitively the provisional anti-dumping duties, *O.J.*, 2 February 1994, No L 28/40).

¹⁰⁷⁹ C.J.E.C., joined cases 260/85 and 106/86, 5 October 1988, *Tokyo Electric Company Ltd (TEC) a.o. v Council*, *E.C.R.*, 1988, (5855), 5906 and 5923 ; C.J.E.C., joined cases 273/85 and 107/86, 5 October 1988, *Silver Seiko Limited a.o. v Council*, *E.C.R.*, 1988, (5927), 5980 ; C.J.E.C., case 156/87, 14 March 1990, *Gestetner Holdings plc v Council and Commission*, *E.C.R.*, 1990, I, (781), 822 and 839-840 ; Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12 ; Commission Regulation (EEC) No 1451/92 of 2 June 1992 imposing a provisional anti-dumping duty on imports into the Community of certain large electrolytic aluminium capacitors originating in Japan, *O.J.*, 4 June 1992, No L 152/22 (corrigendum, *O.J.*, 17 June 1992, No L 163/27).

Conversely, if the imports of the dumped product have a negative impact on other Community producers, the Community producers importing the dumped product will be excluded (Commission Regulation (EEC) No 2812/85 of 7 October 1985 imposing a provisional anti-dumping duty on imports of electronic typewriters manufactured by Nakajima All Co. Ltd originating in Japan, *O.J.*, 9 October 1985, No L 266/5).

- the Community producer resells the dumped product at a price not lower than the price charged for his own product¹⁰⁸⁰ ;
- the Community producer does not unduly benefit from the resale of the dumped product by charging too high a price for the dumped product¹⁰⁸¹ ;
- the Community producer's imports of the dumped product do not contribute to the fall of the overall price level on the Community market, as the resale price charged by the Community producer for the dumped product is undercut by the prices charged by the dumping exporters or importers¹⁰⁸² ;

¹⁰⁸⁰ C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council, E.C.R.*, 1992, I, (1335), 1398-1399 ; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council, E.C.R.*, 1992, I, (1409), 1482 ; C.J.E.C., case C-176/87, 10 March 1992, *Konishiroku Photo Industry Co. Ltd v Council, E.C.R.*, 1992, I, (1493), 1526 ; C.J.E.C., case C-177/87, 10 March 1992, *Sanyo Electric Co. Ltd v Council, E.C.R.*, 1992, I, (1535), 1567 ; C.J.E.C., case C-179/87, 10 March 1992, *Sharp Corporation v Council, E.C.R.*, 1992, I, (1635), 1679 ; Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5 ; Council Decision 87/66/EEC of 19 January 1987 accepting undertakings given in connection with imports of binder and baler twine originating in Brazil and Mexico, and terminating the investigations, *O.J.*, 5 February 1987, No L 34/55 ; Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12 ; Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia, *O.J.*, 9 May 1987, No L 121/11 ; Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1 ; Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5.

¹⁰⁸¹ Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12 ; Council Regulation (EEC) No 725/89 of 20 March 1989 imposing a definitive anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty on such imports, *O.J.*, 22 March 1989, No L 79/24 ; Commission Decision 90/241/EEC of 22 May 1990 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of photo albums originating in South Korea and Hong Kong, and terminating the investigation, *O.J.*, 31 May 1990, No L 138/48.

Conversely, if the Community producer is one of the importers buying a significantly increasing volume at the lowest prices, he will not be included in the Community industry (Commission Decision 85/143/EEC of 18 February 1985 terminating the anti-dumping proceeding concerning imports of certain boots with fitted ice skates originating in Czechoslovakia, Yugoslavia, Romania and Hungary, *O.J.*, 22 February 1985, No L 52/48).

¹⁰⁸² C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council, E.C.R.*, 1992, I, (1335), 1400 ; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council, E.C.R.*, 1992, I, (1409), 1483 ; C.J.E.C., case C-176/87, 10 March 1992, *Konishiroku Photo Industry Co. Ltd v Council, E.C.R.*, 1992, I, (1493), 1527 ; C.J.E.C., case C-177/87, 10 March 1992, *Sanyo Electric Co. Ltd v Council, E.C.R.*, 1992, I, (1535), 1568 ; C.J.E.C., case C-179/87, 10 March 1992, *Sharp Corporation v Council, E.C.R.*, 1992, I, (1635), 1680 ; Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5 ; Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12.

- the volume of the dumped product imported by the Community producer is relatively small¹⁰⁸³ ;

¹⁰⁸³ C.J.E.C., joined cases 260/85 and 106/86, October 5, 1988, *Tokyo Electric Company (TEC) a.o. v Council*, E.C.R., 1988, 5906 and 5923 ; C.J.E.C., joined cases 273/85 and 107/86, 5 October 1988, *Silver Seiko Limited a.o. v Council*, E.C.R., 1988, (5927), 5980 ; C.J.E.C., case 156/87, 14 March 1990, *Gestetner Holdings plc v Council and Commission*, E.C.R., 1990, I, (781), 842 ; C.J.E.C., case C-49/88, 27 June 1991, *Al-Jubail Fertilizer Company and Saudi Arabian Fertilizer Company v Council*, E.C.R., 1991, I, (3187), 3216 (Opinion of Advocate General DARMON) ; C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, E.C.R., 1992, I, (1335), 1398-1399 ; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, E.C.R., 1992, I, (1409), 1482 ; C.J.E.C., case C-176/87, 10 March 1992, *Konishiroku Photo Industry Co. Ltd v Council*, E.C.R., 1992, I, (1493), 1526 ; C.J.E.C., case C-177/87, 10 March 1992, *Sanyo Electric Co. Ltd v Council*, E.C.R., 1992, I, (1535), 1567 ; C.J.E.C., case C-179/87, 10 March 1992, *Sharp Corporation v Council*, E.C.R., 1992, I, (1635), 1679 ; Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, O.J., 26 August 1986, No L 239/5 ; Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, O.J., 24 February 1987, No L 54/12 ; Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia, O.J., 9 May 1987, No L 121/11 ; Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, O.J., 7 November 1987, No L 317/1 ; Council Regulation (EEC) No 3905/88 of 12 December 1988 imposing a definitive anti-dumping duty on imports of polyester yarn originating in Mexico, South Korea, Taiwan and Turkey, O.J., 16 December 1988, No L 347/10 ; Council Regulation (EEC) No 3946/88 of 16 December 1988 imposing a definitive anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, O.J., 17 December 1988, No L 348/49 ; Council Regulation (EEC) No 725/89 of 20 March 1989 imposing a definitive anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty on such imports, O.J., 22 March 1989, No L 79/24 ; Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, O.J., 18 July 1989, No L 205/5 (corrigendum, O.J., 2 September 1989, No L 257/27) ; Council Regulation (EEC) No 3482/92 of 30 November 1992 imposing a definitive anti-dumping duty on imports of certain large electrolytic aluminium capacitors originating in Japan and collecting definitively the provisional anti-dumping duty, O.J., 3 December 1992, No L 353/1 (corrigendum, O.J., 28 January 1993, No L 19/34) ; Commission Regulation (EEC) No 550/93 of 5 March 1993 imposing a provisional anti-dumping duty on imports of bicycles originating in the People's Republic of China, O.J., 11 March 1993, No L 58/12 ; Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, O.J., 21 April 1993, No L 95/5 ; Council Regulation (EEC) No 1189/93 of 14 May 1993 imposing definitive anti-dumping duties on imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in Hungary, Poland and the Republic of Croatia and definitively collecting provisional anti-dumping duties, O.J., 15 May 1993, No L 120/34 ; Council Regulation (EC) No 643/94 of 21 March 1994 amending Regulation (EEC) No 3068/92 in respect of definitive anti-dumping duties on imports of potassium chloride originating in Belarus, Russia and Ukraine, O.J., 24 March 1994, No L 80/1 ; Council Regulation (EC) No 821/94 of 12 April 1994 imposing a definitive anti-dumping duty on imports of silicon carbide, originating in the People's Republic of China, Poland, the Russian Federation and Ukraine, O.J., 13 April 1994, No L 94/21 ; Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries ; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, O.J., 21 May 1994, No L 129/24 ; Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, O.J., 1 October 1994, No L 255/50.

Conversely, the Community producer will not be included in the Community industry, he is the largest importer of the dumped products in the Community (Commission Decision 85/143/EEC of 18 February 1985 terminating the anti-dumping proceeding concerning imports of certain boots with fitted ice skates originating in Czechoslovakia, Yugoslavia, Romania and Hungary, O.J., 22 February 1985, No L 52/48).

The definition of a «relatively small volume» is, however, relative. As a «relatively small volume» have, therefore, been considered, imports of the dumped product representing :

- less than 25 % of the Community producer's production sold in the Community (Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, O.J., 1 October 1994, No L 255/50) ;
- 7 % of the total sales and rentals of the Community producer importing the dumped product and less than 1 % of the total sales and rentals on the Community market by all Community producers (C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, E.C.R., 1992, I, (1335), 1398-1399 ; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, E.C.R., 1992, I, (1409), 1482 ; C.J.E.C., case C-176/87, 10 March 1992, *Konishiroku Photo Industry Co. Ltd v Council*, E.C.R., 1992, I, (1493), 1526 ; C.J.E.C., case C-177/87, 10 March 1992, *Sanyo Electric Co. Ltd v Council*, E.C.R., 1992, I, (1535), 1567 ; Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a

- the imports of the dumped product are necessary for the survival of the Community producer (so-called self-defence strategy)¹⁰⁸⁴ ;

definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12) ;

- between 0.33 % and 5.34 % of total sales of all Community producers (Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia, *O.J.*, 9 May 1987, No L 121/11 ; Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1) ;
- up to 7 % of the total sales on the Community market by the Community producers importing the dumped product (Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5) ;
- 2 % of the total sales on the Community market by the Community producer importing the dumped product (Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27)) ;
- 1.2 % of the sales on the Community market by the Community producers importing the dumped product, and up to 2 % of the total dumped imports (Council Regulation (EC) No 229/94 of 1 February 1994 imposing definitive anti-dumping duties on imports into the Community of ethanolamine originating in the United States of America, and collecting definitively the provisional anti-dumping duties, *O.J.*, 2 February 1994, No L 28/40) ;
- less than 0.5 % of the Community market (Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries ; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24) ;
- only 3 % of total dumped imports (Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5).

Thus, if the right explanation can be found, a larger volume of imported dumped products can be considered to represent only a «relatively small volumes».

¹⁰⁸⁴ C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, *E.C.R.*, 1991, I, (2069), 2102-2103 (Report for the Hearing : conclusions of the Council) and 2191 ; Commission Regulation (EEC) No 2936/82 of 28 October 1982 imposing a provisional anti-dumping duty on copper sulphate originating in Yugoslavia, *O.J.*, 4 November 1982, No L 308/7 ; Commission Regulation (EEC) No 997/85 of 18 April 1985 imposing a provisional anti-dumping duty on imports of glycine originating in Japan, *O.J.*, 19 April 1985, No L 107/8 ; Commission Regulation (EEC) No 2221/85 of 29 July 1985 imposing a provisional anti-dumping duty on imports of basic chromium sulphate originating in Yugoslavia, *O.J.*, 3 August 1985, No L 205/12 ; Council Decision 87/66/EEC of 19 January 1987 accepting undertakings given in connection with imports of binder and baler twine originating in Brazil and Mexico, and terminating the investigations, *O.J.*, 5 February 1987, No L 34/55 ; Council Decision 87/104/EEC of 9 February 1987 accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China, and terminating the investigation, *O.J.*, 14 February 1987, No L 46/45 ; Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 24 November 1988, No L 317/33 ; Council Regulation (EEC) No 725/89 of 20 March 1989 imposing a definitive anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty on such imports, *O.J.*, 22 March 1989, No L 79/24 ; Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27) ; Commission Decision 90/241/EEC of 22 May 1990 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of photo albums originating in South Korea and Hong Kong, and terminating the investigation, *O.J.*, 31 May 1990, No L 138/48 ; Commission Regulation (EEC) No 313/92 of 4 February 1992 imposing a provisional anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in South Korea, *O.J.*, 11 February 1992, No L 34/8 ; Commission Regulation (EEC) No 550/93 of 5 March 1993 imposing a provisional anti-dumping duty on imports of bicycles originating in the People's Republic of China, *O.J.*, 11 March 1993, No L 58/12 ; Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5 ; Council Regulation (EEC) No 2861/93 of 18 October 1993 imposing a definitive anti-dumping duty on imports of certain magnetic

- the Community producer must offer a full range of models of the like product and, therefore, imports only certain models of the dumped product¹⁰⁸⁵, for the European anti-dumping

disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, and collecting definitively the provisional duty imposed, *O.J.*, 21 October 1993, No L 262/4 ; Commission Regulation (EC) No 534/94 of 9 March 1994 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, *O.J.*, 11 March 1994, No L 68/5 ; Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries ; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24.

The self-defence strategy argument is not accepted unconditionally :

- according to Advocate General LENZ, the European anti-dumping authorities are entitled to treat imports of the dumped product as measures of self-defence on the part of the importers, if the size and growth of the share of the market to which the imported products belong, could not be treated as insignificant (C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, *E.C.R.*, 1991, I, (2069), 2158 (Opinion of Advocate General LENZ)) ;
- according to Advocate General VAN GERVEN, the high share (two thirds) of the dumped products imported by the Community producers in total dumped imports raises doubts about the credibility of the self-defence strategy argument ;
- the European anti-dumping authorities have rejected the self-defence strategy argument because the market share held by the importing Community producer's own production had increased, as the Community producer was importing the dumped product. Moreover, the Community producer in question was the largest importer of the dumped product in the Community and was one of the importers buying a significantly increasing volume at the lowest prices (Commission Decision 85/143/EEC of 18 February 1985 terminating the anti-dumping proceeding concerning imports of certain boots with fitted ice skates originating in Czechoslovakia, Yugoslavia, Romania and Hungary, *O.J.*, 22 February 1985, No L 52/48). Conversely, a Community producer whose purchases of the dumped product were accompanied by a proportional drop in the rate of utilization of his production capacity, has been included (Commission Decision 90/154/EEC of 26 March 1990 terminating the anti-dumping proceeding concerning imports of ammonium paratungstate originating in the People's Republic of China and the Republic of Korea, *O.J.*, 30 March 1990, No L 83/117) ;
- the self-defence strategy argument also fails to convince either when the Community producer is able to produce an identical product type, even when the ability to supply a product more quickly than by waiting for Community production to come on-stream enables the Community producer to better defend his overall position (Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12).

¹⁰⁸⁵ C.J.E.C., joined cases 260/85 and 106/86, October 5, 1988, *Tokyo Electric Company (TEC) a.o. v Council*, *E.C.R.*, 1988, 5906 and 5923 ; C.J.E.C., joined cases 273/85 and 107/86, 5 October 1988, *Silver Seiko Limited a.o. v Council*, *E.C.R.*, 1988, (5927), 5980 ; C.J.E.C., case 156/87, 14 March 1990, *Gestetner Holdings plc v Council and Commission*, *E.C.R.*, 1990, I, (781), 839-840 ; C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, *E.C.R.*, 1991, I, (2069), 2191 ; C.J.E.C., case C-49/88, 27 June 1991, *Al-Jubail Fertilizer Company and Saudi Arabian Fertilizer Company v Council*, *E.C.R.*, 1991, I, (3187), 3216 (Opinion of Advocate General DARMON) ; C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, *E.C.R.*, 1992, I, (1335), 1400 ; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, *E.C.R.*, 1992, I, (1409), 1483 ; C.J.E.C., case C-176/87, 10 March 1992, *Konishiroku Photo Industry Co. Ltd v Council*, *E.C.R.*, 1992, I, (1493), 1527 ; C.J.E.C., case C-177/87, 10 March 1992, *Sanyo Electric Co. Ltd v Council*, *E.C.R.*, 1992, I, (1535), 1568 ; C.J.E.C., case C-179/87, 10 March 1992, *Sharp Corporation v Council*, *E.C.R.*, 1992, I, (1635), 1680 ; Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5 ; Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12 ; Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 24 November 1988, No L 317/33 ; Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27) ; Commission Decision 90/241/EEC of 22 May 1990 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of photo albums originating in South Korea and Hong Kong, and terminating the investigation, *O.J.*, 31 May 1990, No L 138/48 ; Commission Regulation (EEC) No 313/92 of 4 February 1992 imposing a provisional anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in South Korea, *O.J.*, 11 February 1992, No L 34/8 ; Commission Regulation (EEC) No 550/93 of 5 March 1993 imposing a provisional anti-dumping duty on imports of bicycles originating in the People's Republic of China, *O.J.*, 11 March 1993, No L 58/12.

In this respect, it is sometimes pointed out that, because of the effect of the dumping on their profitability, the Community producers do not manufacture the models which they import (C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, *E.C.R.*, 1992, I, (1335), 1400 ; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, *E.C.R.*, 1992, I, (1409), 1483 ; C.J.E.C., case C-176/87, 10 March 1992, *Konishiroku Photo Industry Co. Ltd v Council*, *E.C.R.*, 1992, I, (1493), 1527 ; C.J.E.C., case C-177/87, 10 March 1992, *Sanyo Electric Co. Ltd v Council*, *E.C.R.*, 1992, I, (1535), 1568 ; C.J.E.C., case C-179/87, 10 March 1992, *Sharp Corporation v Council*, *E.C.R.*, 1992, I, (1635), 1680 ; Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5 ; Council Regulation (EEC) No 535/87 of 23 February 1987

authorities consider it absolutely normal that big companies engaged in international business buy part of their range of models from other producers¹⁰⁸⁶ and do so on a permanent basis¹⁰⁸⁷ ;

- a company which is part of the same economic group as the Community producer, imports the dumped products which it uses as component in its production process, in order to enjoy

imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12 ; Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12 ; Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 24 November 1988, No L 317/33 ; Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27)).

Moreover, the fact that the gains from imports, needed to fill up the range of models, are short-lived and limited in scope has supported the inclusion of the Community producer within the Community industry (Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12).

The fact that the dumped products imported by a Community producer are similar to or compete with the Community producer's own manufactured product does not prevent this Community producer from being considered part of the Community industry (Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5 ; Commission Decision 90/241/EEC of 22 May 1990 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of photo albums originating in South Korea and Hong Kong, and terminating the investigation, *O.J.*, 31 May 1990, No L 138/48).

Community producers are also allowed to import dumped products in anticipation of their own production (Commission Regulation (EEC) No 997/85 of 18 April 1985 imposing a provisional anti-dumping duty on imports of glycine originating in Japan, *O.J.*, 19 April 1985, No L 107/8 ; Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12).

On the other hand, Community producers who have practically stopped all production activities and have replaced it by imports of the dumped product, are not included in the Community industry (Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia, *O.J.*, 9 May 1987, No L 121/11 ; Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1 ; Commission Decision 90/154/EEC of 26 March 1990 terminating the anti-dumping proceeding concerning imports of ammonium paratungstate originating in the People's Republic of China and the Republic of Korea, *O.J.*, 30 March 1990, No L 83/117).

¹⁰⁸⁶ Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5 ; Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12 ; Commission Regulation (EEC) No 313/92 of 4 February 1992 imposing a provisional anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in South Korea, *O.J.*, 11 February 1992, No L 34/8.

¹⁰⁸⁷ Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12.

Compare with the opinion of the Council that the need to produce a full range of models is no excuse for allegedly dumping exporters to sell some of their models at a loss (C.J.E.C., case C-178/87, 10 March 1992, *Minolta Camera Co. Ltd v Council, E.C.R.*, 1992, I, (1577), 1593-1594 (Report for the Hearing : conclusions of the Council) and 1614 (Opinion of Advocate General MISCHO)).

the same competitive advantages as its competitors which have free access to the low-priced dumped exports¹⁰⁸⁸.

If only one of those conditions is fulfilled, a producer importing the dumped product may be included in the Community industry, even if, on the basis of the other conditions, he should be excluded¹⁰⁸⁹. Moreover, this list is not exhaustive and does not rule out other grounds for

1088 Commission Regulation (EEC) No 1451/92 of 2 June 1992 imposing a provisional anti-dumping duty on imports into the Community of certain large electrolytic aluminium capacitors originating in Japan, *O.J.*, 4 June 1992, No L 152/22 (corrigendum, *O.J.*, 17 June 1992, No L 163/27); Commission Regulation (EEC) No 2686/92 of 16 September 1992 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea, *O.J.*, 17 September 1992, No L 272/13.

1089 Community producers importing the like product have been included :

- because the detrimental effect, on the other Community producers, of importing dumped products was outweighed by the fact that the Community producer in question imported only a low volume of dumped products (Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12; C.J.E.C., case 156/87, 14 March 1990, *Gestetner Holdings plc v Council and Commission*, E.C.R., 1990, I, (781), 842);
- because the Community producer imported only a low volume of dumped products, though no evidence could be produced that his decision to import the dumped products was based on grounds of self-protection (C.J.E.C., case 156/87, 14 March 1990, *Gestetner Holdings plc v Council and Commission*, E.C.R., 1990, I, (781), 842);
- because their resale transactions at low prices are of limited importance, notwithstanding the fact that their too low resale prices were on their own an obstacle for including the Community producers in question (Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia, *O.J.*, 9 May 1987, No L 121/11; Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1);
- because the effect of their imports contributing to a lowering of the overall price level in the Community was substantially outweighed by the effects on prices resulting from the massive volume of imports on the Community market by the dumping exporters and importers (Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5);
- because the dumped product was imported in order to complete the range of products for distribution, notwithstanding the relatively high volume of imported dumped products (25 % of total sales of the Community producer in question) (Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27));
- because the models imported belong to the most important segment of the market which had recently grown significantly faster than the total market and because the Community producers in question wanted to regain their original market shares, notwithstanding the relatively high volume of imported dumped products (10.68 %, 28.9 % and 47.4 % of the total production of the Community producer importing the dumped product) (Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 24 November 1988, No L 317/33);
- because the substantial volume of dumped products (one third of the total sales on the Community market of the Community producers importing the dumped product) was imported by the Community producers as an act of self-defence (Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5);
- because the dumped product was imported in order to complete the range of products for distribution and because the low volume of the dumped product was imported, though the self-defence strategy argument was not accepted (Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12).

justifying the inclusion of Community producers importing the dumped product in the Community industry¹⁰⁹⁰.

As a consequence, a producer will but very rarely be excluded for importing the dumped product. The exception to the general rule under which the Community industry should be determined with reference to all Community producers, is, thus, being interpreted restrictively with regard to complainant producers importing the dumped product. Accordingly, the restrictive interpretation of the exception to exclude producers importing the dumped product results in «one-way flexibility» since the probability that the complainant producers will represent a major proportion of overall Community production increases, as more complainant producers are included into the Community industry. Of course, as always, such «one-way flexibility», from an economic point of view, is not warranted, as it increases the probability of trade restrictive anti-dumping relief, though, from a legal point of view, it cannot be challenged for being illegal.

2.2.2.2.2. Non-complainant producers importing the dumped product

European anti-dumping case law appears to be less «one-way flexible» in respect of non-complainant producers who import the dumped product. In two out of the three cases, though, in which the possible exclusion of a non-complainant producers had to be investigated, the producer was excluded. But, in one of those cases in which non-complainant producers were excluded, they had imported a rather high volume of dumped imports¹⁰⁹¹.

However, appearances may be deceptive. First, in the other of those two cases, the exclusion of the non-complainant producer was hardly explained : the European anti-dumping authorities only relied on the fact that the producer «would be potentially shielded from renewed dumped imports»¹⁰⁹². In sharp contrast with their case law in respect of complainant producers, the European anti-dumping authorities did not even explain why he would be shielded.

If a Community producer causing injury to the other Community producers because of his importing the dumped product, is included in the Community industry for other reasons, his imports are taken into account in assessing the injurious effects of the dumping on the other Community producers (Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12).

¹⁰⁹⁰ C.J.E.C., case C-49/88, 27 June 1991, *Al-Jubail Fertilizer Company and Saudi Arabian Fertilizer Company v Council*, *E.C.R.*, 1991, I, (3187), 3216 (Opinion of Advocate General DARMON).

¹⁰⁹¹ In particular, the import quantities exceeded the producers' Community production sold in the Community and, thus, it could rightly be argued that the core of their business activities took place outside the Community (Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50).

¹⁰⁹² Commission Decision 93/376/EEC of 16 June 1993 terminating the review of anti-dumping measures adopted under Council Regulation (EEC) 1698/85 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 29 June 1993, No L 157/76.

Second, the inclusion of the non-complainant producer in the third case cannot be considered to be the exception to the rule that non-complainant producers are always excluded. Indeed, the exporter the product of whom was imported by the non-complainant Community producer, was not subject to the anti-dumping proceeding¹⁰⁹³. Accordingly, his products could not be alleged to have been dumped (Article 4.1.(i) GATT Anti-dumping Code ; Article 4(1)(i) basic EC Regulation ; Article 4(5), first indent, basic ECSC Decision) and, consequently, the imports of his products could not constitute a reason for excluding the non-complainant Community producer.

Nevertheless, the second case shows that there is less «one-way flexibility» in respect of non-complainant producers who import the dumped product, when compared to the «one-way flexibility» applied in respect of non-complainant producers who are related to the dumping exporters. For the latter are excluded because the exporters to whom they are related were not involved in the anti-dumping proceeding¹⁰⁹⁴. As this exclusion was illegal, it can be concluded that European anti-dumping case law is less «one-way flexible» with regard to non-complainant exporters who import the dumped product, in that it does not exclude them on illegal grounds.

2.2.2.3. Integrated Community producers

Some anti-dumping cases limit the Community industry to non-integrated Community producers, *i.e.*, producers who do not transfer their products to integrated producers for further processing (*i.e.*, on the so-called captive market), but who sell them on the open market. The integrated Community producers manufacturing the product for their captive market are, thus, implicitly, excluded from the Community industry. However, no explicit provision in GATT or European anti-dumping law provides the exclusion of integrated Community producers. It has been argued that this exclusion, though, is not contrary to GATT nor European anti-dumping law, when the non-integrated Community producers represent a major proportion of overall Community production¹⁰⁹⁵. However, European anti-dumping case law usually does not pay any attention to the question whether the non-integrated Community producers by themselves represent a major

¹⁰⁹³ Commission Decision 93/376/EEC of 16 June 1993 terminating the review of anti-dumping measures adopted under Council Regulation (EEC) 1698/85 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 29 June 1993, No L 157/76.

¹⁰⁹⁴ *Supra*, 415.

¹⁰⁹⁵ VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 633.

proportion of total Community production¹⁰⁹⁶. In only one anti-dumping case, it was observed that the sole Community producer active on the open market accounted for some 20 % of total Community production¹⁰⁹⁷, which is clearly less than the 25 % threshold retained as the minimum for constituting a major proportion of overall Community production (Article 5.4. GATT Anti-dumping Code ; Article 5(4) basic EC Regulation)¹⁰⁹⁸. Thus, the exclusion of integrated Community producers cannot be based on the requirement that the Community industry should represent a major proportion of overall Community production.

As a consequence, the question whether the exclusion of integrated Community producers is illegal, subsists. The opinions are divided on this issue : some think it illegal for lack of any legal basis¹⁰⁹⁹ ; others hold that no legal basis is required¹¹⁰⁰. Neither of those arguments can be upheld : a legal basis is required and provided by the concept «like product», as European anti-dumping law specifies that the Community producers who constitute the Community industry should produce the like product. Indeed, the captive market does not form part of the relevant like product market, unless there is competition or, in more accurate economic terms, a sufficient degree of substitutability between the two markets¹¹⁰¹. Substitutability seems only to be possible if prices on the open market are so extremely low that it becomes more profitable for the integrated Community producer to stop (or to reduce) his own production and to buy on the open market. A new situation may then emerge : he may become a Community producer importing the dumped products, a case which is explicitly regulated under GATT and European anti-dumping law (Article 4.1.(i) GATT Anti-dumping Code ; Article 4(1)(i) basic EC Regulation ; Article 4(5)

¹⁰⁹⁶ In *stereo cassette tape heads from Japan and hermetic compressors from Brazil, Spain, Hungary, Japan and Singapore* no trace can be found regarding the share of non-integrated Community producers in total Community production (Commission Decision 80/316/EEC of 14 March 1980 terminating the anti-dumping proceeding concerning stereo cassette tape heads originating in Japan, *O.J.*, 15 March 1980, No L 69/64 ; Commission Decision 81/247/EEC of 15 April 1981 terminating the anti-dumping procedure concerning imports of hermetic compressors originating in Brazil, Spain, Hungary, Japan and Singapore, *O.J.*, 25 April 1981, No L 113/53).

¹⁰⁹⁷ Commission Regulation (EEC) No 163/83 of 21 January 1983 imposing a provisional anti-dumping duty on 4,4'-Isopropylidenediphenol originating in the United States of America, *O.J.*, 26 January 1983, No L 23/9.

¹⁰⁹⁸ VAN BAELE, I., and BELLIS, J.-F., *Anti-Dumping and other Trade Protection Laws of the EEC*, Bicester, CCH Editions, 1990, 118 ; VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 631. See *supra*, 408-409.

¹⁰⁹⁹ DIDIER, P., «Deux années d'application du nouveau règlement antidumping de la CEE», *Cahiers de Droit Européen*, 1982, (21), 44.

¹¹⁰⁰ BESELER, J.-F., *Die Abwehr von Dumping und Subventionen durch die Europäische Gemeinschaften*, Baden-Baden, Nomos, 1980, 105.

¹¹⁰¹ C.J.E.C., case C-315/90, 27 November 1991, *Groupement des Industries de Matériels d'Équipement Électrique et de l'Électronique Industrielle Associée (Gimelec) a.o. v Commission*, *E.C.R.*, 1991, I, (5589), 5618.

Compare with : C.J.E.C., case 322/81, 9 November 1983, *NV Nederlandsche Banden-Industrie-Michelin v Commission*, *E.C.R.*, 1983, (3461), 3503-3510, where products with identical physical and technical characteristics were considered to belong to different product markets because of a different demand structure in these markets. Undoubtedly, the demand structure in the captive market differs from that in the free market.

basic ECSC Decision) ; or he may become part of a Community processing industry buying the (dumped or non-dumped) product, whose interests in the anti-dumping proceeding are being considered in the assessment of the so-called «Community interests»¹¹⁰², rather than in the injury investigation. On the other hand, if there is no sufficient degree of substitutability, the products sold on the captive market are not like products sold on the open market. As a result, the output of the integrated Community producers must not be included in total Community production, nor should integrated Community producers be included in the Community industry¹¹⁰³. If it is correct that products on the captive market are not like products, imports of those products coming from the dumping country should equally be disregarded¹¹⁰⁴. On the other hand, the complainant non-integrated Community producers' output must represent a major proportion of overall Community production in the free market¹¹⁰⁵.

2.2.2.4. Regional industries

In some exceptional circumstances, the Community, for the production of the like product, may be divided into two or more competitive markets, whereas the producers within each market may be regarded as a Community industry. This is the case,

- (a) if the producers within such market sell all or almost all their production of the product in question in that market, and
- (b) if the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the Community.

If those conditions are fulfilled cumulatively¹¹⁰⁶, injury may be found to exist even where a major proportion of the total Community industry is not injured, provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market (Article

¹¹⁰² *Infra*, 606-617.

¹¹⁰³ Commission Regulation (EEC) No 2463/93 of 1 September 1993 imposing a provisional anti-dumping duty on imports of fluorspar originating in the People's Republic of China, *O.J.*, 7 September 1993, No L 226/3 ; Commission Regulation (EEC) No 2720/93 of 28 September 1993 imposing a provisional anti-dumping duty on imports of isobutanol originating in the Russian Federation, *O.J.*, 2 October 1993, No L 246/12.

¹¹⁰⁴ Commission Regulation (EC) No 1783/94 of 18 July 1994 imposing a provisional anti-dumping duty on imports of furfuraldehyde originating in the People's Republic of China, *O.J.*, 21 July 1994, No L 186/11.

¹¹⁰⁵ It is not clear whether the European anti-dumping authorities share this point of view. However, it seems that they do not as they have held that the «separation (between free and captive market) only concerns the assessment of injury and does not infer a reduction of the size of the Community industry for purposes of its qualification under Article 4(5) (former basic EC legislation (now : Article 4(1) basic EC Regulation and Article 4(5) basic ECSC Decision))» (Council Regulation (EC) No 486/94 of 4 March 1994 imposing definitive anti-dumping duties on imports of fluorspar originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 5 March 1994, No L 62/1).

¹¹⁰⁶ Commission Regulation (EC) No 1506/94 of 27 June 1994 imposing provisional duties on imports of urea ammonium nitrate solution originating in Bulgaria and Poland, *O.J.*, 30 June 1994, No L 162/16.

4.1.(ii) GATT Anti-dumping Code ; Article 4(1)(ii) basic EC Regulation ; Article 4(5) basic ECSC Decision).

In accordance with GATT and European anti-dumping law, the European anti-dumping authorities only very rarely have divided the Community into regional markets. In many cases, there was no need to do so, because the production in such regional markets constituted a major proportion of overall Community production so that the Community producers on that regional market by themselves could be considered a Community industry for the whole Community market¹¹⁰⁷. Only in nine anti-dumping cases, it was explicitly investigated whether a regional market existed¹¹⁰⁸. It follows from those cases :

1107 Commission Regulation (EEC) No 261/77 of 4 February 1977 imposing a provisional anti-dumping duty on ball bearings, tapered roller bearings and parts thereof originating in Japan, *O.J.*, 5 February 1977, No L 34/60 ; Council Regulation (EEC) No 1778/77 of 26 July 1977 concerning the application of the anti-dumping duty on ball bearings and tapered roller bearings, originating in Japan, *O.J.*, 3 August 1977, No L 196/1 ; Commission Recommendation No 496/79/ECSC of 13 March 1979 imposing a provisional anti-dumping duty on iron or steel coils for re-rolling originating in Greece, *O.J.*, 15 March 1979, No L 65/16 ; Commission Decision 80/531/EEC of 23 May 1980 accepting undertakings given in connection with the anti-dumping proceedings concerning certain stainless steel bars originating in Brazil and terminating those proceedings, *O.J.*, 28 May 1980, No L 131/18 ; Council Regulation (EEC) No 349/81 of 9 February 1981 imposing a definitive anti-dumping duty on certain chemical fertilizer originating in the United States of America, *O.J.*, 12 February 1981, No L 39/4 ; Commission Regulation (EEC) No 1101/81 of 23 April 1981 imposing a provisional anti-dumping duty on potato granules originating in Canada, *O.J.*, 28 April 1981, No L 116/11 ; Commission Regulation (EEC) No 1590/81 of 10 June 1981 repealing a national anti-dumping duty on louvre doors, originating in Taiwan, imposed under the transitional provisions of the 1972 Act of Accession, *O.J.*, 16 June 1981, No L 158/5 ; Commission Regulation (EEC) No 84/82 of 14 January 1982 imposing a provisional anti-dumping duty on mechanical wrist-watches originating in the USSR, *O.J.*, 16 January 1982, No L 11/14 ; Council Decision 83/9/EEC of 17 January 1983 terminating the anti-dumping proceeding concerning imports of codeine and its salts originating in Czechoslovakia, Hungary, Poland and Yugoslavia, *O.J.*, 20 January 1983, No L 16/30 ; Commission Recommendation No 376/83/ECSC of 14 February 1983 imposing a provisional anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Brazil, *O.J.*, 17 February 1983, No L 45/14 ; Council Regulation (EEC) No 55/93 of 8 January 1993 imposing a definitive anti-dumping duty on imports of outer rings of tapered roller bearings originating in Japan, *O.J.*, 15 January 1993, No L 9/7.

1108 Commission Decision 83/626/EEC of 12 December 1983 terminating the anti-dumping proceeding concerning imports of saccharin and its salts originating in China, the Republic of Korea and the United States of America, *O.J.*, 15 December 1983, No L 352/49 ; Commission Decision 85/209/EEC of 26 March 1985 accepting the undertaking given in connection with the anti-dumping investigation concerning imports of plasterboard of Spanish origin into Ireland and Northern Ireland and terminating that investigation, *O.J.*, 29 March 1985, No L 89/65 ; Commission Decision 86/36/EEC of 26 February 1986 accepting undertakings entered into in connection with the anti-dumping proceeding concerning imports into Greece of certain categories of glass originating in Turkey, Yugoslavia, Romania, Bulgaria, Hungary and Czechoslovakia and terminating the investigation, *O.J.*, 28 February 1986, No L 51/73 ; Commission Decision 86/344/EEC of 17 July 1986 terminating the anti-dumping proceeding concerning imports of Portland cement originating in the German Democratic Republic, Poland and Yugoslavia, *O.J.*, 25 July 1986, No L 202/43 ; Commission Decision 87/236/EEC of 10 April 1987 terminating the anti-dumping proceeding on imports of synthetic fibres of polyesters originating in the German Democratic Republic, Romania, Turkey and Yugoslavia, *O.J.*, 15 April 1987, No L 103/38 ; Commission Decision 91/29/EEC of 11 January 1991 terminating the anti-dumping proceeding concerning imports of Portland cement originating in Yugoslavia, *O.J.*, 22 January 1991, No L 16/34 ; Commission Decision 91/256/EEC of 14 May 1991 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of welded wire-mesh originating in Yugoslavia and terminating the investigation, *O.J.*, 18 May 1991, No L 123/54 ; Commission Decision 91/392/EEC of 21 June 1991 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain asbestos cement pipes originating in Turkey, and terminating the investigation, *O.J.*, 31 July 1991, No L 209/37 ; Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries ; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24.

- a Member State does not constitute a regional market if the Community producers established outside that Member State, for one year, hold a share of 30 % in the market of this Member State¹¹⁰⁹ ;
- a Member State constitutes a regional market if the Community producers established in that Member State sell almost all their production (between 93 and 99 %) in that market and if the Community producers established elsewhere in the Community hold no substantial share (between 0.19 and 5.5 %) in that market¹¹¹⁰.

GATT and European anti-dumping law, thus, impose a shipment test. The test is based on two criteria : «little in from the outside» (LIFO) and «little out from the inside» (LOFI)¹¹¹¹. It is assumed that two areas constitute the same geographic market if substantial shipments take place between these two areas. Such assumption is, indeed, right. However, the reverse does not always hold. Indeed, the fact that, at a certain moment in time, there are no substantial shipments between two areas, does not prove that those areas are not in the same geographic market¹¹¹². Even a small price increase in one area may result in imports from the other areas¹¹¹³. In other words, the fact that, at a certain moment in time, no shipments take place between two

¹¹⁰⁹ Commission Decision 87/236/EEC of 10 April 1987 terminating the anti-dumping proceeding on imports of synthetic fibres of polyesters originating in the German Democratic Republic, Romania, Turkey and Yugoslavia, *O.J.*, 15 April 1987, No L 103/38.

¹¹¹⁰ Commission Decision 86/36/EEC of 26 February 1986 accepting undertakings entered into in connection with the anti-dumping proceeding concerning imports into Greece of certain categories of glass originating in Turkey, Yugoslavia, Romania, Bulgaria, Hungary and Czechoslovakia and terminating the investigation, *O.J.*, 28 February 1986, No L 51/73 ; Commission Decision 86/344/EEC of 17 July 1986 terminating the anti-dumping proceeding concerning imports of Portland cement originating in the German Democratic Republic, Poland and Yugoslavia, *O.J.*, 25 July 1986, No L 202/43 ; Commission Decision 91/29/EEC of 11 January 1991 terminating the anti-dumping proceeding concerning imports of Portland cement originating in Yugoslavia, *O.J.*, 22 January 1991, No L 16/34 ; Commission Decision 91/392/EEC of 21 June 1991 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain asbestos cement pipes originating in Turkey, and terminating the investigation, *O.J.*, 31 July 1991, No L 209/37.

¹¹¹¹ ELZINGA, K.G., and HOGARTY, T.F., «The Problem of Geographic Market Delineation in Antimerger Suits», *Antitrust Bulletin*, 1973, (45), 45-81.

¹¹¹² AREEDA, P., «Market Definition and Horizontal Restraints», *Antitrust Law Journal*, 1983, (553), 572-573.

¹¹¹³ It is recognized that the LIFO-LOFI shipment test does not measure potential competition. It only takes account of actual competition, see : ELZINGA, K.G., and HOGARTY, T.F., «The Problem of Geographic Market Delineation Revisited : The Case of Coal», *Antitrust Bulletin*, 1978, (1), 9.

areas, does not mean that there is no substitutability between the products sold in those areas¹¹¹⁴. The assumption that two areas are not in the same geographic market if no shipments take place between those two areas, will only hold if a sufficiently long period is taken into account. It is impossible to ascertain whether European anti-dumping case law pays enough attention to the period taken into account. For only one anti-dumping case in which a regional market was found indicates, without further explanation, that a period of four years was taken into account¹¹¹⁵. It depends of course on the characteristics of the product (e.g., the frequency of price fluctuations and the responsiveness of the market to price fluctuations) whether such a period of four years is sufficient. Clearly, the choice of the period allows a «one-way flexible» application of the shipment test : by choosing a short period in which no shipments take place between two areas, it is possible to show that the Community market can be divided in regional markets, though, over a longer period of time, the Community market would prove to constitute but one geographic market. This could be explicitly desired, if only Community producers established within a certain geographic area suffer from the dumping. European anti-dumping law should require to consider a sufficiently long period of time into account in order to exclude such «one-way flexibility».

¹¹¹⁴ The substitutability of products sold in different areas should be measured by means of cross-elasticity of demand and supply. In fact, products sold in different markets are products differentiated on a geographical basis. They are, thus, differentiated in the same way as products with different physical and technical characteristics.

Because there is a parallelism between geographically differentiated products and physically or technically differentiated products, it has been suggested to determine the relevant geographic market by means of the similarity of price movements. However, the use of the similarity of price movements imposes the same practical difficulties for geographically differentiated products as for physically or technically differentiated products. See : AREEDA, P., «Market Definition and Horizontal Restraints», *Antitrust Law Journal*, 1983, (553), 566-576 ; HOROWITZ, I., «Market Definition in Antitrust Analysis : A Regression-Based Approach», *Southern Economic Journal*, 1981-1982, (1), 1-16 ; SCHEFFMAN, D.T., and SPILLER, P.T., «Geographic Market Definition under the U.S. Department of Justice Merger Guidelines», *Journal of Law and Economics*, 1987, (123), 129 ; STIGLER, G.J., and SHERWIN, R.A., «The Extent of the Market», *Journal of Law and Economics*, 1985, (555), 555-585 ; *supra*, 392, note 1003

Another method proposed for defining the relevant geographical market consists of a combination of a shipment and a price test. The price test is based on the assumption that within a regional market only one price prevails. Therefore, a regression model is elaborated in order to adjust prices for all differences which may affect prices (differences in transport costs, physical differences, etc.). The shipment test is based on the assumption that two areas with similar supply patterns are within the same geographic market. See : SHRIEVES, R.E., «Geographic Market Areas and Market Structure in the Bituminous Coal Industry», *Antitrust Bulletin*, 1978, (589), 589-625. This method cannot be accepted either. First, as it is difficult to make accurate price adjustments, unity of adjusted prices does not necessarily indicate that two areas are in the same market, nor do different adjusted prices necessarily indicate that there are separate regional markets. Second, the proposed shipment test is not complete. Indeed, it may result in the finding of a regional market, if that market is self-sufficient. It then ignores the exports out of that market to other areas. See : ELZINGA, K.G., and HOGARTY, T.F., «The Problem of Geographic Market Delineation Revisited : The Case of Coal», *Antitrust Bulletin*, 1978, (1), 5-7.

¹¹¹⁵ Commission Decision 86/36/EEC of 26 February 1986 accepting undertakings entered into in connection with the anti-dumping proceeding concerning imports into Greece of certain categories of glass originating in Turkey, Yugoslavia, Romania, Bulgaria, Hungary and Czechoslovakia and terminating the investigation, *O.J.*, 28 February 1986, No L 51/73.

Another «one-way flexible» aspect of the definition of a regional market concerns the fact that imports from non-Member States are disregarded¹¹¹⁶. Thus, a regional market may be found, though the dumped product is also imported into the rest of the Community¹¹¹⁷. However, imports from non-Member States, such as the dumped imports, may be a reason for not dividing the Community into separate regional markets. Indeed, if a country imports a product in different regional markets of the Community, each regional market will be affected by the other. If, for example, the price of a product goes up in one regional market, the importer of that product will supply more of his product in that regional market. This will cause his sales in the other regional markets to drop, if he is unable to increase his production. As a result, overall supply in these

¹¹¹⁶ GATT and European anti-dumping law, nevertheless, require that there must be a concentration of dumped imports in the regional market for injury to a regional industry to be found (Article 4.1(ii) GATT Anti-dumping Code ; Article 4(1)(ii) basic EC Regulation ; Article 4(5) basic ECSC Decision). This requirement, however, does not concern the determination of a regional industry. It only pertains to the finding of injury caused to a regional industry. Indeed, in the two European anti-dumping cases in which a regional industry was found, no attention was paid to any kind of imports from outside the Community for determining whether there was a regional industry, see : Commission Decision 86/36/EEC of 26 February 1986 accepting undertakings entered into in connection with the anti-dumping proceeding concerning imports into Greece of certain categories of glass originating in Turkey, Yugoslavia, Romania, Bulgaria, Hungary and Czechoslovakia and terminating the investigation, *O.J.*, 28 February 1986, No L 51/73 ; Commission Decision 86/344/EEC of 17 July 1986 terminating the anti-dumping proceeding concerning imports of Portland cement originating in the German Democratic Republic, Poland and Yugoslavia, *O.J.*, 25 July 1986, No L 202/43.

¹¹¹⁷ In glass from Turkey, Yugoslavia, Romania, Bulgaria, Hungary and Czechoslovakia the Greek producers were found to represent a regional industry. Nevertheless, dumping was also practised in the other Member States. The dumping exporters there held a market share of 25 % while in Greece the dumping exporters' market share amounted to 55 % (Commission Decision 86/36/EEC of 26 February 1986 accepting undertakings entered into in connection with the anti-dumping proceeding concerning imports into Greece of certain categories of glass originating in Turkey, Yugoslavia, Romania, Bulgaria, Hungary and Czechoslovakia and terminating the investigation, *O.J.*, 28 February 1986, No L 51/73).

In Portland cement from the German Democratic Republic, Poland and Yugoslavia the volume of the dumped imports and their market share were specified not only for the regional markets, but also for the entire Community market :

	volume (tonnes)	market share (%)
Denmark	25 145	1.86
Ireland	18 038	1.32
United Kingdom	116 019	0.78
Community	552 101	0.47

(Commission Decision 86/344/EEC of 17 July 1986 terminating the anti-dumping proceeding concerning imports of Portland cement originating in the German Democratic Republic, Poland and Yugoslavia, *O.J.*, 25 July 1986, No L 202/43).

On the basis of the data about volume and market share of the dumped imports, the volume of consumption on each market, the relative share of each market in total Community consumption and the share of dumped imports into each market in respect of total dumped imports in the Community can be calculated :

	consumption (tonnes)	share in total Community consumption (%)	share in total dumped imports (%)
Denmark	1 351 882	1.15	4.55
Ireland	1 366 515	1.16	21.01
United Kingdom	1 487 423	1.27	3.27
Other Member States	113 262 478	96.42	71.17
Community	117 468 298	100.00	100.00

The dumped product is, thus, imported in the whole of the Community. However, the dumped imports are more concentrated in Denmark, Ireland and the United Kingdom, especially in view of their respective share in total Community consumption.

other regional markets will fall and, consequently, the prices in these markets will rise. Moreover, imports, including the dumped imports, can prevent intra-Community trade. They can have such a depressive effect on prices in the entire Community market that Community producers can only supply their local market at a profit. Nevertheless, all Community producers are potential competitors and, therefore, are in the same geographic market. Thus, by disregarding imports, separate regional markets may be easier to find.

3. INJURY STANDARDS

3.1. INTRODUCTION

The present section examines the requirement that the Community industry must suffer injury. The injury must be material (section 3.2.). Under GATT and European anti-dumping law three injury standards are being distinguished : actual injury (section 3.3.), threat of injury (section 3.4.) and retardation of the establishment of a Community industry (section 3.5.) (Article VI(1) and (6)(a) GATT ; Note 1 *ad* Article 3 GATT Anti-dumping Code ; Article 3(1) basic EC Regulation ; Article 4(1) basic ECSC Decision).

The present section shows how the vagueness of the injury requirement would allow to always find injury («one-way flexibility»). Indeed, any negative factor concerning the status of the Community industry may be decisive for a finding of injury, even if other factors are positive. If need be, injury may be found even if the Community industry does not suffer injury. Because of its complexity, economic reality, of course, is difficult to be laid down in precise rules. However, as is shown in this section, the European anti-dumping authorities do not even bother to explain why a certain factor is decisive in one case but is not in another. This lack of motivation does not enhance legal certainty, though it might, of course, be argued that, to a great extent, there is legal certainty, since injury will usually be found.

3.2. MATERIAL INJURY

The injury the Community industry suffers, must be material (Article VI(1) and (6)(a) GATT ; Note 1 *ad* Article 3 GATT Anti-dumping Code ; Article 3(1) and (6) basic EC Regulation ; Article 4(1) basic ECSC Decision). However, neither GATT nor European anti-dumping law

indicate when injury is material. They only indicate that immaterial injury must be disregarded. However, injury which is not immaterial, is not necessarily material¹¹¹⁸. Some European anti-dumping cases have been terminated because the injury suffered by the Community industry was not material¹¹¹⁹. It is, however, impossible to draw general conclusions. For European anti-dumping authorities have broad discretionary powers subject to but a marginal judicial control¹¹²⁰, since injury determinations necessarily imply the assessment of economic realities which, by definition, are complex.

¹¹¹⁸ BESELER, J.-F., «EEC Protection against Dumping and Subsidies from Third Countries», *Common Market Law Review*, 1968-1969, (327), 337; BESELER, J.-F., *Die Abwehr von Dumping und Subventionen durch die Europäische Gemeinschaften*, Baden-Baden, Nomos, 1980, 93-94; BUHART, J., «Le régime communautaire de l'antidumping : vingt ans d'expérience», *Revue Trimestrielle de Droit Européen*, 1988, (253), 274; STANBROOK, C., *Dumping. A Manual on the EEC Anti-Dumping Law and Procedure*, Chequers, European Business Publications, 1980, 28.

¹¹¹⁹ Injury has been held not to be material because :

- it was not inflicted upon the Community industry as a whole (Commission Decision 85/470/EEC of 7 October 1985 terminating the anti-dumping proceeding concerning imports of standard wood particle board originating in Bulgaria, Czechoslovakia, Poland, Romania, the Soviet Union, Spain and Yugoslavia, *O.J.*, 10 October 1985, No L 268/22; Commission Decision 86/20/EEC of 31 January 1986 terminating the anti-dumping proceeding concerning imports of hammers originating in the People's Republic of China, *O.J.*, 4 February 1986, No L 29/36; Commission Decision 86/86/EEC of 18 March 1986 terminating the anti-dumping proceeding concerning imports of stainless steel household cooking ware originating in South Korea, *O.J.*, 19 March 1986, No L 74/33; Commission Decision 89/111/EEC of 9 February 1989 terminating the anti-dumping proceeding concerning imports of wheeled loaders originating in Japan, *O.J.*, 11 February 1989, No L 39/35);
- the overall situation of the injured Community producers was improving, notwithstanding a slight deterioration in capacity utilization, sales and market share of the Community producers (Commission Decision 89/537/EEC of 27 September 1989 terminating the anti-dumping proceeding concerning imports of mica originating in Japan, *O.J.*, 3 October 1989, No L 284/45);
- the market share of the dumped imports on the Community market was low and stable, in contrast with a high and stable market share of the Community industry and an increasing market share of imports originating in other countries, though the degree of price undercutting by the dumped imports was sufficiently high to find material injury (Commission Decision 85/501/ECSC of 11 November 1985 terminating the anti-dumping proceeding concerning imports of wire rod originating in Brazil, Portugal, Trinidad and Tobago and Venezuela, *O.J.*, 13 November 1985, No L 299/18);
- the substantial rise in the market share of the dumped products on the Community market, the serious price-depressive effects of their price undercutting and the sharp decline in weighted average return of the Community industry were outweighed by the improvement of the situation of the Community industry in terms of in capacity, production, employment, sales on the Community market and exports to the dumping country (Commission Decision 89/560/EEC of 17 October 1989 terminating the anti-dumping proceeding concerning imports of polyester film originating in the Republic of Korea, *O.J.*, 21 October 1989, No L 305/31);
- the exports were of an incidental and temporary nature (Commission Decision 92/423/ECSC of 7 August 1992 terminating the anti-dumping proceeding concerning imports of pig-iron, originating in Turkey, *O.J.*, 13 August 1992, No L 230/30).

¹¹²⁰ C.J.E.C., joined cases 113 and 118-121/77, 29 March 1979, *NTN Toyo Bearing Company Ltd a.o. v Council*, *E.C.R.*, 1979, (1185), 1266 (Advocate-General J.P. WARNER); C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, *E.C.R.*, 1992, I, (1335), 1378 (Opinion of Advocate General MISCHO) and 1402; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, *E.C.R.*, 1992, I, (1409), 1484-1485; C.J.E.C., case C-176/87, 10 March 1992, *Konishiroku Photo Industry Co. Ltd v Council*, *E.C.R.*, 1992, I, (1493), 1529; C.J.E.C., case C-177/87, 10 March 1992, *Sanyo Electric Co. Ltd v Council*, *E.C.R.*, 1992, I, (1535), 1570; C.J.E.C., case C-179/87, 10 March 1992, *Sharp Corporation v Council*, *E.C.R.*, 1992, I, (1635), 1682; BOUDANT, J., *L'anti-dumping communautaire*, Paris, Economica, 1991, 133.

3.3. ACTUAL INJURY

3.3.1. Causes of actual injury

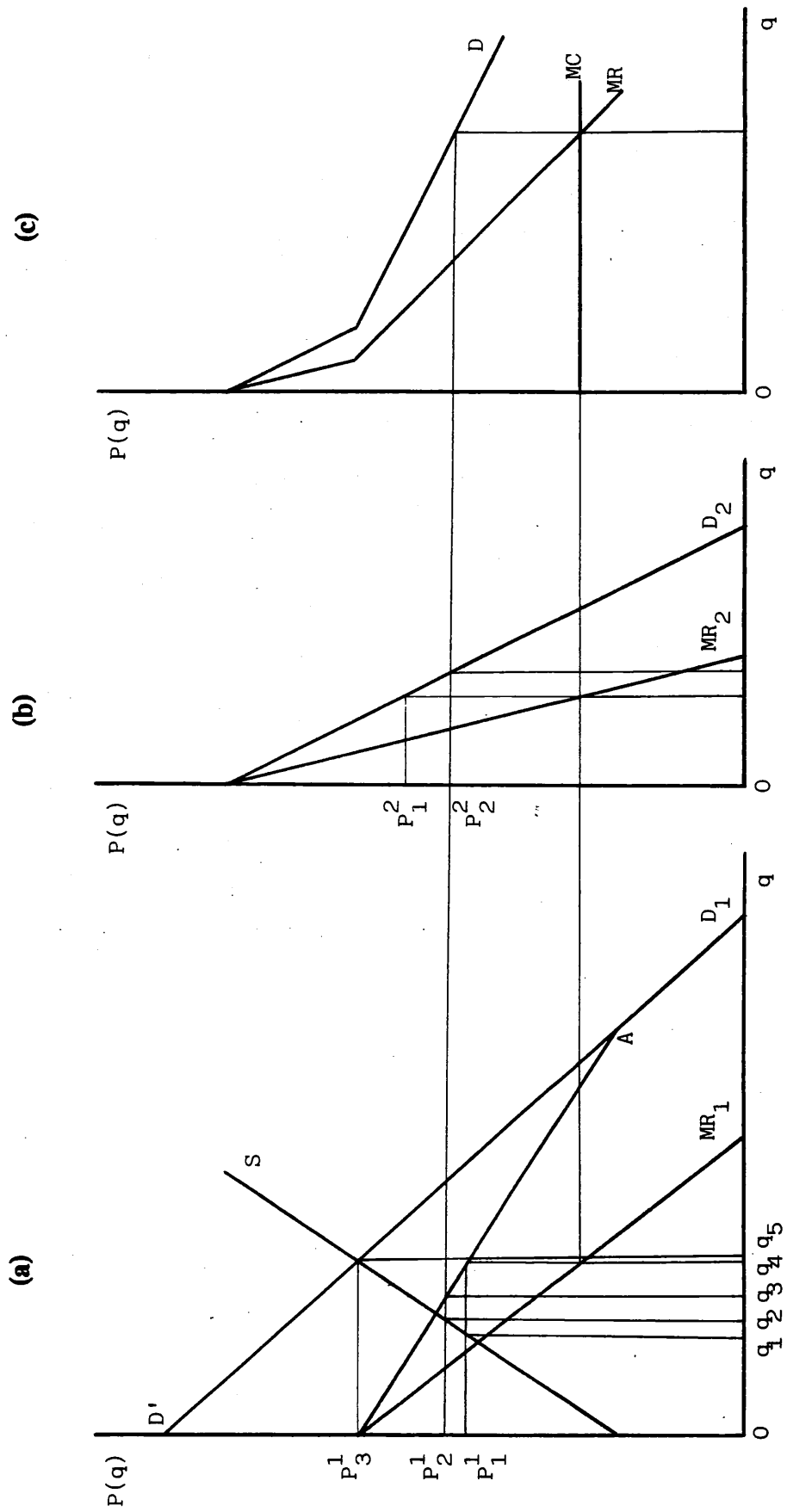
3.3.1.1. Dumping or dumped imports as causes of injury ?

As the injury suffered by the Community industry may have different causes, it is important to know to what extent each of those causes has contributed to the injury. Those causes may boil down to either the actual dumping or the imports of dumped products. Though both causes may look very similar, their effects do not always coincide.

This is illustrated in figure 17. The traditional dumping case of third-degree price discrimination is assumed : the Community market (figure 17(a)) and the domestic market of the exporting country (figure 17(b)) are separated, their demand curves (respectively D_1 and D_2) have different price elasticities, and the exporter has market power in both markets. It is assumed that a Community industry exists ; its supply curve is represented by S in figure 17(a). If there are no imports and the total demand being $D'D_1$, the Community industry supplies a quantity Oq_5 at a price OP^1_3 . If the exporter decides to export to the Community and to price discriminate, he will offer a quantity Oq_4 . Indeed, the demand curve of the Community market for the exporter is the residual demand curve, *i.e.*, overall demand minus overall supply of the Community industry, illustrated by the curve $P^1_3AD_1$. Because of the exporter's market power on the Community market, the price drops to OP^1_1 . At this price the Community industry is willing to sell a quantity Oq_1 . Thus, the Community industry's sales drop by q_1q_5 , while the price level decreases by $P^1_3P^1_1$.

This decline in quantity and price cannot be considered to be the injury caused by the dumping. It is the injury caused by the imports of dumped products. In order to show the pure effects of dumping, assume that the exporter exports, but does not price discriminate. In this case he exports a quantity Oq_3 , which causes the price to decline to OP^1_2 and the Community industry to supply a quantity Oq_2 . The injury to the Community industry amounts to a decline in quantity of q_2q_5 and a fall in price of $P^1_3P^1_2$. This injury is caused by the decision of the exporter to export to the Community. If the exporter decides to dump his products, the injury is worsened by a drop in quantity of q_1q_2 and a drop in price of $P^1_2P^1_1$. The amounts by which the injury is enhanced are the pure effects of dumping.

Figure 17



Thus, the effects of the imports of dumped products are the sum of the effects of imports and the effects of dumping. Only if there would be no imports if no dumping were to take place, the effects of the dumping and the imports of dumped products coincide.

Consequently, the choice between the dumping and the imports of dumped products has important consequences. According to GATT, it should be examined whether the dumping is the cause of the injury (Article VI(1) and (6)(a) GATT). The GATT Anti-dumping Code and ECSC anti-dumping law do not put it that clearly. In their wording, «dumped imports (...), through the effects of dumping», must be the cause of the injury (Article 3.5. GATT Anti-dumping Code ; Article 4(1) basic ECSC Decision). Moreover, on several occasion, the GATT Anti-dumping Code refers to the effects of the dumped imports, rather than to the effects of the dumping (Articles 3.2., 3.5. and 3.6.). As the GATT Anti-dumping Code is merely an implementation of GATT and as European anti-dumping law must comply with GATT anti-dumping law, the clear wording of GATT should prevail and, consequently, the dumping must be the cause of the injury. However, EC anti-dumping law goes a step further and stipulates that «(i)t must be demonstrated (...) that the dumped imports are causing injury» (Article 3(6) basic EC Regulation). In this respect, it may be argued that EC anti-dumping law does not comply with GATT anti-dumping law. The legislative history starting from GATT and ending with EC anti-dumping law shows how anti-dumping law becomes gradually more «one-way flexible» over time.

3.3.1.2. Criteria establishing the cause of injury

Under GATT and European anti-dumping law, two criteria establishing the cause of the injury are being distinguished : the volume and the prices of dumped imports (Articles 3.1. and 3.2. GATT Anti-dumping Code ; Article 3(2), (3) and (6) basic EC Regulation ; Article 4(2)(a) and (b) basic ECSC Decision). Under GATT and ECSC anti-dumping law, this does not contradict the requirement that the dumping must be the cause of the injury. Both factors are but evidence of the dumping as the cause of the injury, since they are defined as «factors» which an examination of injury may involve (Article 3.2. GATT Anti-dumping Code ; Article 4(2)(a) and (b) basic ECSC Decision). However, the representation of the volume and prices of the dumped imports as «factors» to be taken into account, may be deceptive. Indeed, EC anti-dumping law also considers them to be such «factors» (Article 3(3) basic EC Regulation), but considers the dumped imports, rather than the dumping, as the cause of the injury (Article 3(6) basic EC Regulation). It, therefore, is quite possible that European anti-dumping case law will not make the distinction between the dumping and the dumped imports and will not consider the volume and prices of the dumped imports but as factors indicating the effect of the dumping on the state of the Community industry.

As none of these factors can provide necessarily decisive guidance (Article 3.2. GATT Anti-dumping Code ; Article 3(3) basic EC Regulation ; Article 4(2)(a) and (b) basic ECSC Decision)¹¹²¹, the European anti-dumping authorities have discretionary powers in assessing them¹¹²².

Pursuant to GATT and EC anti-dumping law, a determination of injury must be based on positive evidence and involve an objective examination of the volume of the dumped imports and the effect of the dumped imports on prices in the Community market (Article 3.1. GATT Anti-dumping Code ; Article 3(2) basic EC Regulation). Thus, the European anti-dumping authorities must not rely on the assumption that, for instance, the volume of dumped imports has increased or that there is price undercutting by the dumped imports, unless there is proof to contrary. In each case, they must investigate what volume of dumped products has actually been imported and whether those dumped imports actually undercut the Community producers' prices. The fact that ECSC anti-dumping law does not impose the same obligation, poses no problem in respect of GATT anti-dumping law as the European anti-dumping authorities have always relied on positive evidence and made an objective examination of the volume and prices of the dumped imports. The problem, however, is that economic real life is complex and allows several objective interpretations, depending on the accents put on each different aspect of economic real life. For

¹¹²¹ For the interpretation of the sentence «none which can give necessarily decisive guidance», see : *supra*, 486.

¹¹²² C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, E.C.R., 1992, I, (1335), 1402.

example, a market share which increases from 1 % to 2 %, can be said to have doubled and, thus, to have increased considerably ; however, it can also be said that such a market share is negligible. Both representations of this evolution in market share are certainly objective. However, the first one may result in finding injurious dumping, whereas the second may not. The problem in European anti-dumping case law is that the European anti-dumping authorities practically always prefer the «one-way flexible» interpretation.

3.3.1.2.1. Volume of dumped imports

3.3.1.2.1.1. The concept «dumped imports»

GATT and European anti-dumping law adopt a trend analysis, as it is stipulated that it should be examined whether there has been a significant increase in the volume of dumped imports (Article 3.2. GATT Anti-dumping Code ; Article 3(3) basic EC Regulation ; Article 4(2)(a) basic ECSC Decision). As European anti-dumping law does not provide any guideline as to the period during which the development of the dumped imports should be examined, it grants the European anti-dumping authorities large discretionary powers¹¹²³. The period taken into account¹¹²⁴ usually covers the entire investigation period, *i.e.*, the period in which dumping is established¹¹²⁵, plus a certain period prior to the investigation period¹¹²⁶. The *ratio*

¹¹²³ C.J.E.C., case 121/86, 28 November 1989, *Anonymos Etaireia Epicheiriseon Metalleftikon Viomichanikon kai Naftiliakon AE a.o. v Council, E.C.R.*, 1989, (3919), 3952 ; C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council, E.C.R.*, 1991, I, (2069), 2192.

¹¹²⁴ In most European anti-dumping cases this period ranges from two to four years, but also periods of only six months (Commission Regulation (EEC) No 250/82 of 29 January 1982 imposing a provisional anti-dumping duty on certain welded iron or steel tubes originating in Romania, *O.J.*, 3 February 1982, No L 26/5) and even of eight years (Commission Regulation (EEC) No 1500/83 of 9 June 1983 imposing a provisional anti-dumping duty on imports of outboard motors originating in Japan, *O.J.*, 10 June 1983, No L 152/18) have been taken into consideration.

¹¹²⁵ According to Advocate-General TESAURO, the period taken into account for the injury determination must cover the investigation period (C.J.E.C., case 121/86, 28 November 1989, *Anonymos Etaireia Epicheiriseon Metalleftikon Viomichanikon kai Naftiliakon AE a.o. v Council, E.C.R.*, 1989, (3919), 3939). It can, however, be agreed with the Court of Justice that European anti-dumping law does not contain such an obligation (*ibidem*, 3952).

1126 The investigation period may not entirely be included or subsequent periods may also be taken into consideration.

Before 1987 projected imports and, thus, future periods were also taken into account in several anti-dumping cases (Commission Decision 80/603/EEC of 23 June 1980 accepting undertakings given in connection with the anti-dumping proceedings concerning mounted piezo-electric quartz crystal units, originating in Japan, South Korea and the United States of America, and terminating the proceedings, *O.J.*, 27 June 1980, No L 162/62; Commission Decision 81/366/EEC of 18 May 1981 accepting an undertaking given in connection with the anti-dumping proceedings concerning louvre doors originating in Malaysia and Singapore and terminating the proceedings, *O.J.*, 22 May 1981, No L 135/33; Commission Regulation (EEC) No 1590/81 of 10 June 1981 repealing a national anti-dumping duty on louvre doors, originating in Taiwan, imposed under the transitional provisions of the 1972 Act of Accession, *O.J.*, 16 June 1981, No L 158/5; Commission Decision 81/493/EEC of 6 July 1981 terminating the anti-dumping procedure concerning imports of furfural originating in the Dominican Republic, Spain and the People's Republic of China, *O.J.*, 11 July 1981, No L 189/57; Commission Regulation (EEC) No 250/82 of 29 January 1982 imposing a provisional anti-dumping duty on certain welded iron or steel tubes originating in Romania, *O.J.*, 3 February 1982, No L 26/5; Commission Regulation (EEC) No 3018/82 of 11 November 1982 imposing a provisional anti-dumping duty on imports of certain sodium carbonate originating in the United States of America and accepting certain undertakings concerning the imports of certain sodium carbonate originating in the United States of America, *O.J.*, 13 November 1982, No L 317/5; Commission Decision 82/808/EEC of 25 November 1982 terminating the anti-dumping procedure concerning imports of aluminium foil for household and catering use originating in Austria, the German Democratic Republic, Hungary and Israel, *O.J.*, 1 December 1982, No L 339/58; Commission Decision No 2767/86/ECSC of 5 September 1986 imposing a provisional anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Yugoslavia, *O.J.*, 6 September 1986, No L 254/18).

Those projected imports were taken into account in order to determine not only threat of injury, but also actual injury (VAN BAEL, I., and BELLIS, J.F., *Anti-Dumping and other Trade Protection Laws of the EEC*, Bicester, CCH Editions Ltd., 1990, 126-127).

In 1987, however, the European anti-dumping authorities, in pursuance of Article 7(1)(c) of the then prevailing basic EC legislation, adopted the general principle about the illegality of taking into account developments occurring after the investigation period (Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1). Moreover, with regard to the assessment of the volume of the dumped imports, they held, in the same year, that this aspect of European anti-dumping case law was illegal, because European anti-dumping law requires only to establish «whether there has been a significant increase» (Council Regulation (EEC) No 29/87 of 22 December 1986 imposing a definitive anti-dumping duty on imports of certain deep freezers originating in the Soviet Union, *O.J.*, 8 January 1987, No L 6/1).

Ever since, projected imports have no longer been taken into account, except in *sodium carbonate from Bulgaria, the German Democratic Republic, Poland and Romania*, where transactions under the inward processing arrangements were included, because they too may affect the Community industry (Council Regulation (EEC) No 1306/89 of 11 May 1989 imposing a definitive anti-dumping duty on imports of light sodium carbonate originating in Bulgaria, the German Democratic Republic, Poland and Romania, *O.J.*, 13 May 1989, No L 131/4). Moreover, EC anti-dumping law has codified the case law pursuant to which developments occurring after the investigation are ignored (Article 6(1) basic EC Regulation).

Compare the latter case with *barium chloride from the People's Republic of China and in the German Democratic Republic*, where, notwithstanding the fact that only a determination of actual injury was made, the goods held in the Community under the T1 regime (i.e., the regime for inward processing), were held to constitute «at least a threat of injury, as they may be cleared at the customs and put into free circulation in the Community at very short notice» (emphasis added) (Council Regulation (EEC) No 2370/83 of 19 August 1983 imposing a definitive anti-dumping duty on imports of barium chloride originating in the People's Republic of China and in the German Democratic Republic, *O.J.*, 20 August 1983, No L 228/28. See also: Commission Decision 90/540/EEC of 29 October 1990 terminating the anti-dumping review proceeding concerning imports of propanolol originating in the United States of America, *O.J.*, 6 November 1990, No L 306/23, where products imported under the T1 regime were taken into consideration in the actual injury investigation). Thus, for a determination of actual injury via a threat of injury, a possibility is sufficient, whereas European anti-dumping law requires more than a possibility to establish a threat of injury (Article 3.7. GATT Anti-dumping Code and Article 3(9) basic EC Regulation, which stipulate that a determination of threat of injury shall not be based «merely on allegation, conjecture or remote possibility»; see also: Article 4(3) basic ECSC Decision; see further, *infra*, 495-507). Taking into account projected imports in an examination of actual injury is, thus, not only illegal, but may also distort an actual injury determination (VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 642).

It may, however, be argued that it is not illegal to take into account transactions under the inward processing arrangements because the possibility of re-exporting exists also for other imports. The fact that products imported from the dumping country are or will be sold on the Community market would seem decisive. Indeed, the volume of dumped imports is sometimes adjusted to take account of re-exports (Commission Regulation (EC) No 1783/94 of 18 July 1994 imposing a provisional anti-dumping duty on imports of furfuraldehyde originating in the People's Republic of China, *O.J.*, 21 July 1994, No L 186/11). Moreover, in cases where re-exporting is highly probable, the sales and rentals on the Community market have been used for analyzing the trends in dumped imports (Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12), or the European anti-dumping authorities may only have observed that some of the imported products are re-exported but that the great majority of the dumped products are

underlying the practice of taking into account preceding periods could be the assumption that dumping is only practised during the investigation period : by comparing the volume of imports during the investigation period with the volume of imports during the preceding period, it is possible to assess the effect of dumping¹¹²⁷. However, it is, only exceptionally examined whether this assumption holds¹¹²⁸. Therefore, the evolution of the volume of the dumped imports is no exact measure of the effect of dumping. It underestimates the effect of dumping : if, during the preceding period, dumping is practised, the fluctuations in the volume of dumped imports will, *ceteris paribus*, be the result of a change in the dumping margin, but not of the entire dumping margin¹¹²⁹. Sometimes, reasons other than the assumption that there has been any dumping during the preceding period, play a crucial role. For example, in one case, the European anti-dumping authorities had selected a period which started in the year preceding the one in which the exclusive rights of an exporter to manufacture one of the most widespread types of the dumped product had phased out. They selected that year because it typified the situation

consumed within the Community (Commission Regulation (EEC) No 2051/90 of 17 July 1990 imposing a temporary anti-dumping duty on imports of woven polyolefin bags originating in the People's Republic of China, *O.J.*, 19 July 1990, No L 187/36 (corrigendum, *O.J.*, 20 September 1990, No L 256/38)), or that the definitive imports alone caused injury (Commission Regulation (EEC) No 3262/90 of 5 November 1990 imposing a provisional anti-dumping duty on imports of audio tapes in cassettes originating in Japan, the Republic of Korea and Hong Kong, *O.J.*, 13 November 1990, No L 313/5 (corrigendum, *O.J.*, 12 January 1991, No L 9/36)). Conversely, total dumped imports are taken into account when there is no information confirming that re-exports might have taken place (Council Regulation (EEC) No 3434/91 of 25 November 1991 imposing a definitive anti-dumping duty on imports of oxalic acid originating in India or the People's Republic of China, *O.J.*, 28 November 1991, No L 326/6).

¹¹²⁷ *Contra* : VERMULST, E.A., and GRAAFSMA, F., «A Decade of European Community Anti-Dumping Law and Practice Applicable to Imports from China», *Journal of World Trade*, 1992/3, (5), 28 ; VERMULST, E., and WAER, P., « The Calculation of Injury Margins in EC Anti-Dumping Proceedings », *Journal of World Trade*, 1991/6, (5), 10.

¹¹²⁸ There were no dumped imports during the preceding period in : Commission Decision 81/493/EEC of 6 July 1981 terminating the anti-dumping procedure concerning imports of furfural originating in the Dominican Republic, Spain and the People's Republic of China, *O.J.*, 11 July 1981, No L 189/57 ; Commission Regulation (EEC) No 290/83 of 2 February 1983 imposing a provisional anti-dumping duty on imports of urea ammonium nitrate solution fertilizer originating in the United States of America, *O.J.*, 4 February 1983, No L 33/9 ; Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1 ; Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries ; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24.

Review proceedings in which the period for examining injury starts from the year in which the anti-dumping measures under review were imposed, rely on a similar assumption. In these proceedings, such a period is chosen in order to check whether the anti-dumping measures under review continue to be sufficient to eliminate the injury caused by the dumped imports (C.J.E.C., joined cases C-305/86 and C-160/87, 11 July 1990, *Neotype Techmasexport GmbH v Commission and Council*, *E.C.R.*, 1990, I, (2945), 2986 (Opinion of Advocate General VAN GERVEN) and 3005 ; Commission Regulation (EEC) No 3019/86 of 30 September 1986 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania and the USSR, *O.J.*, 1 October 1986, No L 280/68). Hence, they assume that the anti-dumping measures under review were originally able to remedy the injurious effects of the dumping, i.e., to make injurious dumping to disappear. As a consequence, they compare a period without injurious dumping to a period with allegedly injurious dumping and are able to assess exactly the injurious effects of this new stance of dumping.

Dumping during the entire period, i.e., the preceding period and the investigation period, was found in : Commission Regulation (EEC) No 171/82 of 25 January 1982 imposing a provisional anti-dumping duty on imports of oxalic acid originating in China and Czechoslovakia, *O.J.*, 27 January 1982, No L 19/26 (corrigendum, *O.J.*, 9 February 1982, No L 34/11).

¹¹²⁹ DIDIER, P., «Deux années d'application du nouveau règlement antidumping de la CEE», *Cahiers de Droit Européen*, 1982, (21), 42-43.

which existed prior to the opening of a substantial share of the market in the wake of the expiry of these exporter's exclusive rights¹¹³⁰. It should hardly be pointed out that, after the opening of the market for all producers, their market share will substantially increase regardless of whether they dump and that the investigation will result in an overestimation of the effects of the dumping¹¹³¹. Nevertheless, the Court of Justice found that the European anti-dumping authorities did not exceed their discretion in basing their choice on that ground¹¹³². Hence, in the opinion of the Court, European anti-dumping law does not require a comparison between a period without dumping and one with dumping. From a legal point of view, the Court is, indeed, right, but the subsequent underestimation or overestimation of the effects of the dumping will make it difficult to assess them exactly.

On the other hand, under GATT and European anti-dumping law, only the volume of dumped imports is relevant (Articles 3.1. and 3.2. GATT Anti-dumping Code ; Article 3(2) and (3) basic EC Regulation ; Article 4(2)(a) basic ECSC Decision)¹¹³³. Hence, European anti-dumping case law is illegal, because it generally focusses on the evolution of total imports, since, even

¹¹³⁰ C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, E.C.R., 1991, I, (2069), 2104 (Report for the Hearing : conclusions of the Council), 2159 (Opinion of Advocate General LENZ) and 2192.

¹¹³¹ The choice of the period preceding the investigation period may also affect the other factors indicating the cause of injury, such as the margin of price undercutting between the dumping prices and the Community industry's prices (see : *infra*, 456-467). For example, taking as starting point the year preceding the one in which the exclusive rights of a Japanese exporter to manufacture printers compatible with IBM personal computers had phased out, also affected the margin of price undercutting. Indeed, as the Court of Justice has pointed out, the margin of price undercutting would have been lower if the year in which those exclusive rights had phased out, had been taken as starting point (C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, E.C.R., 1991, I, (2069), 2193 ; see also : *ibidem* : 2104 (Report for the Hearing : conclusions of the Council) and 2161 (Opinion of Advocate General LENZ)). Hence, also here, the choice of the period to investigate the injury favours the finding of injury.

¹¹³² C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, E.C.R., 1991, I, (2069), 2192. See also : *ibidem*, 2159 (Opinion of Advocate General LENZ).

¹¹³³ BELLIS, J.-F., «The EEC Antidumping System», in *Antidumping Law and Practice. A Comparative Study*, JACKSON, J.H., and VERMULST, E.A. (eds.), New York, Harvester Wheatsheaf, 1990, (41), 89 ; VAN BAEL, I., and BELLIS, J.-F., *Anti-Dumping and other Trade Protection Laws of the EEC*, Bicester, CCH Editions Ltd., 1990, 126 ; VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 641.

For Advocate General LENZ, only the volume of the dumped imports may be taken into account, but the prices and price undercutting «can be established without restriction» (C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, E.C.R., 1991, I, (2069), 2164 (Opinion of Advocate General LENZ)). This point of view is, however, not consistent : the rule of European anti-dumping law to which he refers in connection with the factors on prices and price undercutting (i.e., Article 3(3) basic EC Regulation and Article 4(2)(b) basic ECSC Decision), treats of «the prices of dumped imports» or of the «price undercutting by the dumped imports», just as the rule on the factor volume treats of «the volume of dumped imports» (i.e., Article 3(3) basic EC Regulation and Article 4(2)(a) basic ECSC Decision) to which he refers in order to restrict this factor to the dumped products. Therefore, contrary to the opinion of Advocate General LENZ, the factors on price and price undercutting, just as the factor on volume, have to be restricted to the dumped imports.

during the investigation period, some products may be imported without dumping¹¹³⁴. Moreover, if the volume of non-dumped imports increases or decreases, this practice will overestimate, respectively, underestimate the effect of dumping : if it is taken into account, an increase (a decrease) in the volume of non-dumped imports will reinforce (weaken) the increase in the volume of dumped imports or it will weaken (reinforce) the decrease in it. In static terms, it always overestimates the effect of dumping, as the volume of total imports can never be smaller than the volume of dumped imports.

According to the Court of Justice, the European anti-dumping authorities must only take account of the dumped imports actually sold on the Community market, unless the volume of the dumped imports is not significantly exceeding of the volume of sales of those imports¹¹³⁵. In this respect, the Court disregards that European, as well as GATT anti-dumping law treat only of dumped imports and do not at all refer to sales of the dumped products on the Community market, not even to assess their evolution relative to Community consumption (Article 3.2. GATT Anti-dumping Code ; Article 3.3. basic EC Regulation ; Article 4(2)(a) basic ECSC Decision).

1134 As J. BUHART (*«Le régime communautaire de l'antidumping : vingt ans d'expérience»*, *Revue Trimestrielle de Droit Européen*, 1988, (253), 274) puts it, it is sufficient that the products are suspected of being the object of dumping (*«produits soupçonnés de faire l'objet d'un dumping»*).

Only in a minority of cases specific references are made to the volume of dumped imports : Commission Regulation (EEC) No 2999/80 of 20 November 1980 imposing a provisional anti-dumping duty on vinyl acetate monomer originating in the United States of America, *O.J.*, 21 November 1980, No L 311/13 ; Commission Decision 80/1175/EEC of 15 December 1980 terminating the anti-dumping proceeding concerning imports of pressure sensitive paper masking tape originating in the United States of America, *O.J.*, 19 December 1980, No L 344/57 ; Council Regulation (EEC) No 3439/80 of 22 December 1980 imposing a definitive anti-dumping duty on imports of certain polyester yarn originating in the United States of America, *O.J.*, 31 December 1980, No L 358/91 ; Council Regulation (EEC) No 349/81 of 9 February 1981 imposing a definitive anti-dumping duty on certain chemical fertilizer originating in the United States of America, *O.J.*, 12 February 1981, No L 39/4 ; Commission Decision 81/35/EEC of 9 February 1981 accepting undertakings in connection with the anti-dumping proceedings concerning certain chemical fertilizer originating in the United States of America, *O.J.*, 12 February 1981, No L 39/35 ; Commission Decision 81/366/EEC of 18 May 1981 accepting an undertaking given in connection with the anti-dumping proceedings concerning louvre doors originating in Malaysia and Singapore and terminating the proceedings, *O.J.*, 22 May 1981, No L 135/33 ; Commission Regulation (EEC) No 1411/81 of 25 May 1981 imposing a provisional anti-dumping duty on orthoxylene (o-Xylene) originating in Puerto Rico and the United States of America, *O.J.*, 27 May 1981, No L 141/29 ; Commission Regulation (EEC) No 1591/81 of 10 June 1981 imposing a provisional anti-dumping duty on paraxylene (p-xylene) originating in Puerto Rico, the United States of America and the US Virgin Islands, *O.J.*, 16 June 1981, No L 158/7 ; Commission Regulation (EEC) No 2017/81 of 15 July 1981 imposing a provisional anti-dumping duty on phenol originating in the United States of America, *O.J.*, 18 July 1981, No L 195/22 ; Council Regulation (EEC) No 2761/81 of 22 September 1981 imposing a definitive anti-dumping duty on o-xylene (orthoxylene) originating in Puerto Rico and the United States of America, *O.J.*, 25 September 1981, No L 270/1 ; Council Regulation (EEC) No 2940/81 of 14 October 1981 imposing a definitive anti-dumping duty on p-xylene (paraxylene) originating in Puerto Rico, the United States of America and the United States Virgin Islands, *O.J.*, 15 October 1981, No L 296/1 ; Council Regulation (EEC) No 90/82 of 18 January 1982 imposing a definitive anti-dumping duty on phenol originating in the United States of America, *O.J.*, 18 January 1982, No L 12/1 ; Commission Regulation (EEC) No 171/82 of 25 January 1982 imposing a provisional anti-dumping duty on imports of oxalic acid originating in China and Czechoslovakia, *O.J.*, 27 January 1982, No L 19/26 (corrigendum, *O.J.*, 9 February 1982, No L 34/11) ; Commission Regulation (EEC) No 250/82 of 29 January 1982 imposing a provisional anti-dumping duty on certain welded iron or steel tubes originating in Romania, *O.J.*, 3 February 1982, No L 26/5 ; Council Decision 82/423/EEC of 21 June 1982 terminating the anti-dumping proceeding concerning imports of certain refrigerators originating in Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania, the Soviet Union and Yugoslavia, *O.J.*, 29 June 1982, No L 184/23 ; Commission Regulation (EEC) No 290/83 of 2 February 1983 imposing a provisional anti-dumping duty on imports of urea ammonium nitrate solution fertilizer originating in the United States of America, *O.J.*, 4 February 1983, No L 33/9 ; Council Regulation (EEC) No 2702/87 of 4 September 1987 repealing a definitive anti-dumping duty on styrene monomer originating in the United States of America and terminating the investigation, *O.J.*, 8 September 1987, No L 258/20 ; VAN BAEL, I., and BELLIS, J.-F., *Anti-Dumping and other Trade Protection Laws of the EEC*, Bicester, CCH Editions Ltd., 1990, 126.

1135 C.J.E.C., joined cases C-305/86 and C-160/87, 11 July 1990, *Neotype Techmashexport GmbH v Commission and Council*, E.C.R., 1990, I, (2945), 2985 (Opinion of Advocate General VAN GERVEN) and 3006.

Although the Court's case law seems reasonable, in particular when the evolution of the volume of the dumped imports is assessed in proportion to Community consumption, it is illegal whether or not imports and sales actually coincide : the volume of the imports should always be used.

3.3.1.2.1.2. *The volume of dumped imports as evidence of injury*

The only specification about the volume of dumped imports as evidence of injury is that the examination of any injury raises the question whether there has been a significant increase, either in absolute terms or regarding the production or consumption in the Community (Article 3.2. GATT Anti-dumping Code ; Article 3(3) basic EC Regulation ; Article 4(2)(a) basic ECSC Decision). Most anti-dumping cases pay attention to both absolute volume and market share in terms of consumption¹¹³⁶. An simultaneous increase in absolute volume and in market share is strong proof of injury¹¹³⁷. However, as none of those factors give necessarily decisive guidance (Article 3.2. GATT Anti-dumping Code ; Article 3(3) basic EC Regulation ; Article 4(2) basic ECSC Decision), no strict guidelines can be found in European anti-dumping case law in which :

¹¹³⁶ BESELER, J.F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 156.

Usually, consumption is seen in terms of total sales realised on the Community market. Exceptionally, the market share in terms of placements (Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5) or total imports (Commission Regulation (EEC) No 1695/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of polyester yarn originating in Mexico, South Korea, Taiwan and Turkey, *O.J.*, 17 June 1988, No L 151/39 (corrigendum, *O.J.*, 18 June 1988, No L 152/58) ; Commission Regulation (EEC) No 1696/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 June 1988, No L 151/47) is taken into consideration. However, in *plain paper photocopiers from Japan* the determination of the market share in terms of the copy volume was rejected because this would involve the investigation of other products such as paper and other supplies instead of photocopiers (Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12).

¹¹³⁷ BESELER, J.F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 156 ; VAN BAEL, I., and BELLIS, J.F., *International Trade Law and Practice of the European Community. EEC Anti-Dumping and other Trade Protection Laws*, Bicester, CCH Editions Ltd., 1985, 74 ; VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 641.

- no injury is found in cases where dumped imports increased both in absolute volume and in terms of market share¹¹³⁸ ;
- injury is found in cases where only the market share increased, whereas the absolute volume remained constant or even decreased¹¹³⁹ ;

¹¹³⁸ Commission Decision 80/1175/EEC of 15 December 1980 terminating the anti-dumping proceeding concerning imports of pressure sensitive paper masking tape originating in the United States of America, *O.J.*, 19 December 1980, No L 344/57 ; Commission Decision 81/493/EEC of 6 July 1981 terminating the anti-dumping procedure concerning imports of furfural originating in the Dominican Republic, Spain and the People's Republic of China, *O.J.*, 11 July 1981, No L 189/57 ; Commission Regulation (EEC) No 1631/83 of 15 June 1983 imposing a provisional anti-dumping duty on imports of certain glass textile fibres (rovings) originating in Czechoslovakia, the German Democratic Republic and Japan, accepting a price undertaking from one Japanese exporter and terminating the proceeding in respect of imports of certain glass textile fibres (mats), originating in Czechoslovakia and the German Democratic Republic, *O.J.*, 18 June 1983, No L 160/18 ; Commission Decision 86/344/EEC of 17 July 1986 terminating the anti-dumping proceeding concerning imports of Portland cement originating in the German Democratic Republic, Poland and Yugoslavia, *O.J.*, 25 July 1986, No L 202/43 ; Commission Decision 90/154/EEC of 26 March 1990 terminating the anti-dumping proceeding concerning imports of ammonium paratungstate originating in the People's Republic of China and the Republic of Korea, *O.J.*, 30 March 1990, No L 83/117.

See also : C.J.E.C., case C-315/90, 27 November 1991, *Groupeement des Industries de Matériels d'Equipement Electrique et de l'Electronique Industrielle Associée (Gimelec) a.o. v Commission, E.C.R.*, 1991, I, (5589), 5595 (Report for the Hearing : conclusions of the Commission), where the Commission stated in general «that an increase in the market share of the (dumped) imports is not a condition *sine qua non* for a determination of injury», a point of view also shared by Advocate General VAN GERVEN (C.J.E.C., case C-315/90, 27 November 1991, *Groupeement des Industries de Matériels d'Equipement Electrique et de l'Electronique Industrielle Associée (Gimelec) a.o. v Commission, E.C.R.*, 1991, I, (5589), 5605 (Opinion of Advocate General VAN GERVEN).

Sometimes, it is underscored that, during the last part of the period taken into account, dumped imports have decreased in absolute volume and market share, in order to explain a finding of no injury in cases where the absolute volume and the market share of the dumped imports increased (Commission Decision 85/501/EEC of 11 November 1985 terminating the anti-dumping proceeding concerning imports of wire rod originating in Brazil, Portugal, Trinidad and Tobago and Venezuela, *O.J.*, 13 November 1985, No L 299/18 ; Commission Decision 86/86/EEC of 18 March 1986 terminating the anti-dumping proceeding concerning imports of stainless steel household cooking ware originating in South Korea, *O.J.*, 19 March 1986, No L 74/33 ; Commission Decision 86/100/EEC of 15 April 1986 terminating the anti-dumping proceeding concerning imports of ball bearings and tapered roller bearings originating in Poland, Romania and the Soviet Union, *O.J.*, 18 April 1986, No L 102/31).

¹¹³⁹ Commission Regulation (EEC) No 1101/81 of 23 April 1981 imposing a provisional anti-dumping duty on potato granules originating in Canada, *O.J.*, 28 April 1981, No L 116/11 ; Commission Regulation (EEC) No 1633/82 of 23 June 1982 imposing a provisional anti-dumping duty on imports of fibre building board (hardboard) originating in Romania, repealing Commission Decision No 80/564/EEC of 4 June 1980 and accepting undertakings in connection with the proceeding in respect of imports of fibre building board from Czechoslovakia, Finland, Hungary, Norway, Poland, Spain, Sweden and the Soviet Union and terminating the proceeding with regard to those countries and Bulgaria, *O.J.*, 25 June 1982, No L 181/19 ; Council Regulation (EEC) No 1882/82 of 12 July 1982 imposing a definitive anti-dumping duty on mechanical wrist-watches originating in the USSR, *O.J.*, 15 July 1982, No L 207/1 ; Commission Regulation (EEC) No 1958/82 of 16 July 1982 imposing a provisional anti-dumping duty on imports of photographic enlargers originating in Poland and the USSR, accepting an undertaking and terminating the proceeding in respect of imports of photographic enlargers originating in Czechoslovakia, *O.J.*, 21 July 1982, No L 212/32 ; Commission Decision 83/428/EEC of 26 August 1983 accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of caravans for camping and parts thereof originating in Yugoslavia and terminating that proceeding, *O.J.*, 30 August 1983, No L 240/12 ; Commission Regulation (EEC) No 761/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten ores and concentrates originating in the People's Republic of China, and terminating the proceeding concerning imports originating in Hong Kong, *O.J.*, 30 March 1990, No L 83/23 ; Commission Regulation (EC) No 1783/94 of 18 July 1994 imposing a provisional anti-dumping duty on imports of furfuraldehyde originating in the People's Republic of China, *O.J.*, 21 July 1994, No L 186/11.

- injury is found in cases where the market share did not increase and where the absolute volume, at the most, followed the evolution of the Community consumption¹¹⁴⁰.

With regard to the extent of the increases and decreases in absolute volume and market share, no guidelines have been provided either. In table 4, it is shown that the same change in absolute volume and market share can lead to either a finding of injury or one of no injury.

¹¹⁴⁰ C.J.E.C., joined cases C-304/86 and C-185/87, 11 July 1990, *Enital SpA v Commission and Council*, E.C.R., 1990, I, (2939), 2941; C.J.E.C., joined cases C-305/86 and C-160/87, 11 July 1990, *Neotype Techmaslexport GmbH v Commission and Council*, E.C.R., 1990, I, (2945), 3005-3006; C.J.E.C., joined cases C-320/86 and C-188/87, 11 July 1990, *Stanko France v Commission and Council*, E.C.R., 1990, I, (3013), 3015; C.J.E.C., case C-157/87, 11 July 1990, *Electroimpex a.o. v Council*, E.C.R., 1990, I, (3021), 3023; C.J.E.C., case C-323/88, 11 July 1990, *SA Sermes v Directeur des services des douanes de Strasbourg*, E.C.R., 1990, I, (3027), 3053; Commission Regulation (EEC) No 1633/82 of 23 June 1982 imposing a provisional anti-dumping duty on imports of fibre building board (hardboard) originating in Romania, repealing Commission Decision No 80/564/EEC of 4 June 1980 and accepting undertakings in connection with the proceeding in respect of imports of fibre building board from Czechoslovakia, Finland, Hungary, Norway, Poland, Spain, Sweden and the Soviet Union and terminating the proceeding with regard to those countries and Bulgaria, *O.J.*, 25 June 1982, No L 181/19; Commission Decision 83/360/EEC of 18 July 1983 terminating the anti-dumping proceeding in respect of imports of certain pears in syrup, originating in Australia, the People's Republic of China and the Republic of South Africa, *O.J.*, 20 July 1983, No L 196/22; Council Regulation (EEC) No 2978/83 of 24 October 1983 amending Regulation (EEC) No 191/80 imposing a definitive anti-dumping duty on lithium hydroxide originating in the United States of America and the Soviet Union, *O.J.*, 26 October 1983, No L 294/3; Commission Regulation (EEC) No 2317/85 of 12 August 1985 imposing a provisional anti-dumping duty on imports of roller chains for cycles originating in the USSR and the People's Republic of China, *O.J.*, 14 August 1985, No L 217/7; Commission Decision 86/35/EEC of 21 February 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of fibre building board from Finland and Sweden and terminating the investigation, *O.J.*, 25 February 1986, No L 46/23; Commission Decision 90/196/EEC of 10 April 1990 terminating the anti-dumping proceeding concerning imports of methenamine (hexamethylenetetramine) originating in Hungary and Yugoslavia and accepting undertakings offered in connection with the proceeding concerning imports of methenamine (hexamethylenetetramine) originating in Bulgaria, Czechoslovakia, Poland and Romania, *O.J.*, 24 April 1990, No L 104/14; Commission Regulation (EEC) No 3262/90 of 5 November 1990 imposing a provisional anti-dumping duty on imports of audio tapes in cassettes originating in Japan, the Republic of Korea and Hong Kong, *O.J.*, 13 November 1990, No L 313/5 (corrigendum, *O.J.*, 12 January 1991, No L 9/36). See also: Council Regulation (EEC) No 1251/91 of 13 May 1991 imposing a definitive anti-dumping duty on imports of audio tapes in cassettes originating in Japan and the Republic of Korea, collecting definitively the provisional duty and terminating the procedure concerning Hong Kong, *O.J.*, 14 May 1991, No L 119/35.

Table 4 - Evolution in the absolute volume and market share of the dumped imports - minimum and maximum average increase/decrease on one-year basis

	Injury		No injury	
<i>Evolution in :</i>	from	up to	from	up to
Absolute volume	-25.1 % ^a	+13236.7 % ^b	-60.3 % ^c	+6830.2 % ^d
Market share	-24.2 % ^e	+931.5 % ^f	-45.3 % ^g	+123.0 % ^h

Source : Official Journal of the European Communities ; own calculations¹¹⁴¹.

Moreover, the evolution in the volume of dumped imports does not have to be taken into account. Also, the absolute height of absolute volume and/or market share may be decisive, since in European anti-dumping law :

- no injury is found because of the low volume of (dumped) imports¹¹⁴² ;

¹¹⁴¹ In particular :

- ^a Commission Regulation (EEC) No 1958/82 of 16 July 1982 imposing a provisional anti-dumping duty on imports of photographic enlargers originating in Poland and the USSR, accepting an undertaking and terminating the proceeding in respect of imports of photographic enlargers originating in Czechoslovakia, *O.J.*, 21 July 1982, No L 212/32 ;
- ^b Commission Recommendation No 2975/82/ECSC of 8 November 1982 imposing a definitive anti-dumping duty on certain sheets and plates, of iron or steel, originating in Brazil, *O.J.*, 9 November 1982, No L 312/10 ;
- ^c Commission Decision 82/808/EEC of 25 November 1982 terminating the anti-dumping procedure concerning imports of aluminium foil for household and catering use originating in Austria, the German Democratic Republic, Hungary and Israel, *O.J.*, 1 December 1982, No L 339/58 ;
- ^d Commission Decision 89/56/EEC of 20 January 1989 terminating the anti-dumping proceeding concerning imports of certain seamless tubes of iron or non-alloy steel originating in Austria, *O.J.*, 28 January 1989, No L 25/87 ;
- ^e Commission Regulation (EEC) No 2317/85 of 12 August 1985 imposing a provisional anti-dumping duty on imports of roller chains for cycles originating in the USSR and the People's Republic of China, *O.J.*, 14 August 1985, No L 217/7 ;
- ^f Commission Regulation (EEC) No 699/88 of 15 March 1988 imposing a provisional anti-dumping duty on imports of oxalic acid originating in Taiwan and South Korea, *O.J.*, 18 March 1988, No L 72/12 ;
- ^g Council Decision 87/66/EEC of 19 January 1987 accepting undertakings given in connection with imports of binder and baler twine originating in Brazil and Mexico, and terminating the investigations, *O.J.*, 5 February 1987, No L 34/55 ;
- ^h Commission Decision 86/86/EEC of 18 March 1986 terminating the anti-dumping proceeding concerning imports of stainless steel household cooking ware originating in South Korea, *O.J.*, 19 March 1986, No L 74/33.

¹¹⁴² Commission Decision 80/1175/EEC of 15 December 1980 terminating the anti-dumping proceeding concerning imports of pressure sensitive paper masking tape originating in the United States of America, *O.J.*, 19 December 1980, No L 344/57 ; Commission Decision 81/493/EEC of 6 July 1981 terminating the anti-dumping procedure concerning imports of furfural originating in the Dominican Republic, Spain and the People's Republic of China, *O.J.*, 11 July 1981, No L 189/57 ; Commission Decision 81/1012/EEC of 17 December 1981 terminating the anti-dumping proceeding concerning imports of certain monochrome portable television sets originating in the Republic of Korea, *O.J.*, 19 December 1981, No L 364/49 ; Commission Regulation (EEC) No 171/82 of 25 January 1982 imposing a provisional anti-dumping duty on imports of oxalic acid originating in China and Czechoslovakia, *O.J.*, 27 January 1982, No L 19/26 (corrigendum, *O.J.*, 9 February 1982, No L 34/11). See also : Commission Regulation (EEC) No 250/82 of 29 January 1982 imposing a provisional anti-dumping duty on certain welded iron or steel tubes originating in Romania, *O.J.*, 3 February 1982, No L 26/5 ; Commission Recommendation No 2975/82/ECSC of 8 November 1982 imposing a definitive anti-dumping duty on certain sheets and plates, of iron or steel, originating in Brazil, *O.J.*, 9 November 1982, No L 312/10.

- no injury is found because of the low market shares (on average below 1 %)¹¹⁴³,

¹¹⁴³ Commission Regulation (EEC) No 1633/82 of 23 June 1982 imposing a provisional anti-dumping duty on imports of fibre building board (hardboard) originating in Romania, repealing Commission Decision No 80/564/EEC of 4 June 1980 and accepting undertakings in connection with the proceeding in respect of imports of fibre building board from Czechoslovakia, Finland, Hungary, Norway, Poland, Spain, Sweden and the Soviet Union and terminating the proceeding with regard to those countries and Bulgaria, *O.J.*, 25 June 1982, No L 181/19 (Bulgaria : between 0.2 % and 0.7 %); Commission Decision 82/808/EEC of 25 November 1982 terminating the anti-dumping procedure concerning imports of aluminium foil for household and catering use originating in Austria, the German Democratic Republic, Hungary and Israel, *O.J.*, 1 December 1982, No L 339/58 (Israel : 1.1 %); Commission Regulation (EEC) No 1631/83 of 15 June 1983 imposing a provisional anti-dumping duty on imports of certain glass textile fibres (rovings) originating in Czechoslovakia, the German Democratic Republic and Japan, accepting a price undertaking from one Japanese exporter and terminating the proceeding in respect of imports of certain glass textile fibres (mats), originating in Czechoslovakia and the German Democratic Republic, *O.J.*, 18 June 1983, No L 160/18 (mats from Czechoslovakia and the German Democratic Republic : between 1.5 % and 3 %); Commission Decision 85/252/EEC of 23 April 1985 terminating the anti-dumping proceeding concerning imports of certain titanium mill products originating in Japan and the United States of America, *O.J.*, 26 April 1985, No L 113/30 (market share of the sole dumping exporter : 1.8 %); Commission Decision 85/470/EEC of 7 October 1985 terminating the anti-dumping proceeding concerning imports of standard wood particle board originating in Bulgaria, Czechoslovakia, Poland, Romania, the Soviet Union, Spain and Yugoslavia, *O.J.*, 10 October 1985, No L 268/22 (market shares held by each country individually : between 0.2 and 1.4 %); Commission Decision 85/501/EEC of 11 November 1985 terminating the anti-dumping proceeding concerning imports of wire rod originating in Brazil, Portugal, Trinidad and Tobago and Venezuela, *O.J.*, 13 November 1985, No L 299/18 (all dumping countries cumulated : 0.9 %); Commission Decision 86/100/EEC of 15 April 1986 terminating the anti-dumping proceeding concerning imports of ball bearings and tapered roller bearings originating in Poland, Romania and the Soviet Union, *O.J.*, 18 April 1986, No L 102/31 (market shares held by each country individually : between 0.7 and 1.5 %); Commission Decision 86/344/EEC of 17 July 1986 terminating the anti-dumping proceeding concerning imports of Portland cement originating in the German Democratic Republic, Poland and Yugoslavia, *O.J.*, 25 July 1986, No L 202/43 (all dumping countries cumulated : between 0.13 % and 0.47 %); Council Decision 87/66/EEC of 19 January 1987 accepting undertakings given in connection with imports of binder and baler twine originating in Brazil and Mexico, and terminating the investigations, *O.J.*, 5 February 1987, No L 34/55 (Mexico : 1.6 %); Commission Decision 89/56/EEC of 20 January 1989 terminating the anti-dumping proceeding concerning imports of certain seamless tubes of iron or non-alloy steel originating in Austria, *O.J.*, 28 January 1989, No L 25/87 (market share less than 1.0 %); Commission Decision No 1056/89/EEC of 19 April 1989 terminating the review of anti-dumping measures concerning imports of certain iron or steel coils, hot-rolled, originating in Argentina and Canada and confirming the expiry of those measures, *O.J.*, 25 April 1989, No L 112/5 (cumulated market share less than 1.0 %); Commission Decision 90/196/EEC of 10 April 1990 terminating the anti-dumping proceeding concerning imports of methenamine (hexamethylenetetramine) originating in Hungary and Yugoslavia and accepting undertakings offered in connection with the proceeding concerning imports of methenamine (hexamethylenetetramine) originating in Bulgaria, Czechoslovakia, Poland and Romania, *O.J.*, 24 April 1990, No L 104/14 (Hungary : 0.3 %; Yugoslavia : 0.1 %); Commission Decision 90/240/EEC of 22 May 1990 terminating the proceeding in connection with a review of anti-dumping measures regarding imports of fibre building-board (hardboard) originating in Finland, Argentina, Switzerland and Yugoslavia and repealing Decisions 86/35/EEC and 86/232/EEC accepting the undertakings given by the exporters concerned, *O.J.*, 31 May 1990, No L 138/44 (Argentina : below 1 %); Commission Decision 90/383/EEC of 13 July 1990 terminating the anti-dumping proceeding concerning imports of NPK fertilizers originating in Hungary, Poland, Romania and Yugoslavia, *O.J.*, 20 July 1990, No L 188/63 (Hungary : 0.58 %; Poland : 0.25 %; Romania : 0.15 %; Yugoslavia : 1.94 %); Commission Decision 90/507/EEC of 7 September 1990 terminating the review of the anti-dumping measures concerning dense sodium carbonate originating in the United States of America, *O.J.*, 16 October 1990, No L 283/38 (United States of America : 1.4 %); Council Regulation (EEC) No 1251/91 of 13 May 1991 imposing a definitive anti-dumping duty on imports of audio tapes in cassettes originating in Japan and the Republic of Korea, collecting definitively the provisional duty and terminating the procedure concerning Hong Kong, *O.J.*, 14 May 1991, No L 119/35 (Hong Kong : 1.6 %); Commission Regulation (EEC) No 2818/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports of cotton yarn originating in Brazil, Egypt and Turkey and terminating the anti-dumping proceeding in respect of cotton yarn originating in India and Thailand, *O.J.*, 27 September 1991, No L 271/17 (Thailand : 0.1 %; India : 0.7 %); Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7 (the Republic of Korea : 0.5 %); Council Regulation (EEC) No 2553/93 of 13 September 1993 amending Regulation (EEC) No 2089/84 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 18 September 1993, No L 235/3 (Singapore : 0.6 %); Council Regulation (EC) No 3359/93 of 2 December 1993 imposing amended anti-dumping measures on imports of ferro-silicon originating in Russia, Kazakhstan, Ukraine, Iceland, Norway, Sweden, Venezuela and Brazil, *O.J.*, 9 December 1993, No L 302/1 (the Republics of Bosnia-Herzegovina and Slovenia and the former Yugoslav Republic of Macedonia together : less than 1.2 %); Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50 (Turkey : 1.5 %); VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 641.

See also : *B.I.S.D.*, Thirty-second Supplement, Geneva, GATT, 1986, 69, where, in a particular case under the GATT dispute settlement procedure, a market share of 1.5 % was held to constitute an almost insignificant part in the overall sales of the like product.

probably because such low market shares indicate that the dumping exporter lacks market power on the Community market¹¹⁴⁴ ;

- injury is found, notwithstanding low market shares (around 2 %)¹¹⁴⁵ ; in such cases, the low market shares are usually upgraded by data about higher market shares in parts of the

1144 See :

- *wheeled loaders from Japan*, where the price undercutting was considered not to be material in view of the market share amounting to only 8.8 % (Commission Decision 89/111/EEC of 9 February 1989 terminating the anti-dumping proceeding concerning imports of wheeled loaders originating in Japan, *O.J.*, 11 February 1989, No L 39/35) ;
- *sodium carbonate from the United States of America*, where, in the light of the limited volume of the dumped imports (market share of 1.4 %), the price undercutting was found to have practically no effect on general price levels (Commission Decision 90/507/EEC of 7 September 1990 terminating the review of the anti-dumping measures concerning dense sodium carbonate originating in the United States of America, *O.J.*, 16 October 1990, No L 283/38).

Conversely, proof of market power has been based on large market shares :

- in *electronic scales from Japan*, where a market share of 85 % in Greece, of 77 % in the Netherlands, of 58 % in Belgium and of 30 % in the United Kingdom, held by the dumped imports, was found to be sufficient to determine that the price level of those Community markets was particularly affected (Council Regulation (EEC) No 1058/86 of 8 April 1986 imposing a definitive anti-dumping duty on imports of certain electronic scales originating in Japan, *O.J.*, 12 April 1986, No L 97/1) ;
- in *housed bearing units from Japan*, where it was noted that «(t)his situation [that the sales prices charged by the Community producers were below those required to cover their production costs and to provide a reasonable profit margin] is obviously due to the level of price undercutting on housed bearing units originating in Japan and to the market share of such units as compared with that of housed bearing units originating in the Community (40:60)» (Commission Regulation (EEC) No 2516/86 of 4 August 1986 imposing a provisional anti-dumping duty on imports of housed bearing units originating in Japan, *O.J.*, 7 August 1986, No L 221/16) ;
- in *standardized multi-phase electric motors from Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union*, where a market share of 20.3 % was considered to be more than sufficient to determine the price level in the Community (Council Regulation (EEC) No 864/87 of 23 March 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union, and definitively collecting the amounts secured as provisional duties, *O.J.*, 27 March 1987, No L 83/1) ;
- in *DRAMs from Japan*, where a market share of between 70 and 85 % was considered to represent a dominant market position (Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79 ; corrigendum, *O.J.*, 10 February 1990, No L 38/44)) ;
- in *polyolefin bags from the People's Republic of China*, where it was stated that «(b)ecause of their large market share, Chinese exports have greatly influenced the price of bags in the Community» (Commission Regulation (EEC) No 2051/90 of 17 July 1990 imposing a temporary anti-dumping duty on imports of woven polyolefin bags originating in the People's Republic of China, *O.J.*, 19 July 1990, No L 187/36 (corrigendum, *O.J.*, 20 September 1990, No L 256/38)) (market share of the dumped imports : 35.2 % ; market share of Community producers : 26.6 % ; market share of non-dumped imports originating in 30 different countries : 26.9 %. Remarkably, the sum of these three market shares amounts only to 88.7 % and not 100.0 %. The anti-dumping decision does not explain who holds the spare market share of 11.3 %) ;
- where the dumping exporters, in view of the size of their market shares and the fact that their prices were low, were said to exert heavy downward pressure on the price level in the Community and consequently on the level of the Community producers' prices (Commission Regulation (EEC) No 2054/91 of 11 July 1991 imposing a provisional anti-dumping duty on imports of dihydrostreptomycin originating in the People's Republic of China, *O.J.*, 13 July 1991, No L 187/23 ; Council Regulation (EEC) No 3836/91 of 19 December 1991 imposing a definitive anti-dumping duty on imports of dihydrostreptomycin originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty, *O.J.*, 31 December 1991, No 362/1) (figures on market share were not provided).

However, high market shares, such as a market share of 60 % in *housed bearing units from Japan* or market shares of between 30 % and 85 % in *electronic scales from Japan*, are not required to find that the dumping exporters have market power on the Community market. In *cylinder vacuum cleaners from Czechoslovakia, the German Democratic Republic and Poland*, the market share held by the dumped imports rose from 5.4 % in 1979 up to 7 % in 1981. This was considered «sufficient to disrupt the Community market for cylinder vacuum cleaners» (Commission Decision 82/398/EEC of 14 June 1982 accepting undertakings given in connection with the anti-dumping procedure concerning cylinder vacuum cleaners originating in Czechoslovakia, the German Democratic Republic and Poland and terminating the procedure, *O.J.*, 18 June 1982, No L 172/47).

1145 See, however : BOUDANT, J., *L'anti-dumping communautaire*, Paris, Economica, 1991, 138-139.

Community market¹¹⁴⁶, by referring to the substantial increase in these low market

¹¹⁴⁶ Reference has been made to :

- the non-captive Community market, see : *4,4'-isopropylidenediphenol from the United States of America*, where a market share of only 2 % was found to cause injury. The finding of injury was supported by the fact that practically all American imports were destined for the non-captive market, on which they held a market share of 16.60 % (Council Regulation (EEC) No 2024/83 of 18 July 1983 establishing a definitive anti-dumping duty on 4,4'-isopropylidenediphenol originating in the United States of America, *O.J.*, 22 July 1983, No L 199/4) ;
- regional markets within the Community, see : *sheets and plates, of iron or steel, from Yugoslavia*, where dumping was found to cause injury, though the dumped imports held a market share of only 2.1 %. In certain regional markets in Germany and Italy, however, the dumped products held a market share of up to 18 % (Commission Decision No 2767/86/ECSC of 5 September 1986 imposing a provisional anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Yugoslavia, *O.J.*, 6 September 1986, No L 254/18).

See also : *iron or steel coils for re-rolling from Czechoslovakia and South Korea*, where only the market share held by the Czech and Korean dumped imports on the market of the United Kingdom was mentioned. This market share amounted to 3 %. Nowhere the market share of the dumped imports on the entire Community market is referred to. In view of the fact that total imports into the Community, in absolute volume, amounted in the first half of 1977 to 1 015 000 tonnes, i.e., a market share of 16 %, total consumption within the Community must equal 6 343 750 tonnes ; consequently, the dumped imports originating in Czechoslovakia and South Korea, which, over the same period, in absolute volume, amounted to 92 000 tonnes, must hold a market share of only 1.6 % on the whole Community market (Commission Recommendation No 112/78/ECSC of 18 January 1978 imposing a provisional anti-dumping duty on imports of iron or steel coils for re-rolling, originating in Czechoslovakia and South Korea, *O.J.*, 21 January 1978, No L 17/27).

The concentration of dumped imports on the market of some Member States is considered to be an instance of aggravating circumstances. Indeed, in *sodium carbonate from the United States of America* the Commission held that «these imports [originating in other countries than the United States of America], unlike those originating in the United States of America, are evenly spread over the whole Community market and their impact is thereby felt to a lesser extent» (Commission Regulation (EEC) No 2253/84 of 31 July 1984 imposing a provisional anti-dumping duty on certain imports of certain sodium carbonate originating in the United States of America and accepting undertakings in respect of other imports of the same product, *O.J.*, 2 August 1984, No L 206/15).

However, dumped imports concentrated on the market of some Member States may affect the Community producers established in the other Member States. It is possible that the Community producers established in the other Member States export their products to the markets of the Member States particularly affected by the dumped imports and, thus, on these markets face the competition of the dumped imports (Commission Regulation (EEC) No 2712/79 of 30 November 1979 imposing a provisional anti-dumping duty on certain acrylic fibres originating in the United States of America, *O.J.*, 4 December 1979, No L 308/11 ; Commission Decision 80/488/EEC of 6 May 1980 accepting an undertaking given in connection with the anti-dumping proceeding concerning certain acrylic fibres originating in Japan and terminating this proceeding, *O.J.*, 9 May 1980, No L 118/60 ; Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia, *O.J.*, 9 May 1987, No L 121/11). The dumped imports may also force the producers established in the Member States particularly affected by the dumped imports, to attempt to export increasing quantities of the product concerned to the markets of the other Member States, which may result in an increased degree of competition between the producers established in different Member States (Commission Decision 84/404/EEC of 25 July 1984 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of copper sulphate originating in Yugoslavia and terminating the proceeding, *O.J.*, 11 August 1984, No L 215/16 ; Council Regulation (EEC) No 1244/86 of 28 April 1986 imposing a definitive anti-dumping duty on imports of copper sulphate originating in Yugoslavia, *O.J.*, 30 April 1986, No L 113/4). European anti-dumping authorities take into account both indirect effects of dumping.

shares¹¹⁴⁷, to the usual height of the dumping exporter's market share¹¹⁴⁸, to the volatile nature of the trade pattern in the products as shown by the sudden increase of the dumped products¹¹⁴⁹, by cumulating dumped imports of various countries¹¹⁵⁰ or

1147 See :

- *sheets and plates, of iron or steel, from Yugoslavia*, where the dumped imports held a market share of only 2.1 %. Nevertheless, injury was found not only because of a market share of up to 18 % in certain regional markets in Germany and Italy, but also because the market shares held on the Community market, the German market and the Italian market had risen respectively by 83.8 %, 74.1 % and 110.2 % on a one-year basis (Commission Decision No 2767/86/ECSC of 5 September 1986 imposing a provisional anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Yugoslavia, *O.J.*, 6 September 1986, No L 254/18) ;
- *asbestos-cement corrugated sheets from Czechoslovakia and the German Democratic Republic*, where a finding of injury was arrived at though the dumped imports represented a market share of only 2.3 %. In this case it was emphasized that the market share had increased from 1.4 % in 1980 up to 2.3 % in 1983, which represents a rise of 64.3 % between 1980 and 1983 (or a rise of 18.0 % on a one-year basis). Moreover, it was added that the share of the Benelux market held by these imports had increased from 5.8 % in 1980 up to 20.4 % in 1983, representing a rise of 251.7 % (or a rise of 52.1 % on a one-year basis) (Commission Decision 84/465/EEC of 26 September 1984 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of asbestos-cement corrugated sheets originating in Czechoslovakia and the German Democratic Republic and terminating that proceeding, *O.J.*, 28 September 1984, No L 259/48) ;
- *mounted piezo-electric quartz crystal units from Japan, South Korea and the United States of America*, where the dumped imports held a market share of 2.47 % on the whole Community market and a market share of not more than 3.6 % on the market of the Federal Republic of Germany. Nevertheless, a finding of injury was arrived at because, over the period between 1977 and 1979, the market share on the whole Community market rose with 109.3 % (or 44.7 % on a one-year basis), whereas it rose with 157.1 % (or 60.4 % on a one-year basis) on the German market (Commission Decision 80/603/EEC of 23 June 1980 accepting undertakings given in connection with the anti-dumping proceedings concerning mounted piezo-electric quartz crystal units, originating in Japan, South Korea and the United States of America, and terminating the proceedings, *O.J.*, 27 June 1980, No L 162/62) ;
- *gas-fuelled, non-refillable pocket flint lighters from the People's Republic of China*, where the Chinese imports represented only a market share of 1.4 % ; they were cumulated with the dumped imports coming from other countries because they were found to be «still significant especially in view of the fact that they were increasing rapidly» (Commission Regulation (EEC) No 1386/91 of 23 May 1991 imposing a provisional anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in Japan, the People's Republic of China, the Republic of Korea and Thailand, *O.J.*, 28 May 1991, No L 133/20).

1148 The most striking anti-dumping case in this respect is *hardboard from Romania, Czechoslovakia, Finland, Hungary, Norway, Poland, Spain, Sweden and the Soviet Union and Bulgaria*, where the question was raised whether the dumped imports originating in Romania and Bulgaria had to be taken into account, in view of their low market shares. The answer to this question was negative in respect of Bulgaria because during the investigation period its market share amounted to only 0.2 % and before it had never exceeded 0.7 %. On the other hand, the Commission was of the opinion that the imports from Romania contributed to the injury because during the investigation period they held a market share of 0.8 % and this market share had been traditionally higher (Commission Regulation (EEC) No 1633/82 of 23 June 1982 imposing a provisional anti-dumping duty on imports of fibre building board (hardboard) originating in Romania, repealing Commission Decision No 80/564/EEC of 4 June 1980 and accepting undertakings in connection with the proceeding in respect of imports of fibre building board from Czechoslovakia, Finland, Hungary, Norway, Poland, Spain, Sweden and the Soviet Union and terminating the proceeding with regard to those countries and Bulgaria, *O.J.*, 25 June 1982, No L 181/19).

1149 Commission Decision No 891/92/ECSC of 30 March 1992 imposing a provisional anti-dumping duty on imports of certain semi-finished products of alloy steel, originating in Turkey and Brazil, *O.J.*, 9 April 1992, No L 95/26.

1150 Injury was found in cases where the individual market shares by country of origin were extremely low (below 2 %) :

- *sheets and plates, of iron or steel, from Czechoslovakia and Spain :*

- market share held by dumped imports from Spain, cumulated with dumped imports from Japan, Czechoslovakia, Romania, Poland, Hungary, Bulgaria, the German Democratic Republic and Australia, which were not subjected to the present anti-dumping proceeding but were already subjected to anti-dumping measures, and with imports originating from Sweden, Austria and Finland, which were not subjected to the present anti-dumping proceeding but were subject to steel arrangements between the ECSC and their respective governments : 15.1 % ;
- market share held by dumped imports from Czechoslovakia : 1.2 % ;
- market share held by dumped imports from Spain : 1 % ;

(Commission Recommendation No 120/78/ECSC of 18 January 1978 imposing a provisional duty on certain sheets and plates, of iron or steel, originating in Czechoslovakia, *O.J.*, 24 January 1978, No L 19/7 ; Commission Recommendation No 433/79/ECSC of 27 February 1979 imposing a provisional anti-dumping duty on certain sheets and plates of iron or steel originating in Spain and repealing certain suspended anti-dumping duties, *O.J.*, 3 March 1979, No L 53/21 ; Commission Recommendation No 1083/79/ECSC of 30 May 1979 imposing a definitive anti-dumping duty on certain plates of iron or steel originating in Spain but imported from some other non-member country, *O.J.*, 1 June 1979, No L 135/54) ;

- *standardized electric multi-phase motors having an output of more than 0.75 kW but not more than 75 kW, from the USSR :*

- market share held by dumped imports from Bulgaria, Hungary, Poland, the German Democratic Republic, Romania, Czechoslovakia and the USSR : 5.25 % ;
- market share held by dumped imports from the USSR : 1.47 % ;

(Commission Regulation (EEC) No 451/80 of 22 February 1980 imposing a provisional anti-dumping duty on imports of standardized electric multi-phase motors having an output of more than 0.75 kW but not more than 75 kW, originating in the USSR, *O.J.*, 27 February 1980, No L 53/15 ; Council Regulation (EEC) No 1560/80 of 20 June 1980 concerning the definitive collection of the provisional anti-dumping duty imposed on imports of standardized electric multi-phase motors having an output of more than 0.75 kW but not more than 75 kW, originating in the USSR, *O.J.*, 21 June 1980, No L 153/45 ; Commission Decision 80/599/EEC of 19 June 1980 accepting undertakings in connection with the anti-dumping proceeding concerning imports of standardized electric multi-phase motors having an output of more than 0.75 kW but not more than 75 kW, originating in the USSR and terminating that proceeding, *O.J.*, 21 June 1980, No L 153/48) ;

- *acrylic fibres from Japan :*

- market share held by dumped imports from Japan, cumulated with dumped imports from the United States of America and Spain, which were not subjected to the present anti-dumping proceeding but were already subjected to anti-dumping measures : 7.6 % ;
- market share held by dumped imports from Japan : 1.6 % ;

(Commission Decision 80/488/EEC of 6 May 1980 accepting an undertaking given in connection with the anti-dumping proceeding concerning certain acrylic fibres originating in Japan and terminating this proceeding, *O.J.*, 9 May 1980, No L 118/60) ;

- *methylamine, dimethylamine and trimethylamine from the German Democratic Republic and Romania :*

- cumulated market share : 26 % ;
- market share held by dumped imports from Romania : 1.8 % ;
- market share held by dumped imports from the German Democratic Republic : 24.2 % ;

(Commission Regulation (EEC) No 2243/82 of 12 August 1982 imposing a provisional anti-dumping duty on imports of methylamine, dimethylamine and trimethylamine originating in the German Democratic Republic and accepting an undertaking and terminating the procedure in respect of imports of methylamine, dimethylamine and trimethylamine originating in Romania, *O.J.*, 13 August 1982, No L 238/35) ;

- *kraft liner paper and board from Spain :*

- market share held by dumped imports from Spain, cumulated with dumped imports from Canada, Finland, Austria, Portugal, Sweden, the United States of America and the USSR, which were not subjected to the present anti-dumping proceeding but were already subjected to anti-dumping measures : 73 % ;
- market share held by dumped imports from Spain : 1.7 % ;

(Commission Decision 84/407/EEC of 10 August 1984 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain kraft liner paper and board originating in Spain and terminating that proceeding, *O.J.*, 21 August 1984, No L 224/30) ;

- *hardboard from Argentina, Switzerland and Yugoslavia :*

- cumulated market share : 7.5 % ;
- market share held by dumped imports from Argentina : 1.0 % ;
- market share held by dumped imports from Switzerland : 1.5 % ;
- market share held by dumped imports from Yugoslavia : 4.9 % ;

(Commission Decision 86/232/EEC of 9 June 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of hardboard originating in Argentina, Switzerland and Yugoslavia and terminating the investigation, *O.J.*, 12 June 1986, No L 157/61) ;

- *artificial corundum from Hungary, Poland and the USSR :*

- cumulated market share : 8.1 % ;
- market share held by dumped imports from Hungary : 1.6 % ;
- market share held by dumped imports from Poland : 2.4 % ;
- market share held by dumped imports from the USSR : 3 % ;

(Commission Decision 86/464/EEC of 17 September 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of artificial corundum originating in Hungary, Poland and the USSR, and terminating the

investigation, *O.J.*, 23 September 1986, No L 271/26);

urea from Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia :

- cumulated market share : 20.28 % ;
- market share held by dumped imports from Czechoslovakia : 0.9 % ;
- market share held by dumped imports from the German Democratic Republic : 2.0 % ;
- market share held by dumped imports from Kuwait : 1.3 % ;
- market share held by dumped imports from Libya : 5.1 % ;
- market share held by dumped imports from Saudi Arabia : 3.1 % ;
- market share held by dumped imports from the Soviet Union : 4.3 % ;
- market share held by dumped imports from Trinidad and Tobago : 2.7 % ;
- market share held by dumped imports from Yugoslavia : 0.8 % ;

(Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1);

iron or steel coils, from Algeria, Mexico and Yugoslavia :

- cumulated market share : 5.9 % ;
- market share held by dumped imports from Algeria : 2.0 % ;
- market share held by dumped imports from Yugoslavia : 2.1 % ;
- market share held by dumped imports from Mexico : 1.8 % ;

(Commission Decision No 163/88/ECSC of 20 January 1988 imposing a provisional anti-dumping duty on imports of certain iron or steel coils, originating in Algeria, Mexico and Yugoslavia, *O.J.*, 22 January 1988, No L 18/31);

iron or steel sections from Yugoslavia and Turkey :

- cumulated market share : 3.9 % ;
- market share held by dumped imports from Yugoslavia : 3.7 % ;
- market share held by dumped imports from Turkey : 0.2 % ;

(Commission Decision No 2158/88/ECSC of 20 July 1988 imposing a provisional anti-dumping duty on imports of certain iron or steel sections originating in Yugoslavia or Turkey, *O.J.*, 21 July 1988, No L 190/5);

urea from Austria, Hungary, Malaysia, Romania, the USA and Venezuela :

- market share held by dumped imports from Austria, Hungary, Malaysia, Romania, the USA and Venezuela, cumulated with dumped imports from Libya, Saudi Arabia, Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia, which were not subjected to the present anti-dumping proceeding but were already subjected to anti-dumping measures : 20 % ;
- cumulated market share held by dumped imports from Austria, Hungary, Malaysia, Romania, the USA and Venezuela : 11.5 ;
- market share held by dumped imports from Austria : 1.8 % ;
- market share held by dumped imports from Hungary : 0.9 % ;
- market share held by dumped imports from Malaysia : 1.2 % ;
- market share held by dumped imports from Romania : 2.8 % ;
- market share held by dumped imports from the USA : 3.7 % ;
- market share held by dumped imports from Venezuela : 1.0 % ;

(Commission Regulation (EEC) No 2623/88 of 24 August 1988 imposing a provisional anti-dumping duty on imports of urea originating in Austria, Hungary, Malaysia, Romania, the USA and Venezuela, *O.J.*, 25 August 1988, No L 235/5);

audio tapes in cassettes from Japan, the Republic of Korea and Hong Kong :

- cumulated market share : 48.6 % ;
- market share held by dumped imports from Hong Kong : 1.6 % ;
- market share held by dumped imports from the Republic of Korea : 12 % ;
- market share held by dumped imports from Japan : 35 % ;

(Commission Regulation (EEC) No 3262/90 of 5 November 1990 imposing a provisional anti-dumping duty on imports of audio tapes in cassettes originating in Japan, the Republic of Korea and Hong Kong, *O.J.*, 13 November 1990, No L 313/5 (corrigendum, *O.J.*, 12 January 1991, No L 9/36));

welded tubes of iron or non-alloy steel, from Turkey and Venezuela :

- cumulated market share : 5.8 % ;
- market share held by dumped imports from Venezuela : 1.9 % ;
- market share held by dumped imports from Turkey : 3.9 % ;

(Commission Regulation (EEC) No 3617/90 of 11 December 1990 imposing a provisional anti-dumping duty on imports of certain welded tubes of iron or non-alloy steel, originating in Turkey or in Venezuela and accepting undertakings offered in connection with such imports, *O.J.*, 15 December 1990, No L 351/17);

gas-fuelled, non-refillable pocket flint lighters from Japan, the People's Republic of China, the Republic of Korea and Thailand :

- cumulated market share : 35 % ;
- market share held by dumped imports from Japan : 12.7 % ;
- market share held by dumped imports from the People's Republic of China : 1.4 % ;
- market share held by dumped imports from the Republic of Korea : 14.0 % ;
- market share held by dumped imports from Thailand : 6.8 % ;

exporters¹¹⁵¹, or even by referring to inaccuracies in the data about the market

(Commission Regulation (EEC) No 1386/91 of 23 May 1991 imposing a provisional anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in Japan, the People's Republic of China, the Republic of Korea and Thailand, *O.J.*, 28 May 1991, No L 133/20);

semi-finished products of alloy steel, from Turkey and Brazil :

- cumulated market share : 8.7 % ;
- market share held by dumped imports from Turkey : 2.4 % ;
- market share held by dumped imports from Brazil : 6.3 % ;

(Commission Decision No 891/92/ECSC of 30 March 1992 imposing a provisional anti-dumping duty on imports of certain semi-finished products of alloy steel, originating in Turkey and Brazil, *O.J.*, 9 April 1992, No L 95/26)

synthetic fibres of polyesters from India and the Republic of Korea :

- cumulated market share : 6.2 % ;
- market share held by dumped imports from India : 2.1 % ;
- market share held by dumped imports from the Republic of Korea : 4.1 % ;

(Commission Regulation (EEC) No 1956/92 of 7 July 1992 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in India and the Republic of Korea, *O.J.*, 16 July 1992, No L 197/25 ; Council Regulation (EEC) No 54/93 of 8 January 1993 imposing a definitive duty on imports of synthetic fibres of polyesters originating in India and the Republic of Korea, *O.J.*, 15 January 1993, No L 9/2);

seamless pipes and tubes, of iron or non-alloy steel, from Czechoslovakia, Hungary, Poland and the Republic of Croatia :

- cumulated market share : 13.7 % ;
- market share held by dumped imports from Poland : 1.5 % ;
- market share held by dumped imports from Hungary : 3.1 % ;
- market share held by dumped imports from Czechoslovakia : 4.6 % ;
- market share held by dumped imports from Croatia : 4.6 % ;

(Commission Regulation (EEC) No 3296/92 of 12 November 1992 imposing a provisional anti-dumping duty on imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in Czechoslovakia, Hungary, Poland and the Republic of Croatia and terminating the anti-dumping proceeding with regard to the Republics of Serbia and of Montenegro, the former Yugoslav Republic of Macedonia, the Republic of Bosnia-Herzegovina and the Republic of Slovenia, *O.J.*, 14 November 1992, No L 328/15);

ferro-silicon from Russia, Kazakhstan, Ukraine, Iceland, Norway, Sweden, Venezuela and Brazil :

- cumulated market share : 69.5 % ;
- market share held by dumped imports from Venezuela : 2 % ;
- market share held by dumped imports from Sweden : 2 % ;
- market share held by dumped imports from Iceland : 4 % ;
- market share held by dumped imports from Brazil : 5.5 % ;
- market share held by dumped imports from Russia, Kazakhstan and Ukraine : 16 % ;
- market share held by dumped imports from Norway : 40 % ;

(Council Regulation (EC) No 3359/93 of 2 December 1993 imposing amended anti-dumping measures on imports of ferro-silicon originating in Russia, Kazakhstan, Ukraine, Iceland, Norway, Sweden, Venezuela and Brazil, *O.J.*, 9 December 1993, No L 302/1);

silicon carbide from the People's Republic of China, Poland, the Russian Federation and Ukraine

- cumulated market share : 24.2 % ;
- market share held by dumped imports from Poland : 1.9 % ;
- market share held by dumped imports from the Russian Federation and Ukraine : 7 % ;
- market share held by dumped imports from the People's Republic of China : 15.3 % ;

(Council Regulation (EC) No 821/94 of 12 April 1994 imposing a definitive anti-dumping duty on imports of silicon carbide, originating in the People's Republic of China, Poland, the Russian Federation and Ukraine, *O.J.*, 13 April 1994, No L 94/21).

¹¹⁵¹ European anti-dumping case law held that «(u)nder (basic EC legislation) injury may still be caused even if the volume of each individual exporter is very small» (Council Regulation (EEC) No 3905/88 of 12 December 1988 imposing a definitive anti-dumping duty on imports of polyester yarn originating in Mexico, South Korea, Taiwan and Turkey, *O.J.*, 16 December 1988, No L 347/10 ; Council Regulation (EEC) No 3946/88 of 16 December 1988 imposing a definitive anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 December 1988, No L 348/49).

shares¹¹⁵² ; sometimes, however, such low market shares are, without any further excuse, considered not to be *de minimis*¹¹⁵³.

As similar situations may lead to opposite injury findings, the outcome of injury investigations on the basis of the factor «volume of dumped imports» cannot be predicted. Though such arbitrary case law does not enhance legal certainty, it broadly paves the way for «one-way flexibility».

The new GATT Anti-dumping Code tries to limit this «one-way flexibility» in respect of *de minimis* quantities as, under that Code, «the volume of dumped imports shall *normally* be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3 percent of imports of the like product in the importing country unless countries which individually account for less than 3 percent of the imports of the like product in the importing country collectively account for more than 7 percent of imports of the like product in the importing country» (Article 5.8.) (emphasis added). However, in view of the wording «normally», the anti-dumping authorities may deviate from the Code rule on negligible quantities whenever they can show that the case is «abnormal». It may even not be necessary to deviate from that rule : the rule on negligible cumulated quantities is easy to circumvent by initiating anti-dumping proceedings against as many countries as possible¹¹⁵⁴. Moreover, this new rule is different from European anti-dumping case law on *de minimis* market shares, as it does not refer to the share on the Community market, but to the share in overall Community imports of the like product. Even more, EC anti-dumping law, though being amended in order to incorporate the new GATT Anti-dumping Code, has not copied this provision on negligible volumes of dumped imports. Instead, it has adopted another definition of such negligible volumes, *i.e.*, imports representing a market share of below 1 % unless the dumped imports coming from several countries collectively account for 3 %, or more, of Community consumption (Article 5(7) basic EC Regulation). By means of that definition, EC anti-dumping law has codified European anti-dumping case law on market shares below 1 %, leaving all the room for the European anti-dumping authorities to maintain their «one-way flexible» case law on market shares lying just above the *de minimis* market shares of less than 1 %.

¹¹⁵² See : *barium chloride from the People's Republic of China and the German Democratic Republic*, where injury was found though the market share amounted to only 2 %. This low market share was found to be injurious because the market shares were underestimated since the figures for imports from the German Democratic Republic into the Federal Republic of Germany were not available (Commission Regulation (EEC) No 2402/89 of 31 July 1989 imposing a provisional anti-dumping duty on imports of barium chloride originating in the People's Republic of China or the German Democratic Republic, *O.J.*, 4 August 1989, No L 227/24). This is, however, an invalid argument because, under anti-dumping law, intra-German trade was not considered as foreign trade and could, therefore, not be taken into account.

¹¹⁵³ Commission Regulation (EC) No 534/94 of 9 March 1994 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, *O.J.*, 11 March 1994, No L 68/5.

¹¹⁵⁴ WAER, P., and VERMULST, E., «EC Anti-Dumping Law and Practice after the Uruguay Round. A New Lease of Life ?», *Journal of World Trade*, 1994/2, (5), 16.

3.3.1.2.2. Prices of dumped imports

3.3.1.2.2.1. Prices of dumped imports as evidence of injury

The prices of dumped imports are indicated as a relevant factor for the examination of injury. GATT and European anti-dumping law specify that a significant price undercutting as compared with the price of a like product in the Community may be particularly relevant (Article 3.2. GATT Anti-dumping Code ; Article 3(3) basic EC Regulation ; Article 4(2)(b) basic ECSC Decision). However, the prices of dumped products in general, and the price undercutting in particular are not necessarily decisive under GATT and European anti-dumping law. As a consequence, price undercutting is no necessary indication of injury¹¹⁵⁵, though no price undercutting may be conclusive proof that the Community industry is not injured by the dumping¹¹⁵⁶.

It is impossible to derive the relevant threshold for price undercutting which implies injury from European anti-dumping case law. Indeed, a weighted average margin of price undercutting of 43 % was mentioned in a finding of no injury¹¹⁵⁷, whereas a margin of price undercutting of only 2 % did not preclude a finding of injury¹¹⁵⁸. It might be argued that a margin of 2 % is not significant. In fact, though, no threshold can be determined, because the effect of price undercutting depends not only on the margin of price undercutting, but also on the market structure. In an oligopolistic market, *i.e.*, a market consisting of a few producers manufacturing a fully identical product, a small margin of price undercutting causes enormous shifts in demand

¹¹⁵⁵ Council Regulation (EEC) No 1058/86 of 8 April 1986 imposing a definitive anti-dumping duty on imports of certain electronic scales originating in Japan, *O.J.*, 12 April 1986, No L 97/1 ; Council Regulation (EEC) No 117/91 of 16 January 1991 imposing a definitive anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 19 January 1991, No L 14/1.

¹¹⁵⁶ Commission Decision 81/493/EEC of 6 July 1981 terminating the anti-dumping procedure concerning imports of furfural originating in the Dominican Republic, Spain and the People's Republic of China, *O.J.*, 11 July 1981, No L 189/57 ; Commission Decision 82/808/EEC of 25 November 1982 terminating the anti-dumping procedure concerning imports of aluminium foil for household and catering use originating in Austria, the German Democratic Republic, Hungary and Israel, *O.J.*, 1 December 1982, No L 339/58 ; Commission Decision 83/493/EEC of 28 September 1983 terminating the anti-dumping proceeding concerning imports of xanthan gum originating in the United States of America, *O.J.*, 30 September 1983, No L 268/60 ; Commission Decision 85/143/EEC of 18 February 1985 terminating the anti-dumping proceeding concerning imports of certain boots with fitted ice skates originating in Czechoslovakia, Yugoslavia, Romania and Hungary, *O.J.*, 22 February 1985, No L 52/48 ; Council Regulation (EEC) No 2702/87 of 4 September 1987 repealing a definitive anti-dumping duty on styrene monomer originating in the United States of America and terminating the investigation, *O.J.*, 8 September 1987, No L 258/20 ; Commission Decision 88/651/EEC of 23 December 1988 terminating the anti-dumping proceeding concerning imports of certain cellular mobile radio telephones originating in Canada, Hong Kong and Japan, *O.J.*, 30 December 1988, No L 362/59.

¹¹⁵⁷ Council Decision 83/9/EEC of 17 January 1983 terminating the anti-dumping proceeding concerning imports of codeine and its salts originating in Czechoslovakia, Hungary, Poland and Yugoslavia, *O.J.*, 20 January 1983, No L 16/30.

¹¹⁵⁸ Commission Regulation (EEC) No 163/83 of 21 January 1983 imposing a provisional anti-dumping duty on 4,4'-Isopropylidenediphenol originating in the United States of America, *O.J.*, 26 January 1983, No L 23/9.

from one producer to the other¹¹⁵⁹. In a monopolistic market, *i.e.*, a market with a large

¹¹⁵⁹ In European anti-dumping case law, several, though not explicit, references to an oligopolistic market structure may be discerned in connection with price undercutting :

- the fact that the product was very price-sensitive (Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia, *O.J.*, 9 May 1987, No L 121/11 ; Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1 ; Council Regulation (EEC) No 385/90 of 12 February 1990 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in Czechoslovakia and definitively collecting the provisional anti-dumping duty imposed on those imports, *O.J.*, 16 February 1990, No L 42/1 ; Commission Regulation (EEC) No 1537/90 of 28 May 1990 imposing a provisional anti-dumping duty on imports of potassium permanganate originating in the USSR, *O.J.*, 8 June 1990, No L 145/9 ; Commission Decision 91/256/EEC of 14 May 1991 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of welded wire-mesh originating in Yugoslavia and terminating the investigation, *O.J.*, 18 May 1991, No L 123/54 ; Commission Regulation (EEC) No 2818/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports of cotton yarn originating in Brazil, Egypt and Turkey and terminating the anti-dumping proceeding in respect of cotton yarn originating in India and Thailand, *O.J.*, 27 September 1991, No L 271/17 ; Council Regulation (EEC) No 3091/91 of 21 October 1991 imposing a definitive anti-dumping duty on imports of video tapes in cassettes originating in the People's Republic of China and definitively collecting the provisional duty, *O.J.*, 24 October 1991, No L 293/2 ; Commission Regulation (EEC) No 313/92 of 4 February 1992 imposing a provisional anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in South Korea, *O.J.*, 11 February 1992, No L 34/8 ; Council Regulation (EEC) No 830/92 of 30 March 1992 imposing a definitive anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and collecting definitively the provisional duty, *O.J.*, 3 April 1992, No L 88/1 (corrigendum, *O.J.*, 5 June 1992, No L 153/16) ; Commission Regulation (EEC) No 1956/92 of 7 July 1992 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in India and the Republic of Korea, *O.J.*, 16 July 1992, No L 197/25 ; Council Regulation (EEC) No 2306/92 of 4 August 1992 imposing a definitive anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in the Republic of Korea, *O.J.*, 7 August 1992, No L 222/8 (corrigendum, *O.J.*, 21 January 1993, No L 13/20) ; Council Regulation (EEC) No 54/93 of 8 January 1993 imposing a definitive duty on imports of synthetic fibres of polyesters originating in India and the Republic of Korea, *O.J.*, 15 January 1993, No L 9/2 ; Council Regulation (EEC) No 2455/93 of 2 September 1993 amending Regulation (EEC) No 1798/90 in respect of the definitive anti-dumping duty on imports of monosodium glutamate originating in Indonesia, the Republic of Korea, Taiwan and Thailand, *O.J.*, 4 September 1993, No L 225/1 ; Commission Decision 93/479/EEC of 30 July 1993 accepting undertakings offered in connection with the review of anti-dumping measures applicable to certain imports of monosodium glutamate originating in Indonesia, the Republic of Korea, Taiwan and Thailand, *O.J.*, 4 September 1993, No L 225/35 ; Commission Regulation (EC) No 3119/94 of 19 December 1994 imposing a provisional anti-dumping duty on imports of ferro-silico-manganese originating in Russia, Ukraine, Brazil and South Africa, *O.J.*, 21 December 1994, No L 330/15) ;
- the fact that the consumer is predominantly sensitive to price (Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1 ; Commission Regulation (EEC) No 129/91 of 11 January 1991 imposing a provisional anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China, *O.J.*, 19 January 1991, No L 14/31) ;
- the fact that, in the highly price-sensitive market, the Community producers had little choice but to follow the prices set by the dumping exporters (Commission Regulation (EEC) No 2686/92 of 16 September 1992 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea, *O.J.*, 17 September 1992, No L 272/13) ;
- the price sensitivity of the market, along with the fact that there is little scope for product differentiation, leaving the Community producers little choice but to match the dumping prices in order to keep their position in the market (Commission Regulation (EC) No 1506/94 of 27 June 1994 imposing provisional duties on imports of urea ammonium nitrate solution originating in Bulgaria and Poland, *O.J.*, 30 June 1994, No L 162/16) ;
- the fact that in a highly price-sensitive market, important price undercutting is extremely detrimental (Commission Decision No 891/92/ECSC of 30 March 1992 imposing a provisional anti-dumping duty on imports of certain semi-finished products of alloy steel, originating in Turkey and Brazil, *O.J.*, 9 April 1992, No L 95/26) ;
- the fact «that prices play a very important role in the market», along with the fact that «price undercutting due to dumping has therefore an immediate negative effect on the prices practised by the Community industry» (Council Regulation (EEC) No 2093/91 of 15 July 1991 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China and collecting definitively the provisional duty, *O.J.*, 18 July 1991, No L 195/1. See also : Commission Regulation (EEC) No 3798/90 of 21 December 1990 imposing a provisional anti-dumping duty on imports of espadrilles originating in the People's Republic of China, *O.J.*, 28 December 1990, No L 365/25) ;
- the transparency and price sensitivity of the market, which explain why sales at low prices inevitably have substitution effects as customers choose to be supplied at the lowest price offered (Council Regulation (EC) No 821/94 of 12 April 1994 imposing a definitive anti-dumping duty on imports of silicon carbide, originating in the People's Republic of China, Poland, the Russian Federation and Ukraine, *O.J.*, 13 April 1994, No L 94/21) ;

- the transparency of the market, along with the fact that purchase decisions are essentially made on the basis of prices (Commission Regulation (EEC) No 550/93 of 5 March 1993 imposing a provisional anti-dumping duty on imports of bicycles originating in the People's Republic of China, *O.J.*, 11 March 1993, No L 58/12) ;
- the transparency of the market, along with the fact that the market is extremely sensitive to price changes (Commission Regulation (EEC) No 1031/92 of 23 April 1992 imposing a provisional anti-dumping duty on imports of potassium chloride (potash) originating in Belarus, Russia or Ukraine, *O.J.*, 28 April 1992, No L 110/5 ; Council Regulation (EEC) No 2305/92 of 4 August 1992 imposing a definitive anti-dumping duty on imports of silicon metal originating in Brazil and definitively collecting the amounts secured by way of the provisional anti-dumping duty, *O.J.*, 7 August 1992, No L 222/1 ; Council Regulation (EEC) No 3068/92 of 23 October 1992 imposing a definitive anti-dumping duty on imports of potassium chloride originating in Belarus, Russia or Ukraine, *O.J.*, 24 October 1992, No L 308/41 ; Commission Regulation (EEC) No 2477/93 of 6 September 1993 imposing a provisional anti-dumping duty on imports of certain photo albums originating in the People's Republic of China, *O.J.*, 9 September 1993, No L 228/16 ; Commission Regulation (EEC) No 2581/93 of 20 September 1993 imposing provisional anti-dumping duties on imports of ferro-silicon originating in South Africa and the People's Republic of China, *O.J.*, 22 September 1993, No L 237/2 ; Commission Decision 93/521/EEC of 3 September 1993 accepting undertakings given in connection with the anti-dumping review in respect of imports of binder and baler twine originating in Brazil, terminating the anti-subsidy review proceeding with regard to these imports and terminating the anti-dumping and anti-subsidy review in respect of imports of binder and baler twine originating in Mexico, *O.J.*, 8 October 1993, No L 251/28 ; Council Regulation (EC) No 3359/93 of 2 December 1993 imposing amended anti-dumping measures on imports of ferro-silicon originating in Russia, Kazakhstan, Ukraine, Iceland, Norway, Sweden, Venezuela and Brazil, *O.J.*, 9 December 1993, No L 302/1 ; Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50) ;
- the fact that the effect of price undercutting is augmented by the transparency of the market, along with the fact that the price constitutes the main competitive factor (Commission Regulation (EEC) No 906/92 of 30 March 1992 imposing a provisional anti-dumping duty on imports of silicon metal originating in Brazil, *O.J.*, 10 April 1992, No L 96/17 ; Commission Regulation (EEC) No 1451/92 of 2 June 1992 imposing a provisional anti-dumping duty on imports into the Community of certain large electrolytic aluminium capacitors originating in Japan, *O.J.*, 4 June 1992, No L 152/22 (corrigendum, *O.J.*, 17 June 1992, No L 163/27)) ;
- the transparency of the market, along with the fact that price is the most important factor in marketing the product (Commission Decision 94/82/EC of 10 January 1994 terminating the anti-dumping proceeding concerning imports of gum rosin originating in the People's Republic of China, *O.J.*, 12 February 1994, No L 41/50) ;
- the transparency of the market, in which there is a limited number of operators (Commission Regulation (EEC) No 797/93 of 30 March 1993 imposing a provisional anti-dumping duty on imports of ferro-chrome with a carbon content by weight of max. 0,5 % (low carbon ferro-chrome) originating in Kazakhstan, Russia and Ukraine, *O.J.*, 2 April 1993, No L 80/8 ; Council Regulation (EEC) No 2717/93 of 28 September 1993 imposing a definitive anti-dumping duty on imports of ferro-chrome with a carbon content by weight of maximum 0,5 % (low carbon ferro-chrome), originating in Kazakhstan, Russia and Ukraine, *O.J.*, 2 October 1993, No L 246/1) ;
- the transparency and price elasticity of the market, along with the fact that the price was the most important factor for customers in determining their source of supply (Commission Regulation (EEC) No 2463/93 of 1 September 1993 imposing a provisional anti-dumping duty on imports of fluorspar originating in the People's Republic of China, *O.J.*, 7 September 1993, No L 226/3) ;
- the high price elasticity of the market, as well as the fact that the market is transparent and price-sensitive, which explains why the price undercutting by the dumping exporters was injurious to the Community producers (Commission Regulation (EEC) No 1034/91 of 23 April 1991 imposing a provisional anti-dumping duty on imports of video tapes in cassettes originating in the People's Republic of China, *O.J.*, 26 April 1991, No L 106/15 ; Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5 ; Council Regulation (EEC) No 993/93 of 26 April 1993 imposing a definitive anti-dumping duty on imports of certain electronic weighing scales originating in Japan, *O.J.*, 29 April 1993, No L 104/4) ;
- the fact that competition is mainly based on prices (Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries ; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24) ;
- the fact that competition was based mainly on prices as there were no perceptible quality differences and the market was transparent (Commission Regulation (EEC) No 1994/92 of 14 July 1992 imposing a provisional anti-dumping duty on imports into the Community of outer rings of tapered roller bearings originating in Japan, *O.J.*, 18 July 1992, No L 199/8) ;
- the transparency and price sensitivity of the market, on which competition, to a large extent, was based on price alone, along with the fact that products were of comparatively standard technology and did not have significant differences in features and quality (Commission Regulation (EEC) No 1103/93 of 30 April 1993 imposing a provisional anti-dumping duty on imports into the Community of certain electronic weighing scales originating in Singapore and the Republic of Korea, *O.J.*, 6 May 1993, No L 112/20) ;
- the fact that competition is, to a large extent, based on price alone in the segment of basic products which are of a comparative standard technology and do not show significant differences in features and quality (Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27)) ;

number of producers manufacturing diversified, though still similar products, such shifts in demand may require large margins of price undercutting, as competition in such a market depends

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- the fact that, because of the homogeneous nature of the product, the dumping prices, which undercut the Community producers' prices with a margin of up to 14 %, exerted a sharp downward pressure on the Community producers' prices (Commission Regulation (EEC) No 384/81 of 13 February 1981 imposing a provisional anti-dumping duty on styrene monomer originating in the United States of America, *O.J.*, 14 February 1981, No L 42/14) ;
 - the fact that the wide standardization of the products accentuated the price-depressive effect of the dumping prices (Commission Decision No 163/88/ECSC of 20 January 1988 imposing a provisional anti-dumping duty on imports of certain iron or steel coils, originating in Algeria, Mexico and Yugoslavia, *O.J.*, 22 January 1988, No L 18/31 ; Commission Decision 90/196/EEC of 10 April 1990 terminating the anti-dumping proceeding concerning imports of methenamine (hexamethylenetetramine) originating in Hungary and Yugoslavia and accepting undertakings offered in connection with the proceeding concerning imports of methenamine (hexamethylenetetramine) originating in Bulgaria, Czechoslovakia, Poland and Romania, *O.J.*, 24 April 1990, No L 104/14) ;
 - the fact that the price was the main consideration in sourcing supply as there were no real differences in quality, particularly in the case of standard types (Commission Regulation (EEC) No 1613/90 of 13 June 1990 imposing a provisional anti-dumping duty on imports of ball bearings with a greatest external diameter not exceeding 30 mm originating in Thailand, *O.J.*, 16 June 1990, No L 152/24 ; Council Regulation (EEC) No 2685/90 of 17 September 1990 amending Regulation (EEC) No 2089/84 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 20 September 1990, No L 256/1 (corrigendum, *O.J.*, 10 January 1991, No L 7/38)) ;
 - the fact that, at the bottom end of the market, producers compete to a very large extent on price alone, their products being of comparative standard technology and having no significant differences in features and quality (Commission Regulation (EEC) No 3262/90 of 5 November 1990 imposing a provisional anti-dumping duty on imports of audio tapes in cassettes originating in Japan, the Republic of Korea and Hong Kong, *O.J.*, 13 November 1990, No L 313/5 (corrigendum, *O.J.*, 12 January 1991, No L 9/36)) ;
 - the high price competitiveness of the market (Commission Regulation (EEC) No 1386/91 of 23 May 1991 imposing a provisional anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in Japan, the People's Republic of China, the Republic of Korea and Thailand, *O.J.*, 28 May 1991, No L 133/20 ; Commission Regulation (EEC) No 3296/92 of 12 November 1992 imposing a provisional anti-dumping duty on imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in Czechoslovakia, Hungary, Poland and the Republic of Croatia and terminating the anti-dumping proceeding with regard to the Republics of Serbia and of Montenegro, the former Yugoslav Republic of Macedonia, the Republic of Bosnia-Herzegovina and the Republic of Slovenia, *O.J.*, 14 November 1992, No L 328/15) ;
 - the fact that the price is the most important factor for customers in determining their source of supply (Commission Regulation (EEC) No 2799/92 of 25 September 1992 imposing a provisional anti-dumping duty on imports of deadburned (sintered) magnesia originating in the People's Republic of China, *O.J.*, 26 September 1992, No L 282/15 ; Commission Regulation (EEC) No 2800/92 of 25 September 1992 imposing a provisional anti-dumping duty on imports of magnesium oxide originating in the People's Republic of China, *O.J.*, 26 September 1992, No L 282/23) ;
 - the fact that the dumped product has homogenous characteristics and that, in a very competitive market, prices are the decisive factor as to each operator's position (Commission Regulation (EC) No 1783/94 of 18 July 1994 imposing a provisional anti-dumping duty on imports of furfuraldehyde originating in the People's Republic of China, *O.J.*, 21 July 1994, No L 186/11) ;
 - the fact that, in a market where the price level was a decisive factor in the decision to buy, the dumping exporters, owing to the size of their market shares and the fact that their prices were low, placed heavy downward pressure on the price level in the Community and consequently on the level of the Community producers' prices (Commission Regulation (EEC) No 2054/91 of 11 July 1991 imposing a provisional anti-dumping duty on imports of dihydrostreptomycin originating in the People's Republic of China, *O.J.*, 13 July 1991, No L 187/23 ; Council Regulation (EEC) No 3836/91 of 19 December 1991 imposing a definitive anti-dumping duty on imports of dihydrostreptomycin originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty, *O.J.*, 31 December 1991, No 362/1) ;
 - the fact that the dumping exporters have a dominant position on the highly price-competitive market of the Community which explains why their price undercutting had such an appreciable effect on the condition of the Community industry (Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12 ; Commission Regulation (EEC) No 2005/88 of 5 July 1988 imposing a provisional anti-dumping duty on imports of serial impact fully formed character printers originating in Japan, *O.J.*, 8 July 1988, No L 177/1 ; Commission Regulation (EEC) No 4062/88 of 23 December 1988 imposing a provisional anti-dumping duty on imports of video cassettes and video tape reels originating in the Republic of Korea and Hong Kong, *O.J.*, 24 December 1988, No L 356/47) ;
 - the fact that the dumping exporter was the major world supplier of the product and, for that reason, had a considerable influence on selling prices (Commission Regulation (EEC) No 761/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten ores and concentrates originating in the People's Republic of China, and terminating the proceeding concerning imports originating in Hong Kong, *O.J.*, 30 March 1990, No L 83/23).

not only on prices, but also on product differentiation¹¹⁶⁰. The existence of prices of differentiated products distorts the inquiry into price undercutting, since price adjustments must be made in order to determine exactly the margin of price undercutting¹¹⁶¹. Such adjustments

¹¹⁶⁰ An excellent example of monopolistic competition may be found in *audio tapes in cassettes from Japan*. Only a relatively low weighted average margin of price undercutting of 6 % was established. Nevertheless, injury was found probably because the Japanese exporters were active on the high-quality segments of the market, where competition is based more on non-price elements, mainly brand name, marketing, features and styling, than on prices (Commission Regulation (EEC) No 3262/90 of 5 November 1990 imposing a provisional anti-dumping duty on imports of audio tapes in cassettes originating in Japan, the Republic of Korea and Hong Kong, *O.J.*, 13 November 1990, No L 313/5 (corrigendum, *O.J.*, 12 January 1991, No L9/36)).

See also : *compact disc players from Japan and South Korea*, where it was noted that the attractiveness, for the consumer, of a model is based essentially on his evaluation of price/brand/features, in whichever order, but that a drastic price decrease for a specific model could still profoundly alter its attractiveness compared with another directly competitive model (Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27)).

¹¹⁶¹ C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, *E.C.R.*, 1992, I, (1335), 1379 (Opinion of Advocate General MISCHO).

Price adjustments have been made for :

- differences in physical characteristics (see e.g., Council Regulation (EC) No 3664/93 of 22 December 1993 imposing a definitive anti-dumping duty on imports into the Community of photo albums in bookbound form originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 31 December 1993, No L 333/67) ;
- differences in quality (see e.g., Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries ; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24) ;
- differences in security of supply (Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries ; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24) ;
- differences in quantity (see e.g., Commission Regulation (EEC) No 1613/90 of 13 June 1990 imposing a provisional anti-dumping duty on imports of ball bearings with a greatest external diameter not exceeding 30 mm originating in Thailand, *O.J.*, 16 June 1990, No L 152/24) ;
- import duties and taxes (see e.g., Commission Regulation (EC) No 1076/94 of 6 May 1994 imposing a provisional anti-dumping duty on imports of certain watch movements originating in Malaysia and Thailand, *O.J.*, 11 May 1994, No L 120/3) ;
- the costs of importing the dumped product (Commission Regulation (EEC) No 2243/82 of 12 August 1982 imposing a provisional anti-dumping duty on imports of methylamine, dimethylamine and trimethylamine originating in the German Democratic Republic and accepting an undertaking and terminating the procedure in respect of imports of methylamine, dimethylamine and trimethylamine originating in Romania, *O.J.*, 13 August 1982, No L 238/35) ;
- differences in conditions and terms of sale (see e.g., Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12), such as :
 - transport costs (see e.g., Commission Regulation (EC) No 1648/94 of 6 July 1994 imposing a provisional anti-dumping duty on imports of furazolidone originating in the People's Republic of China, *O.J.*, 8 July 1994, No L 174/4) ;
 - insurance costs (Commission Regulation (EEC) No 2686/92 of 16 September 1992 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea, *O.J.*, 17 September 1992, No L 272/13) ;
 - handling costs (see e.g., Commission Decision No 67/94/ECSC of 12 January 1994 imposing a provisional anti-dumping duty on imports into the Community of hematite pig iron, originating in Brazil, Poland, Russia and Ukraine, *O.J.*, 15 January 1994, No L 12/5) ;
 - ancillary costs (see e.g., Council Regulation (EEC) No 1768/89 of 19 June 1989 imposing a definitive anti-dumping duty on imports of video cassettes originating in the Republic of Korea and Hong Kong, collecting definitively the provisional duty and terminating the anti-dumping proceeding with regard to the imports of video tape reels originating in the Republic of Korea, *O.J.*, 22 June 1989, No L 174/1) ;
 - storage costs (see e.g., Commission Decision No 67/94/ECSC of 12 January 1994 imposing a provisional anti-dumping duty on imports into the Community of hematite pig iron, originating in Brazil, Poland, Russia and Ukraine, *O.J.*, 15 January 1994, No L 12/5) ;
 - distribution channels (Commission Regulation (EEC) No 1386/91 of 23 May 1991 imposing a provisional anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in Japan, the People's Republic of China, the Republic of Korea and Thailand, *O.J.*, 28 May 1991, No L 133/20 ; Commission Regulation (EEC) No 1956/92 of 7

are frequently inaccurate so that the determination of the margin of price undercutting is not fully

July 1992 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in India and the Republic of Korea, *O.J.*, 16 July 1992, No L 197/25);

- credit terms (see e.g., Commission Regulation (EEC) No 724/82 of 30 March 1982 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0.75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Poland, Romania and the USSR, and terminating the proceeding in respect of imports of said products originating in Hungary, *O.J.*, 31 March 1982, No L 85/9 (comparison at the level of cash payment); Commission Decision 86/344/EEC of 17 July 1986 terminating the anti-dumping proceeding concerning imports of Portland cement originating in the German Democratic Republic, Poland and Yugoslavia, *O.J.*, 25 July 1986, No L 202/43 (extended payment terms));

- financing costs (Commission Regulation (EEC) No 3296/92 of 12 November 1992 imposing a provisional anti-dumping duty on imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in Czechoslovakia, Hungary, Poland and the Republic of Croatia and terminating the anti-dumping proceeding with regard to the Republics of Serbia and of Montenegro, the former Yugoslav Republic of Macedonia, the Republic of Bosnia-Herzegovina and the Republic of Slovenia, *O.J.*, 14 November 1992, No L 328/15; Commission Decision No 67/94/ECSC of 12 January 1994 imposing a provisional anti-dumping duty on imports into the Community of hematite pig iron, originating in Brazil, Poland, Russia and Ukraine, *O.J.*, 15 January 1994, No L 12/5);

- commissions (Commission Regulation (EEC) No 3296/92 of 12 November 1992 imposing a provisional anti-dumping duty on imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in Czechoslovakia, Hungary, Poland and the Republic of Croatia and terminating the anti-dumping proceeding with regard to the Republics of Serbia and of Montenegro, the former Yugoslav Republic of Macedonia, the Republic of Bosnia-Herzegovina and the Republic of Slovenia, *O.J.*, 14 November 1992, No L 328/15);

- discounts and rebates (see e.g., Commission Regulation (EEC) No 2805/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports into the Community of certain thermal paper originating in Japan, *O.J.*, 26 September 1991, No L 270/15);

- differences in the level of trade (see e.g., Commission Regulation (EEC) No 2818/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports of cotton yarn originating in Brazil, Egypt and Turkey and terminating the anti-dumping proceeding in respect of cotton yarn originating in India and Thailand, *O.J.*, 27 September 1991, No L 271/17) (comparison of the ex-works prices charged by the Community industry with the cif Community frontier prices charged by the exporters); Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27) (end-user prices versus dealer prices); Commission Decision 91/512/EEC of 25 July 1991 accepting undertakings given in connection with the review of anti-dumping measures concerning imports of artificial corundum originating in the Soviet Union, Hungary, Poland, Czechoslovakia and the People's Republic of China and in connection with the anti-dumping proceeding concerning imports of artificial corundum originating in Brazil and Yugoslavia, and terminating the investigation, *O.J.*, 2 October 1991, No L 275/27 (comparison of the Community producers' ex-works prices with the dumping exporters' prices cif Community border)). According to the Court of Justice, the same interpretation is placed on «differences in the level of trade» with regard to the determination of the margin of price undercutting, as in respect of the determination of the dumping margin (C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council, E.C.R.*, 1991, I, (2069), 2193-2194) (for their interpretation in respect of the dumping margin, see: *supra*, 274-283). However, the export prices of the dumped product which serve as basis for the determination of the dumping margin (see: Article 2(8) and (9) basic EC Regulation; Article 2(8) basic ECSC Decision), are not used for the determination of the margin of price undercutting. Instead the resale prices charged for the dumped products on the Community market are taken into account. If the European anti-dumping authorities do not know these resale prices, they calculate them on the basis of the facts available, i.e., export prices plus import duties, a reasonable profit margin for the importer and other cost (Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia, *O.J.*, 9 May 1987, No L 121/11; Commission Regulation (EEC) No 3296/92 of 12 November 1992 imposing a provisional anti-dumping duty on imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in Czechoslovakia, Hungary, Poland and the Republic of Croatia and terminating the anti-dumping proceeding with regard to the Republics of Serbia and of Montenegro, the former Yugoslav Republic of Macedonia, the Republic of Bosnia-Herzegovina and the Republic of Slovenia, *O.J.*, 14 November 1992, No L 328/15);
- differences on the demand side (Commission Regulation (EEC) No 2064/90 of 17 July 1990 imposing a provisional anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 20 July 1990, No L 188/10 (corrigendum, *O.J.*, 21 November 1990, No L 321/19); Council Regulation (EEC) No 117/91 of 16 January 1991 imposing a definitive anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 19 January 1991, No L 14/1 (comparison between the Community producers' prices to dealers and the dumped product's prices to manufacturers and distributors).

Moreover, in order to prevent price manipulation, only prices paid by independent buyers on the Community market are taken into account (see e.g., Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7).

accurate either¹¹⁶². However, sufficiently substantial indications, without giving, though, an exact quantification of the margin of price undercutting, may prove the existence of price undercutting¹¹⁶³.

When the exporters dump a large number of product types, making it administratively extremely difficult to determine the price-linked effects of the dumping, the European anti-dumping authorities may use sampling techniques insofar as the sampling is representative for the dumped exports to the Community as a whole¹¹⁶⁴.

Sometimes, the general price level and the price level of a specific product are compared, rather than the dumping price and the Community producers' price. Thus, injury may be found when the prices of the like product show an overall fall during a period in which prices are generally on the rise¹¹⁶⁵. Injury may also be found when the dumping exporters' prices on their domestic

¹¹⁶² It may be impossible to properly make quantifications of all the differences affecting price comparability and, thus, to make these adjustments :

- in *plain paper photocopiers from Japan* the Commission underscored the difficulty of making accurate quantifications and contended itself by making «a reasonable comparison» (Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5 ; Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12) ;
- in *hydraulic excavators from Japan* the Council, when confronted with this difficulty, noted that, in view of the price-depressive effect, a detailed examination of the price undercutting was not necessary ; therefore, no accurate adjustments were made (Council Regulation (EEC) No 1877/85 of 4 July 1985 imposing a definitive anti-dumping duty on imports of certain hydraulic excavators originating in Japan, *O.J.*, 6 July 1985, No L 176/1) ;
- in *serial-impact dot-matrix printers from Japan* no adjustments were made if no commonly accepted standards existed for measuring the differences and only limited adjustments were made if the formula for calculating these adjustments were based on assumptions and estimations but not on precise, reliable and verifiable data (Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 24 November 1988, No L 317/33) ;
- in *deep freezers from the USSR, Yugoslavia and the German Democratic Republic* no adjustment was made because the impact of consumer preferences is often a matter of subjective judgement and, thus, difficult to quantify (Commission Regulation (EEC) No 2800/86 of 9 September 1986 imposing a provisional anti-dumping duty on imports of certain deep freezers originating in the USSR, accepting the undertakings in connection with the investigation of imports of certain deep freezers originating in Yugoslavia or in the German Democratic Republic and terminating the investigation, and terminating the proceeding concerning imports of certain deep freezers, *O.J.*, 11 September 1986, No L 259/14).

However, in *electronic typewriters from Japan* the average of various subjective estimates was used (Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1). The Court of Justice did not forbid to use this average in view of the lack of an objective method (C.J.E.C., case 250/85, 5 October 1988, *Brother Industries' Ltd v Council*, *E.C.R.*, 1988, (5683), 5726 ; C.J.E.C., joined cases 277 and 300/85, 5 October 1988, *Canon Inc. a.o. v Council*, *E.C.R.*, 1988, (5731), 5810).

¹¹⁶³ C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, *E.C.R.*, 1992, I, (1335), 1379 (Opinion of Advocate General MISCHO), and 1402 and 1406 ; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, *E.C.R.*, 1992, I, (1409), 1485 and 1489 ; C.J.E.C., case C-176/87, 10 March 1992, *Konishiroku Photo Industry Co. Ltd v Council*, *E.C.R.*, 1992, I, (1493), 1529 and 1533 ; C.J.E.C., case C-177/87, 10 March 1992, *Sanyo Electric Co. Ltd v Council*, *E.C.R.*, 1992, I, (1535), 1570-1571 and 1574 ; C.J.E.C., case C-179/87, 10 March 1992, *Sharp Corporation v Council*, *E.C.R.*, 1992, I, (1635), 1682-1683 and 1686.

¹¹⁶⁴ It is not necessary that the sample is representative for the market of each Member (C.J.E.C., case C-323/88, 11 July 1990, *SA Sermes v Directeur des services des douanes de Strasbourg*, *E.C.R.*, 1990, I, (3027), 3043 (Opinion of Advocate General VAN GERVEN) and 3053).

¹¹⁶⁵ Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5.

market do not decrease to the same extent as their prices on the Community market¹¹⁶⁶. Both comparisons are meaningless. Indeed, an increase of the general price level does not imply that each individual price goes up¹¹⁶⁷; there may be a price difference between markets merely because of a different competitive situation in these markets¹¹⁶⁸.

In other cases, the price trend of the dumped imports in the Community is examined. In those cases, the dumping prices are said to have decreased by more than might have been expected on the basis of economies of scale and the learning-curve effect of the industry¹¹⁶⁹. Here, the European anti-dumping authorities fail to take account of the effect of competition on the evolution of the price level, unless the learning-curve effect is considered to refer not only to the accumulation of experience of the dumping exporters in producing the product, but also to the entry of new competitors on the market, as the production know-how and technology become more accessible to an increasing number of (potential) competitors¹¹⁷⁰.

The price-depressive or price-suppressive effects of the dumping may also be taken into account within the framework of the injury investigation (Article 3.2. GATT Anti-dumping Code ; Article 3(3) basic EC Regulation ; Article 4(2)(c) basic ECSC Decision¹¹⁷¹)¹¹⁷². Those effects

¹¹⁶⁶ Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27).

¹¹⁶⁷ In *plain paper photocopiers from Japan* (Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5), a drop in the price of plain paper photocopiers was not so extraordinary during the period taken into consideration (1976-1984) - a period of worldwide inflation. Indeed, the end of the world-wide monopoly position of the United States Xerox Corporation in 1976 made the technology for manufacturing plain paper photocopiers accessible to all interested producers all over the world. As a consequence, competition among several producers grew and resulted in lower prices.

¹¹⁶⁸ Precisely those different competitive situations may cause price discrimination, see : *supra*, 26-27.

¹¹⁶⁹ Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79 ; corrigendum, *O.J.*, 10 February 1990, No L 38/44)

¹¹⁷⁰ In *plain paper photocopiers from Japan* (Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5), reference was made to the end of the world-wide monopoly position of the United States Xerox Corporation in 1976. This, undoubtedly, made the technology for manufacturing plain paper photocopiers accessible to all interested producers all over the world. As a consequence, competition among several producers grew and resulted in lower prices.

¹¹⁷¹ Contrary to Article 3.2. GATT Anti-dumping Code and Article 3(3) basic EC Regulation, Article 4(2)(b) basic ECSC Decision does not refer to the possible price-depressive or price-suppressive effects of dumped imports (i.e., whether dumped imports have depressed prices or prevented price increases) with regard to the prices of dumped imports. Nevertheless, European anti-dumping case law is not illegal when price-depressive and price-suppressive effects are taken into account. By taking into account price-depressive and price-suppressive effects, together with the margin of price undercutting, a combined application is given of Article 4(2)(b) and (c) basic ECSC Decision. Article 4(2)(c) basic ECSC Decision mentions the Community producers' prices as a factor which may be taken into account for determining the degree of injury. In this respect, reference is made to possible price depression or suppression. Moreover, the list of factors in Article 4(2) basic ECSC Decision is not exhaustive and none of the factors enumerated necessarily gives decisive guidance.

may not accurately be deducted from the margin of price undercutting¹¹⁷³. Therefore, so-called «target sales prices», i.e., the price level required for Community producers to cover their costs and to make a reasonable profit¹¹⁷⁴, are used instead of the actual Community

¹¹⁷² For example, in colour television receivers from Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, there was simultaneously price depression, namely an overall price decrease of 3 %, and price suppression, namely price should have had increased as a result of improved quality and performance (Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50).

A direct price-depressive or price-suppressive effect on the prices charged by the Community producers is not required. Indeed, in *copper sulphate from Yugoslavia* the Commission held that «(i)n the rest of the Community market (i.e., the Community market, Italy excluded) Yugoslav prices have had a depressive effect both directly on those of the Community producers and indirectly where the Italian producer has been forced to attempt to sell increasing quantities of the product concerned in areas other than its traditional markets where it can no longer compete with the dumped imports» (Commission Decision 84/404/EEC of 25 July 1984 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of copper sulphate originating in Yugoslavia and terminating the proceeding, *O.J.*, 11 August 1984, No L 215/16. See also : Council Regulation (EEC) No 1244/86 of 28 April 1986 imposing a definitive anti-dumping duty on imports of copper sulphate originating in Yugoslavia, *O.J.*, 30 April 1986, No L 113/4).

¹¹⁷³ Commission Regulation (EEC) No 2297/80 of 29 August 1980 imposing a provisional anti-dumping duty on imports of certain polyester yarn originating in the United States of America, *O.J.*, 2 September 1980, No L 231/5 ; Commission Regulation (EEC) No 1337/81 of 18 May 1981 imposing a provisional anti-dumping duty on imports of certain textured polyester fabrics originating in the United States of America, *O.J.*, 20 May 1981, No L 133/17 ; Council Regulation (EEC) No 1570/81 of 11 June 1981 imposing a definitive anti-dumping duty on styrene monomer originating in the United States of America, *O.J.*, 13 June 1981, No L 154/10 ; Commission Decision 82/757/EEC of 11 November 1982 accepting undertakings given in connection with the anti-dumping procedure concerning decabromodiphenylether originating in the United States of America and terminating the procedure, *O.J.*, 16 November 1982, No 319/16 ; Commission Regulation (EEC) No 163/83 of 21 January 1983 imposing a provisional anti-dumping duty on 4,4'-Isopropylidenediphenol originating in the United States of America, *O.J.*, 26 January 1983, No L 23/9 ; Council Regulation (EEC) No 2024/83 of 18 July 1983 establishing a definitive anti-dumping duty on 4,4'-isopropylidenediphenol originating in the United States of America, *O.J.*, 22 July 1983, No L 199/4 ; Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1 ; Council Regulation (EEC) No 1877/85 of 4 July 1985 imposing a definitive anti-dumping duty on imports of certain hydraulic excavators originating in Japan, *O.J.*, 6 July 1985, No L 176/1 ; Council Regulation (EEC) No 1058/86 of 8 April 1986 imposing a definitive anti-dumping duty on imports of certain electronic scales originating in Japan, *O.J.*, 12 April 1986, No L 97/1 ; Commission Regulation (EEC) No 2450/87 of 12 August 1987 imposing a provisional anti-dumping duty on imports of mercury originating in the Union of Soviet Socialist Republics, *O.J.*, 14 August 1987, No L 227/8 ; Commission Regulation (EEC) No 2684/88 of 26 August 1988 imposing a provisional anti-dumping duty on certain imports of video cassette recorders originating in Japan and the Republic of Korea, *O.J.*, 31 August 1988, No L 240/5.

¹¹⁷⁴ The production costs taken into account are all the Community producers' production costs of the like product, both fixed and variable, plus overheads (Commission Regulation (EEC) No 1633/82 of 23 June 1982 imposing a provisional anti-dumping duty on imports of fibre building board (hardboard) originating in Romania, repealing Commission Decision No 80/564/EEC of 4 June 1980 and accepting undertakings in connection with the proceeding in respect of imports of fibre building board from Czechoslovakia, Finland, Hungary, Norway, Poland, Spain, Sweden and the Soviet Union and terminating the proceeding with regard to those countries and Bulgaria, *O.J.*, 25 June 1982, No L 181/19 ; Commission Decision 83/75/EEC of 15 February 1983 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain fibre building board originating in Brazil, *O.J.*, 19 February 1983, No L 47/30 ; Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1 ; Commission Regulation (EEC) No 3019/86 of 30 September 1986 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania and the USSR, *O.J.*, 1 October 1986, No L 280/68 ; Council Regulation (EEC) No 864/87 of 23 March 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union, and definitively collecting the amounts secured as provisional duties, *O.J.*, 27 March 1987, No L 83/1 ; Commission Regulation (EEC) No 1043/87 of 10 April 1987 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Yugoslavia, *O.J.*, 14 April 1987, No L 102/5 ; Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27) ; Council Regulation (EEC) No 2808/89 of 18 September 1989 imposing a definitive anti-dumping duty on imports of calcium metal originating in the People's Republic of China and the Soviet Union and definitively collecting the provisional anti-dumping duty imposed on such imports, *O.J.*, 20 September 1989, No L 271/1).

producers' prices of the like product¹¹⁷⁵. As «target sales prices» rely on the costs and profits

The determination of a reasonable profit margin is based on the product life cycle, the investments necessary to carry out research and development in order to keep pace with new developments, the financial risks of embarking on new research and development programmes, the need to provide shareholders with an adequate return on their investment (Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1; Commission Regulation (EEC) No 2516/86 of 4 August 1986 imposing a provisional anti-dumping duty on imports of housed bearing units originating in Japan, *O.J.*, 7 August 1986, No L 221/16).

¹¹⁷⁵ See e.g.: Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1 (where the sum of the production costs, including overheads, and a reasonable profit margin was called «target sales prices»); Council Regulation (EEC) No 864/87 of 23 March 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union, and definitively collecting the amounts secured as provisional duties, *O.J.*, 27 March 1987, No L 83/1; Commission Regulation (EEC) No 1043/87 of 10 April 1987 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Yugoslavia, *O.J.*, 14 April 1987, No L 102/5; Council Regulation (EEC) No 112/90 of 16 January 1990 imposing a definitive anti-dumping duty on imports of certain compact disc players originating in Japan and the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 17 January 1990, No L 13/21 (where the production costs were called «reference costs»); Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27) (where the sum of the production costs, including overheads, and a reasonable profit margin was called «target sales prices»); Commission Decision 89/573/EEC of 30 October 1989 terminating the investigation concerning imports of dicumyl peroxide originating in Taiwan and accepting an undertaking offered in the context of the review concerning imports of dicumyl peroxide originating in Japan and terminating the proceeding, *O.J.*, 31 October 1989, No L 317/49.

According to the Court of Justice the use of «target sales prices» is legal whenever the prices actually charged by the Community producers are not usefull when they have decreased due to the dumping. Thus, the Court of Justice allows the use of «target sales prices» to measure the price-suppressive effect of the dumping (C.J.E.C., case 250/85, 5 October 1988, *Brother Industries' Ltd v Council*, *E.C.R.*, 1988, (5683), 5726; C.J.E.C., joined cases 277 and 300/85, 5 October 1988, *Canon Inc. a.o. v Council*, *E.C.R.*, 1988, (5731), 5809; C.J.E.C., joined cases 260/85 and 106/86, 5 October 1988, *Tokyo Electric Company (TEC) a.o. v Council*, *E.C.R.*, 1988, (5855), 5906-5908 and 5923-5924; C.J.E.C., joined cases 273/85 and 107/86, 5 October 1988, *Silver Seiko Limited a.o. v Council*, *E.C.R.*, 1988, (5927), 5980-5981). Advocate-General P. VERLOREN VAN THEMAAT is, however, of the opinion that the use of «target sales prices» is incompatible with the wording, as well as with the market-economic background of Article 3 basic EC Regulation and Article 4 basic ECSC Decision (C.J.E.C., case 53/83, 23 May 1985, *Allied Corporation a.o. v Council*, *E.C.R.*, 1985, (1621), 1631). Advocate-General P. VERLOREN VAN THEMAAT cannot be agreed with. The use of «target sales prices» for measuring the price-suppressive effect of dumping cannot be illegal, merely because the list of economic factors enumerated in European anti-dumping law (Article 3(3) basic EC Regulation; Article 4(2)(c) basic EC legislation) is not exhaustive. It is, moreover, not necessarily incompatible with the market-economic background of European anti-dumping law, in view of the fact that the use of the constructed value as normal value standard is allowed explicitly by European and even GATT anti-dumping law. The only valid arguments against the use of «target sales prices» are the same as those which may be raised against the use of the constructed value: first, the fact that full cost pricing is assumed, and, second, the fact that each price reconstruction allows for arbitrariness and, thus, «one-way flexibility» (see: *supra*, 161-180).

The comparison between dumping prices and the Community producers' production costs plus a reasonable profit margin is similar to the use of «target sales prices»: the fact that dumping prices are lower than those production costs and a reasonable profit margin may be decisive in findings of injury (BESELER, J.F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 157-158; VAN BAEL, I., and BELLIS, J.F., *Anti-Dumping and other Trade Protection Laws of the EEC*, Bicester, CCH Editions Ltd., 1990, 129). In this respect it is sometimes underscored that:

- the dumping price level covers only a part of the Community producers' production costs (Commission Regulation (EEC) No 348/83 of 10 February 1983 imposing a provisional anti-dumping duty on imports of hexamethylenetetramine originating in the German Democratic Republic and the Soviet Union, and accepting undertakings and terminating the proceeding in respect of imports of hexamethylenetetramine originating in Czechoslovakia and Romania, *O.J.*, 12 February 1983, No L 40/24; Commission Regulation (EEC) No 1631/83 of 15 June 1983 imposing a provisional anti-dumping duty on imports of certain glass textile fibres (rovings) originating in Czechoslovakia, the German Democratic Republic and Japan, accepting a price undertaking from one Japanese exporter and terminating the proceeding in respect of imports of certain glass textile fibres (mats), originating in Czechoslovakia and the German Democratic Republic, *O.J.*, 18 June 1983, No L 160/18; Commission Decision 84/404/EEC of 25 July 1984 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of copper sulphate originating in Yugoslavia and terminating the proceeding, *O.J.*, 11 August 1984, No L 215/16; Commission Decision 84/408/EEC of 16 August 1984 accepting an undertaking given in connection with the anti-dumping review proceeding concerning imports of copper sulphate originating in Czechoslovakia and terminating that proceeding, *O.J.*, 22 August 1984, No L 225/22; Commission Regulation (EEC) No 2690/84 of 21 September 1984 imposing a provisional anti-dumping duty on imports of artificial corundum originating in the People's Republic of China and Czechoslovakia and terminating the proceeding in respect of imports of artificial corundum originating in Spain and Yugoslavia, *O.J.*, 25 September 1984, No L 255/9; Council Decision 87/104/EEC of 9 February 1987 accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of paint, distemper, varnish and similar brushes

of the Community producers, they do not measure the price-depressive or price-suppressive effects ; they measure only whether the dumping exporters are more efficient than the Community producers, unless they too charge prices below their own production costs¹¹⁷⁶. Price-

originating in the People's Republic of China, and terminating the investigation, *O.J.*, 14 February 1987, No L 46/45 ; Council Regulation (EEC) No 725/89 of 20 March 1989 imposing a definitive anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty on such imports, *O.J.*, 22 March 1989, No L 79/24) ;

- the dumping forces the Community producers to sell at prices which do not cover all their costs (Commission Regulation (EEC) No 2317/85 of 12 August 1985 imposing a provisional anti-dumping duty on imports of roller chains for cycles originating in the USSR and the People's Republic of China, *O.J.*, 14 August 1985, No L 217/7 ; Commission Decision 86/536/EEC of 7 November 1986 terminating the anti-dumping proceeding concerning imports of certain tube and pipe fittings originating in Brazil, Taiwan, Yugoslavia and Japan, *O.J.*, 8 November 1986, No L 313/20) ;

- because of the pressure of the dumping on prices, the achievable price increases were insufficient for the Community producers to cover the rise in wage and raw material cost (Commission Decision No 891/92/ECSC of 30 March 1992 imposing a provisional anti-dumping duty on imports of certain semi-finished products of alloy steel, originating in Turkey and Brazil, *O.J.*, 9 April 1992, No L 95/26) ;

- the prices of the dumped product which is of a superior quality, are lower than the Community producers' costs of producing the like product of inferior quality, plus a reasonable profit margin (Commission Decision 83/75/EEC of 15 February 1983 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain fibre building board originating in Brazil, *O.J.*, 19 February 1983, No L 47/30) ;

- the prices of dumped imports cover total production costs, but do not provide a reasonable profit margin for the Community industry (Council Decision 82/423/EEC of 21 June 1982 terminating the anti-dumping proceeding concerning imports of certain refrigerators originating in Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania, the Soviet Union and Yugoslavia, *O.J.*, 29 June 1982, No L 184/23 ; Commission Regulation (EEC) No 2690/84 of 21 September 1984 imposing a provisional anti-dumping duty on imports of artificial corundum originating in the People's Republic of China and Czechoslovakia and terminating the proceeding in respect of imports of artificial corundum originating in Spain and Yugoslavia, *O.J.*, 25 September 1984, No L 255/9 ; Commission Regulation (EEC) No 2516/86 of 4 August 1986 imposing a provisional anti-dumping duty on imports of housed bearing units originating in Japan, *O.J.*, 7 August 1986, No L 221/16).

If, however, a price control system is established by a Member State and the production costs of the Community producers selling on the market of this Member State are higher than the prices they are compelled to charge, attention is only paid to the differences between the prices fixed by the Member State and the prices of the dumped imports (Commission Decision 86/36/EEC of 26 February 1986 accepting undertakings entered into in connection with the anti-dumping proceeding concerning imports into Greece of certain categories of glass originating in Turkey, Yugoslavia, Romania, Bulgaria, Hungary and Czechoslovakia and terminating the investigation, *O.J.*, 28 February 1986, No L 51/73).

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See : *barium chloride from the People's Republic of China*, where the Commission pointed out that the argument according to which the low export prices were caused by the cost of raw materials and labour, was not relevant to the establishment of injury and did not obviate the price undercutting established (Council Regulation (EEC) No 541/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of barium chloride originating in the People's Republic of China, *O.J.*, 7 March 1991, No L 60/1).

See, however :

- *EPROMs from Japan*, where it was noted that the dumping prices were generally at levels below production costs (Council Regulation (EEC) No 577/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as EPROMs (erasable programmable read only memories) originating in Japan, *O.J.*, 12 March 1991, No L 65/1) ;

- *copper sulphate from Bulgaria or the Soviet Union*, where reference was made to the cost of the raw material on the world market instead of the cost to the Community producers. The fact that the prices of the dumped imports are lower than the world market price of the raw material which accounts for 70 % of the total cost of production was, thus, put forward as evidence of the very low price level of the dumped imports (Council Regulation (EEC) No 176/89 of 23 January 1989 imposing a definitive anti-dumping duty on imports of copper sulphate originating in Bulgaria or the Soviet Union, *O.J.*, 27 January 1989, No L 23/1). The fact that the prices of the dumped imports lie below the world market prices of the raw material is, indeed, an indication that the dumping prices do not reflect the efficiency of the dumping exporters. However, the dumping exporters may have bought the raw material at prices below the world market price. In such a case, the fact that their prices are lower than the world market price of the raw material is no evidence that they were charging extremely low prices. The European anti-dumping authorities, however, did not make clear at which price the dumping exporters had bought the raw material. Probably, they did not investigate it because it concerned dumping from NME countries. Indeed, under European anti-dumping law it is refused to take account of the production costs in NME countries because the notion of comparative advantage is strange to the economic system of NME countries (see : *supra*, 61-65). As a consequence, NME countries may be sanctioned for input dumping, whereas ME countries are not (see : *supra*, 167-169 and 172-173) ;

- *magnetic disks (3,5" microdisks) from Japan*, where the production costs of a Community producer were found to be lower than those of the dumping exporters. As the dumping prices undercut the prices of the Community industry, the dumping exporters will have sold their exports to the Community at a loss (Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan,

depressive and price-suppressive effects are advanced also to explain why no detailed examination of price undercutting is undertaken¹¹⁷⁷ or why no significant and systematic price undercutting is found¹¹⁷⁸.

GATT and European anti-dumping law, thus, vest broad discretionary powers in the European anti-dumping authorities, which enables the latter to find injury on the basis of the prices of the dumped imports whenever they want to. Indeed, a low margin of price undercutting may be sufficient. If there is no price undercutting, they can compare the dumping prices with other, irrelevant prices, or rely on price-depressive or price-suppressive effects¹¹⁷⁹, which it is hard, if not impossible, to measure; «target sales prices», in particular, are no good measure in this respect. Moreover, the price adjustments necessary to determine the margin of price undercutting leaves also room for arbitrariness, be it only because of the difficulties of quantifying product differentiations.

3.3.1.2.2.2. *Technical dumping*

It is sometimes argued that so-called «technical dumping», *i.e.*, the dumping exporters align their prices to the prices charged either by the Community industry or by other dumping or non-dumping exporters, must not be held to cause injury because, with technical dumping, the dumped imports are priced competitively¹¹⁸⁰.

Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5).

¹¹⁷⁷ Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1; Council Regulation (EEC) No 1877/85 of 4 July 1985 imposing a definitive anti-dumping duty on imports of certain hydraulic excavators originating in Japan, *O.J.*, 6 July 1985, No L 176/1.

¹¹⁷⁸ Commission Decision 86/536/EEC of 7 November 1986 terminating the anti-dumping proceeding concerning imports of certain tube and pipe fittings originating in Brazil, Taiwan, Yugoslavia and Japan, *O.J.*, 8 November 1986, No L 313/20; Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12.

¹¹⁷⁹ See *e.g.*: *sodium carbonate from the United States of America*, where the Commission held that «(w)hereas resale prices of imported sodium carbonate in general were below those prevailing in the markets concerned, albeit in part only marginally, (...) they nevertheless prevented price increases (...) and led to price depression» (Commission Regulation (EEC) No 3018/82 of 11 November 1982 imposing a provisional anti-dumping duty on imports of certain sodium carbonate originating in the United States of America and accepting certain undertakings concerning the imports of certain sodium carbonate originating in the United States of America, *O.J.*, 13 November 1982, No L 317/5).

¹¹⁸⁰ C.J.E.C., case 53/83, 23 May 1985, *Allied Corporation a.o. v Council*, *E.C.R.*, 1985, (1621), 1632 (Opinion of Advocate-General P. VERLOREN VAN THEMATAAT); BESELER, J.F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 158; VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 655-657.

Only for price alignments to prices of non-dumped imports the «technical dumping» argument has been successful, when it is established that the low priced non-dumped imports are the sole¹¹⁸¹ cause of the injury¹¹⁸².

For price alignments to low priced Community products, the «technical dumping» argument has not yet been accepted, either because in fact the Community producers had to align their prices to the dumping prices and not the other way around¹¹⁸³, because it was impossible or irrelevant

¹¹⁸¹ If the dumped imports also cause injury, anti-dumping relief is granted (Commission Decision 82/881/EEC of 23 December 1982 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of perchlorethylene originating in Czechoslovakia, Romania, Spain and the United States of America and terminating that proceeding, *O.J.*, 30 December 1982, No L 371/47 ; Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia, *O.J.*, 9 May 1987, No L 121/11), unless anti-dumping relief is considered not to be in the Community interests because of the undercutting of the dumped imports by non-dumped imports. Indeed, in *furfural from Spain and the People's Republic of China, nickel from the Soviet Union and tube and pipe fittings from Brazil, Yugoslavia and Japan* the dumped imports were considered to cause injury. Nevertheless, anti-dumping relief was not granted because, in view of the fact that the prices of the dumped imports were undercut by non-dumped imports, it was not considered to be in the Community interests (Commission Decision 81/493/EEC of 6 July 1981 terminating the anti-dumping procedure concerning imports of furfural originating in the Dominican Republic, Spain and the People's Republic of China, *O.J.*, 11 July 1981, No L 189/57 ; Council Regulation (EEC) No 2907/83 of 17 October 1983 terminating the anti-dumping proceeding concerning imports of unwrought nickel, not alloyed, in the form of cathodes produced by electrolysis, either uncut or cut into squares, originating in the Soviet Union, *O.J.*, 19 October 1983, No L 286/29 ; Commission Decision 86/536/EEC of 7 November 1986 terminating the anti-dumping proceeding concerning imports of certain tube and pipe fittings originating in Brazil, Taiwan, Yugoslavia and Japan, *O.J.*, 8 November 1986, No L 313/20).

¹¹⁸² In *saccharin and its salts from China, the Republic of Korea and the United States of America* the anti-dumping proceeding was terminated because the non-dumped imports from other countries, which undercut the prices of the dumped imports, were considered to be the cause of the injury (Commission Decision 83/626/EEC of 12 December 1983 terminating the anti-dumping proceeding concerning imports of saccharin and its salts originating in China, the Republic of Korea and the United States of America, *O.J.*, 15 December 1983, No L 352/49). Thus, the proceeding was terminated because of the lack of a causal relationship between the dumping and the injury (as required by Article 3(6) basic EC Regulation and Article 4(1) basic ECSC Decision).

¹¹⁸³ In *DRAMs from Japan and EPROMs from Japan*, the technical dumping argument was not accepted because there were strong grounds for regarding the dumping exporters collectively as price leaders (Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79 ; corrigendum, *O.J.*, 10 February 1990, No L 38/44) ; Council Regulation (EEC) No 577/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as EPROMs (erasable programmable read only memories) originating in Japan, *O.J.*, 12 March 1991, No L 65/1). By considering the dumping exporters as price leaders, it was implicitly said that the price cutting must have been started by the dumping exporters.

In *silicon carbide from Norway*, the alignment defence was rejected on the basis that the Community industry had frequently and increasingly matched the prices of the Norwegian imports (Commission Decision 86/497/EEC of 7 October 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of silicon carbide originating in the People's Republic of China, Norway, Poland and the USSR, and terminating the investigation regarding imports of that product originating in the People's Republic of China, Norway, Poland, Czechoslovakia, the USSR and Yugoslavia, *O.J.*, 10 October 1986, No L 287/25).

See also : *4,4'-isopropylidenediphenol from the United States of America*, where the American exporter claimed that he had not influenced the market prices in the Community, as the company's policy had been to align itself to the prices established by competition between the Community producers. Nevertheless, the American imports were not considered to play a passive role on the Community market because the drop in prices would not have occurred - at least not to the same extent - in the absence of the dumped imports (Council Regulation (EEC) No 2024/83 of 18 July 1983 establishing a definitive anti-dumping duty on 4,4'-isopropylidenediphenol originating in the United States of America, *O.J.*, 22 July 1983, No L 199/4).

to determine who had started the price cutting¹¹⁸⁴, or because the dumped imports did not merely follow price decreases of the Community producers but were consistently made at lower levels¹¹⁸⁵. Moreover, even if the dumping exporters match their prices to the prices of the Community producers, injury will be found if the price policy of the dumping exporters contributes to the price fall on the Community market.

For price alignments to low prices of dumped imports originating in third countries, it seems that the «technical dumping» argument will never be accepted¹¹⁸⁶, unless the low dumping prices are introduced by a Community producer who imports the low-priced dumped products¹¹⁸⁷. Under European anti-dumping law, it is considered not essential which dumping exporter has

¹¹⁸⁴ In *calcium metal from the People's Republic of China and the Soviet Union*, the Council, after having reminded that it would be difficult, if not impossible to determine who had started the price cutting, considered it not relevant to the issue of price undercutting who had started the price cutting during the period in which injury is examined (Council Regulation (EEC) No 2808/89 of 18 September 1989 imposing a definitive anti-dumping duty on imports of calcium metal originating in the People's Republic of China and the Soviet Union and definitively collecting the provisional anti-dumping duty imposed on such imports, *O.J.*, 20 September 1989, No L 271/1).

See also : *silicon carbide from Norway*, where it was underscored that it is difficult to verify conclusively who had started the price cutting. Nevertheless, the alignment defence was rejected on the basis that the Community industry had frequently and increasingly matched the prices of the Norwegian imports (Commission Decision 86/497/EEC of 7 October 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of silicon carbide originating in the People's Republic of China, Norway, Poland and the USSR, and terminating the investigation regarding imports of that product originating in the People's Republic of China, Norway, Poland, Czechoslovakia, the USSR and Yugoslavia, *O.J.*, 10 October 1986, No L 287/25).

¹¹⁸⁵ Council Regulation (EC) No 3319/94 of 22 December 1994 imposing a definitive anti-dumping duty on imports of urea ammonium nitrate solution originating in Bulgaria and Poland, exported by companies not exempted from the duty, and collecting definitively the provisional duty imposed, *O.J.*, 31 December 1994, No L 350/20.

¹¹⁸⁶ In *pentaerythritol from Canada* it was considered not essential in an anti-dumping proceeding to determine which exporter started to cause injury to the Community industry if it is established that all exporters contributed to the material injury suffered by the Community industry (Council Regulation (EEC) No 96/85 of 14 January 1985 imposing a definitive anti-dumping duty on imports of pentaerythritol originating in Canada, *O.J.*, 16 January 1985, No L 13/1 (corrigendum, *O.J.*, 24 January 1985, No L 20/46)).

See also : *tungsten ores and concentrates from the People's Republic of China*, where competition between dumping suppliers, established in the same country which causes sharp price falls, was not accepted as a ground to conclude that the dumping was not injurious (Commission Regulation (EEC) No 761/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten ores and concentrates originating in the People's Republic of China, and terminating the proceeding concerning imports originating in Hong Kong, *O.J.*, 30 March 1990, No L 83/23).

Moreover, in *potassium permanganate from Czechoslovakia, the German Democratic Republic and the People's Republic of China* it was established that the price decrease was initiated by Chinese exporters and that this trend was followed by the Czech and East German exporters. Nevertheless, an anti-dumping duty was imposed on exports from all three countries concerned (Commission Regulation (EEC) No 2495/86 of 1 August 1986 imposing a provisional anti-dumping duty on imports of potassium permanganate originating in Czechoslovakia, the German Democratic Republic and the People's Republic of China, *O.J.*, 5 August 1986, No L 217/12).

¹¹⁸⁷ In *boots with fitted ice skates from Czechoslovakia, Yugoslavia, Romania and Hungary* no material injury was found *inter alia* because the resale prices of the dumped imports from Yugoslavia, Romania and Hungary were equal to or higher than the prices at which the dumped Czech products were sold on the Community market. It was decisive that the complainant Community producer imported the dumped Czech products and determined the prices at which they were offered on the Community market (Commission Decision 85/143/EEC of 18 February 1985 terminating the anti-dumping proceeding concerning imports of certain boots with fitted ice skates originating in Czechoslovakia, Yugoslavia, Romania and Hungary, *O.J.*, 22 February 1985, No L 52/48). In fact, under European anti-dumping law a Community producer is not allowed to use dumped imports from one country in order to undercut the prices of dumped imports originating in another country.

started to cause injury, if it is established that all dumping exporters have contributed to the injury suffered¹¹⁸⁸.

European anti-dumping case law applies the «technical dumping» argument in a too restrictive way. First, it assumes that there is no technical dumping unless proof to the contrary is being provided. As it is frequently difficult to prove who has started the price cutting, this assumption introduces a «one-way flexible» basis in favour of an injury finding¹¹⁸⁹. Second, European anti-dumping case law also increases the number of injury findings, since an investigation of the «technical dumping» argument is rejected when it is considered to be irrelevant for the injury determination. Indeed, if the «technical dumping» argument is not investigated, the dumping may be found to be injurious because of the low price level of the dumped products, even if the low dumping prices are the result of a price alignment to other low prices.

European anti-dumping case law, moreover, is characterized by arbitrariness. First, no reason can be detected why in some cases the «technical dumping» argument is considered irrelevant, whereas in other cases it is relevant, for it results in findings of no injury. Second, there is no reason either why the «technical dumping» is outrightly rejected for price alignments to low-priced dumped imports, whereas price alignments by the Community producers to low-priced dumped imports are considered to be a normal business practice intended to meet competition. Indeed, as is the case for price alignments by the Community producers, price alignments applied by dumping exporters to other, low-priced dumped imports may also be a normal business practice. The argument that the illegal dumping practices of third parties are no excuse for exporters to start the same illegal practices, fails to convince, unless it also applies to Community producers. However, the fact that Community producers, in response to low-priced dumped imports, resort to practices which are illegal if engaged into by exporters, such as cutting their prices below their own production costs, does not preclude the application of anti-dumping law.

3.3.1.2.2.3. Margins analysis

In the margins analysis, the dumping margin is compared with the margin of price undercutting : if the dumping margin is lower than the margin of price undercutting, the dumping is considered not to cause the injury ; conversely, if the dumping margin is higher than the margin of price

¹¹⁸⁸ *Infra*, 514.

¹¹⁸⁹ It may, nevertheless, be difficult to determine which party has started the price cutting either by reducing prices or by not carrying out normal price increases (C.J.E.C., case C-358/89, 11 June 1992, *Extramet Industrie SA v Council*, E.C.R., 1992, I, (3813), 3839 (Opinion of Advocate General JACOBS). A chronological approach, i.e., investigating who has set the lowest price first, is not satisfactory since, for example, the Community industry may have decided to sell its products at low prices in anticipation of the effects of the imported products in order to maintain its market share (BESELER, J.F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 158). Likewise, price cutting by importers may also be a defence resorted to as in anticipation of an aggressive pricing policy of the Community industry.

undercutting, the dumping is considered to cause the injury. The *ratio* underlying this approach is that, if the dumping margin is smaller than the margin of price undercutting, the Community industry would still suffer injury, even if no dumping had occurred. For, even without dumping, the imported products would always be less expensive than the product of the Community industry. In fact, the Community industry suffers injury not from the dumping, but from the comparative advantage of the exporting country¹¹⁹⁰.

The European anti-dumping authorities are not very consistent in applying the margins analysis. In several cases in which they found injurious dumping, they seem to accept the margins analysis, as they pointed out that the dumping margin exceeded the margin of price undercutting¹¹⁹¹. In other cases, they could not have applied the margins analysis, for they found injurious dumping, though they observed that the margin of price undercutting exceeded the dumping margin¹¹⁹². In one of those cases, they even explicitly rejected the margins analysis¹¹⁹³. This inconsistent application of the margins analysis may be reduced to the simple «one-way

1190 KAPLAN, S., «Injury and Causation in USITC Antidumping Determinations: Five Recent Approaches», in *Policy Implications of Antidumping Measures*, THARAKAN, P.K.M. (ed.), Amsterdam, North-Holland, 1991, (143), 155-156. See also: DIDIER, P., «Deux années d'application du nouveau règlement antidumping de la CEE», *Cahiers de Droit Européen*, 1982, (21), 41-42; VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 648-651.

1191 Commission Regulation (EEC) No 2667/82 of 4 October 1982 imposing a provisional anti-dumping duty on imports of certain sodium carbonate originating in Bulgaria, the German Democratic Republic, Poland, Romania and the Soviet Union, *O.J.*, 6 October 1982, No L 283/9; Council Regulation (EEC) No 273/83 of 1 February 1983 imposing a definitive anti-dumping duty on imports of light sodium carbonate originating in Bulgaria, the German Democratic Republic, Poland, Romania and the Soviet Union, *O.J.*, 3 February 1983, No L 32/1; Commission Regulation (EEC) No 1386/91 of 23 May 1991 imposing a provisional anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in Japan, the People's Republic of China, the Republic of Korea and Thailand, *O.J.*, 28 May 1991, No L 133/20; Commission Regulation (EEC) No 3296/92 of 12 November 1992 imposing a provisional anti-dumping duty on imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in Czechoslovakia, Hungary, Poland and the Republic of Croatia and terminating the anti-dumping proceeding with regard to the Republics of Serbia and of Montenegro, the former Yugoslav Republic of Macedonia, the Republic of Bosnia-Herzegovina and the Republic of Slovenia, *O.J.*, 14 November 1992, No L 328/15.

1192 Commission Regulation (EEC) No 871/82 of 14 April 1982 imposing a provisional anti-dumping duty on upright pianos originating in the USSR, *O.J.*, 16 April 1982, No L 101/30 (corrigendum, *O.J.*, 29 April 1982, No L 115/22); Council Decision 82/220/EEC of 14 April 1982 terminating an anti-dumping proceeding in respect of imports of upright pianos originating in Czechoslovakia, the German Democratic Republic and Poland, *O.J.*, 16 April 1982, No L 101/45; Commission Regulation (EEC) No 1958/82 of 16 July 1982 imposing a provisional anti-dumping duty on imports of photographic enlargers originating in Poland and the USSR, accepting an undertaking and terminating the proceeding in respect of imports of photographic enlargers originating in Czechoslovakia, *O.J.*, 21 July 1982, No L 212/32; Commission Regulation (EEC) No 2464/84 of 24 August 1984 imposing a provisional anti-dumping duty on imports of certain shovels originating in Brazil, *O.J.*, 29 August 1984, No L 231/29; Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1; Commission Decision 90/138/EEC of 16 March 1990 accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of certain diesel engines originating in Finland and Sweden, and terminating the investigation, *O.J.*, 22 March 1990, No L 76/28; Council Regulation (EEC) No 1048/90 of 25 April 1990 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 27 April 1990, No L 107/56 (corrigendum, *O.J.*, 24 May 1990, No L 133/92).

1193 Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1; Council Regulation (EEC) No 1048/90 of 25 April 1990 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 27 April 1990, No L 107/56 (corrigendum, *O.J.*, 24 May 1990, No L 133/92).

flexible» device : apply the margins analysis only when it underbuilds a finding of injurious dumping ; otherwise, ignore it or even reject it. Obviously, such an inconsistent application has to be rejected.

As a matter of principle, the European anti-dumping authorities should never apply the margins analysis. First, the margins analysis assumes that the price of the imported products, when there is no dumping, will increase by exactly the amount of the dumping margin¹¹⁹⁴. However, this will not necessarily be the case, since the dumping margin may be reduced to zero by increasing the export price, by lowering the normal value or by a combination of both (the latter being the case in figure 17 in this Chapter¹¹⁹⁵)¹¹⁹⁶. Second, the margins analysis mistakenly assumes dumping to cause injury to the Community industry, only if the dumping prices undercut the Community prices. However, dumping causes injury only by changing the proportion of dumping prices to Community prices. If the dumped product is a more expensive product, a fall in its price makes it less expensive *vis-à-vis* the Community product, even if its price is still higher in absolute terms than the Community product's price¹¹⁹⁷.

3.3.2. *Criteria of actual injury*

An injury examination cannot be based only on the impact of the dumping on the volume and prices of the dumped imports. It should also be investigated whether the Community industry suffers injury (Articles 3.1. and 3.4. GATT Anti-dumping Code ; Article 3(2) and (5) basic EC Regulation ; Article 4(2)(c) basic ECSC Decision).

In order to determine whether the Community industry suffers injury, all relevant economic factors having a bearing on the state of the industry must be assessed according to GATT and EC anti-dumping law (Article 3.4. GATT Anti-dumping Code ; Article 3(5) basic EC Regulation). ECSC anti-dumping law does not hold such an explicit obligation. However, the provision of ECSC anti-dumping law, according to which «(a)n examination of injury must involve (...) the consequent impact on the Community industry» (Article 4(2)(c) basic ECSC Decision), imposes the same obligation. Indeed, the impact on the Community industry can only be evaluated, if all

¹¹⁹⁴ The European anti-dumping authorities, though not being asked for an opinion on the margins analysis, held that, should there not be any dumping, the price of the imported product would be higher (Council Regulation (EEC) No 117/91 of 16 January 1991 imposing a definitive anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 19 January 1991, No L 14/1).

¹¹⁹⁵ *Supra*, 433-435.

¹¹⁹⁶ KAPLAN, S., «Injury and Causation in USITC Antidumping Determinations : Five Recent Approaches», in *Policy Implications of Antidumping Measures*, THARAKAN, P.K.M. (ed.), Amsterdam, North-Holland, 1991, (143), 155-156.

¹¹⁹⁷ KAPLAN, S., «Injury and Causation in USITC Antidumping Determinations : Five Recent Approaches», in *Policy Implications of Antidumping Measures*, THARAKAN, P.K.M. (ed.), Amsterdam, North-Holland, 1991, (143), 157.

the relevant economic factors having a bearing on the state of the industry are taken into consideration.

Pursuant to GATT and EC anti-dumping law, the determination of injury must be based on positive evidence and involve an objective examination of the impact of the dumped imports on the Community industry (Article 3.1. GATT Anti-dumping Code ; Article 3(2) basic EC Regulation). As a consequence, the European anti-dumping authorities must not assume that, because of the Community industry's anti-dumping complaint, the state of the Community industry has deteriorated. On the contrary, the European anti-dumping authorities must investigate whether the state of the Community industry has actually deteriorated. As the European anti-dumping authorities always ground their findings on actual data about the situation of the Community industry, the fact that ECSC anti-dumping law does not require that a determination of injury is based on positive evidence and an objective examination, does not pose a problem in respect of GATT anti-dumping law. GATT and EC anti-dumping law, however, do not guarantee that injury determinations will not be tainted by «one-way flexibility». Indeed, economic realities are complex and allow several objective representations. Moreover, the findings on the situation of the Community industry will not always be univocal. As a consequence, depending on the representation chosen of economic real life and the selection of the different factors considered to be decisive, GATT and EC anti-dumping leave much room for «one-way flexibility».

As the effect on the dumped imports must be assessed in relation to the Community *production* of the *like product* (Article 3.6. GATT Anti-dumping Code ; Article 3(8) basic EC Regulation ; Article 4(4) basic ECSC Decision), the overall situation of Community producers cannot be taken into account. This requirement to take only account of the «Community production of the like product» increases the probability of finding injury. For example, Community producers may import the dumped product. They may earn profits on those imports and may increase their overall market share in the Community. The resale of those dumped imports will, however, be disregarded in assessing the effect of the dumped imports on the condition of the Community industry¹¹⁹⁸. As European anti-dumping case law only exceptionally excludes complainant Community producers from the Community industry¹¹⁹⁹ and the Community industry, thus, may include Community producers which make a profitable business importing the dumped product, this case of «one-way flexibility» is hard to defend. Another example concerns the

¹¹⁹⁸ C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, E.C.R., 1992, I, (1335), 1358-1359 (Report for the Hearing : conclusions of the Council) and 1402-1403 ; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, E.C.R., 1992, I, (1409), 1442 (Report for the Hearing : conclusions of the Council) and 1485-1486 ; C.J.E.C., case C-176/87, 10 March 1992, *Konishiroku Photo Industry Co. Ltd v Council*, E.C.R., 1992, I, (1493), 1508-1509 (Report for the Hearing : conclusions of the Council) and 1529-1530 ; C.J.E.C., case C-177/87, 10 March 1992, *Sanyo Electric Co. Ltd v Council*, E.C.R., 1992, I, (1535), 1551 (Report for the Hearing : conclusions of the Council) and 1571 ; C.J.E.C., case C-179/87, 10 March 1992, *Sharp Corporation v Council*, E.C.R., 1992, I, (1635), 1657 (Report for the Hearing : conclusions of the Council) and 1683.

¹¹⁹⁹ *Supra*, 417-426.

bundling of heterogenous products, which the European anti-dumping authorities also disregard when assessing the state of the Community producers¹²⁰⁰. Product bundling is a generally accepted business practice which consists in selling a related, but «unlike» product at a very high price in order to compensate for the losses incurred in selling the like product¹²⁰¹. Clearly, by disregarding product bundling, the European anti-dumping authorities will find more injury than the Community producers actually suffer.

EC anti-dumping law contains a list of examples of relevant economic factors : the fact that the Community industry is still in process of recovering from the effects of past dumping or subsidization, the magnitude of the actual dumping margin, actual and potential decline in sales, profits, output, market share, productivity, return on investments, utilization off capacity ; factors affecting Community prices ; actual and potential negative effects on cash flow, inventories, employment, wages growth, ability to raise capital or investments (Article 3(5) basic EC Regulation). ECSC anti-dumping law contains a smaller list : production, utilization of capacity, stocks, sales, market share, prices, profits, return on investment, cash flow and employment (Article 4(2)(c) basic ECSC Decision). Both lists are based on an analogous list in GATT anti-dumping law (Article 3.5. GATT Anti-dumping Code). However, the ECSC list is smaller than the GATT list, which is, on its turn, more restrictive than the EC list (*i.e.*, the GATT list does not refer to the fact that the Community industry is still in the process of recovering from the effects of past dumping or subsidization). Those differences do not really matter, as those lists are not exhaustive (Article 3.4. GATT Anti-dumping Code¹²⁰² ; Article 3(5) basic EC Regulation¹²⁰³ ; Article 4(2)(c) basic ECSC Decision¹²⁰⁴). As a consequence, factors not

¹²⁰⁰ C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, E.C.R., 1992, I, (1335), 1358-1359 (Report for the Hearing : conclusions of the Council) and 1402-1403 ; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, E.C.R., 1992, I, (1409), 1442 (Report for the Hearing : conclusions of the Council) and 1485-1486 ; C.J.E.C., case C-176/87, 10 March 1992, *Konishiroku Photo Industry Co. Ltd v Council*, E.C.R., 1992, I, (1493), 1508-1509 (Report for the Hearing : conclusions of the Council) and 1529-1530 ; C.J.E.C., case C-177/87, 10 March 1992, *Sanyo Electric Co. Ltd v Council*, E.C.R., 1992, I, (1535), 1551 (Report for the Hearing : conclusions of the Council- and 1571 ; C.J.E.C., case C-179/87, 10 March 1992, *Sharp Corporation v Council*, E.C.R., 1992, I, (1635), 1657 (Report for the Hearing : conclusions of the Council) and 1683 ; Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, O.J., 26 August 1986, No L 239/5 ; Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, O.J., 24 February 1987, No L 54/12.

¹²⁰¹ *Supra*, 291-294.

¹²⁰² Article 3.4. GATT Anti-dumping Code stipulates explicitly that «(t)his list is not exhaustive».

¹²⁰³ Article 3(5) basic EC Regulation stipulates explicitly that «(t)his list is not exhaustive».

¹²⁰⁴ Article 4(2)(c) basic ECSC Decision is not exhaustive since it uses the words «such as» before enumerating the relevant economic factors. See also : C.J.E.C., joined cases 277 and 300/85, 5 October 1988, *Canon Inc. a.o. v Council*, E.C.R., 1988, (5731), 5808 ; C.J.E.C., joined cases 273/85 and 107/86, 5 October 1988, *Silver Seiko Limited a.o. v Council*, E.C.R., 1988, (5927), 5980 ; C.J.E.C., joined cases C-304/86 and C-185/87, 11 July 1990, *Enital SpA v Commission and Council*, E.C.R., 1990, I, (2939), 2940 ; Commission Decision 83/360/EEC of 18 July 1983 terminating the anti-dumping proceeding in respect of imports of certain pears in syrup, originating in Australia, the People's Republic of China and the Republic of South Africa, O.J., 20 July 1983, No L 196/22.

enumerated in European anti-dumping law, such as intra-community trade¹²⁰⁵, turnover¹²⁰⁶, return on sales¹²⁰⁷, the effect on the restructuring measures undertaken by

¹²⁰⁵ Intra-community trade is used as a relevant economic factor in cases where the European anti-dumping authorities do not possess full information on the whole Community industry. It is also used in cases where their investigation was focused on the market of one particular Member State, because either the dumped imports were concentrated into that market, or because there were no precise data concerning the other Member States available. Thus, the imports coming from other Member States into a particular Member State are not merely taken into consideration to ascertain if and how they affect the Community producers established within that particular Member State, but also to investigate whether the producers established in these other Member States do not suffer injury from the dumping.

Indeed, the fact that the imports from other Member States compete with the dumped imports on the market of a particular Member State has been held to prove that also the producers established in these other Member States are injured by the dumping (Commission Regulation (EEC) No 2712/79 of 30 November 1979 imposing a provisional anti-dumping duty on certain acrylic fibres originating in the United States of America, *O.J.*, 4 December 1979, No L 308/11 ; Commission Decision 80/488/EEC of 6 May 1980 accepting an undertaking given in connection with the anti-dumping proceeding concerning certain acrylic fibres originating in Japan and terminating this proceeding, *O.J.*, 9 May 1980, No L 118/60 ; Council Regulation (EEC) No 101/83 of 17 January 1983 imposing a definitive anti-dumping duty on certain chemical fertilizer originating in the United States of America, *O.J.*, 19 January 1983, No L 15/1 ; Commission Regulation (EEC) No 290/83 of 2 February 1983 imposing a provisional anti-dumping duty on imports of urea ammonium nitrate solution fertilizer originating in the United States of America, *O.J.*, 4 February 1983, No L 33/9 ; Commission Recommendation No 376/83/ECSC of 14 February 1983 imposing a provisional anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Brazil, *O.J.*, 17 February 1983, No L 45/14 ; Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia, *O.J.*, 9 May 1987, No L 121/11 ; Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1).

However, the fact that the absolute volume and market share of the imports of Member States into another Member State in which the dumped imports were concentrated, has increased and that their prices were significantly lower than those of the dumped products, has been only once held to be a reason for not finding injury (Council Decision 83/9/EEC of 17 January 1983 terminating the anti-dumping proceeding concerning imports of codeine and its salts originating in Czechoslovakia, Hungary, Poland and Yugoslavia, *O.J.*, 20 January 1983, No L 16/30). Usually, increased low-priced Community imports into one Member State do not prevent an injury finding (Council Regulation (EEC) No 1882/82 of 12 July 1982 imposing a definitive anti-dumping duty on mechanical wrist-watches originating in the USSR, *O.J.*, 15 July 1982, No L 207/1 ; Commission Decision 84/259/EEC of 10 May 1984 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain sensitized paper for colour photographs originating in Japan and terminating that proceeding, *O.J.*, 11 May 1984, No L 124/45 ; Commission Regulation (EEC) No 2464/84 of 24 August 1984 imposing a provisional anti-dumping duty on imports of certain shovels originating in Brazil, *O.J.*, 29 August 1984, No L 231/29 ; Commission Decision 84/465/EEC of 26 September 1984 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of asbestos-cement corrugated sheets originating in Czechoslovakia and the German Democratic Republic and terminating that proceeding, *O.J.*, 28 September 1984, No L 259/48 ; Commission Regulation (EEC) No 2221/85 of 29 July 1985 imposing a provisional anti-dumping duty on imports of basic chromium sulphate originating in Yugoslavia, *O.J.*, 3 August 1985, No L 205/12 ; Council Regulation (EEC) No 264/86 of 4 February 1986 imposing a definitive anti-dumping duty on imports of certain clogs originating in Sweden and definitively collecting the provisional anti-dumping duty, *O.J.*, 7 February 1986, No L 32/1 ; Commission Decision 86/21/EEC of 4 February 1986 accepting undertakings given in connection with the anti-dumping investigation concerning imports of certain clogs originating in Sweden, *O.J.*, 7 February 1986, No L 32/28 ; Commission Regulation (EEC) No 3019/86 of 30 September 1986 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania and the USSR, *O.J.*, 1 October 1986, No L 280/68 ; Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia, *O.J.*, 9 May 1987, No L 121/11).

¹²⁰⁶ Commission Decision 89/560/EEC of 17 October 1989 terminating the anti-dumping proceeding concerning imports of polyester film originating in the Republic of Korea, *O.J.*, 21 October 1989, No L 305/31 ; Council Regulation (EEC) No 577/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as EPROMs (erasable programmable read only memories) originating in Japan, *O.J.*, 12 March 1991, No L 65/1.

the Community industry¹²⁰⁸ or the effect on the structural adjustment policy undertaken by the Community¹²⁰⁹, are used to examine the state of the Community industry. Since the lists are

1207 Commission Decision 85/209/EEC of 26 March 1985 accepting the undertaking given in connection with the anti-dumping investigation concerning imports of plasterboard of Spanish origin into Ireland and Northern Ireland and terminating that investigation, *O.J.*, 29 March 1985, No L 89/65; Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1; Commission Decision 86/497/EEC of 7 October 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of silicon carbide originating in the People's Republic of China, Norway, Poland and the USSR, and terminating the investigation regarding imports of that product originating in the People's Republic of China, Norway, Poland, Czechoslovakia, the USSR and Yugoslavia, *O.J.*, 10 October 1986, No L 287/25; Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7.

1208 If the Community industry is faced with structural adjustment problems, dumping has been found to cause injury because :

- it undermines the process of recovery (Commission Regulation (EEC) No 2712/79 of 30 November 1979 imposing a provisional anti-dumping duty on certain acrylic fibres originating in the United States of America, *O.J.*, 4 December 1979, No L 308/11; Council Regulation (EEC) No 1100/80 of 30 April 1980 imposing a definitive anti-dumping duty on certain acrylic fibres originating in the United States of America, *O.J.*, 3 May 1980, No L 114/37; Commission Decision 80/488/EEC of 6 May 1980 accepting an undertaking given in connection with the anti-dumping proceeding concerning certain acrylic fibres originating in Japan and terminating this proceeding, *O.J.*, 9 May 1980, No L 118/60; Commission Decision No 2158/88/ECSC of 20 July 1988 imposing a provisional anti-dumping duty on imports of certain iron or steel sections originating in Yugoslavia or Turkey, *O.J.*, 21 July 1988, No L 190/5; Commission Decision 90/138/EEC of 16 March 1990 accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of certain diesel engines originating in Finland and Sweden, and terminating the investigation, *O.J.*, 22 March 1990, No L 76/28; Commission Decision No 2297/92/ECSC of 31 July 1992 amending Decision No 2131/88/ECSC, accepting undertakings offered in connection with imports of certain sheets and plates, of iron or steel, originating in the Republic of Slovenia and the Yugoslav republics of Macedonia, Montenegro and Serbia, and terminating the anti-dumping proceeding with regard to the Republic of Croatia and the Republic of Bosnia-Herzegovina, *O.J.*, 6 August 1992, No L 221/36);
- it jeopardizes the results of the restructuring measures taken by the Community industry (Council Regulation (EEC) No 3946/88 of 16 December 1988 imposing a definitive anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 December 1988, No L 348/49; Commission Decision No 708/89/ECSC of 17 March 1989 imposing a provisional anti-dumping duty on imports of certain flat-rolled products of iron or non-alloy steel, cold-rolled, originating in Yugoslavia, *O.J.*, 21 March 1989, No L 78/14; Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7).

1209 If a European structural adjustment policy, such as production quotas, guidance price systems and even steel arrangements with non-Member States, is elaborated, the fact that the objectives of this policy are being jeopardized is considered as an indication of injury. This was the case in several ECSC anti-dumping cases concerning steel products, where it was underscored that the Community industry was in a state of crisis warranting a structural adjustment policy (Commission Recommendation No 112/78/ECSC of 18 January 1978 imposing a provisional anti-dumping duty on imports of iron or steel coils for re-rolling, originating in Czechoslovakia and South Korea, *O.J.*, 21 January 1978, No L 17/27; Commission Recommendation No 119/78/ECSC of 18 January 1978 imposing a provisional anti-dumping duty on wire rod originating in Czechoslovakia, *O.J.*, 24 January 1978, No L 19/5; Commission Recommendation No 120/78/ECSC of 18 January 1978 imposing a provisional duty on certain sheets and plates, of iron or steel, originating in Czechoslovakia, *O.J.*, 24 January 1978, No L 19/7; Commission Recommendation No 121/78/ECSC of 18 January 1978 imposing a provisional anti-dumping duty on certain sheets and plates, of iron or steel, originating in Bulgaria, Czechoslovakia and Japan, *O.J.*, 24 January 1978, No L 19/9; Commission Recommendation No 159/78/ECSC of 27 January 1978 imposing a provisional anti-dumping duty on certain angles, shapes and sections, of iron and steel, not further worked than hot-rolled or extruded, originating in Spain, *O.J.*, 28 January 1978, No L 23/31; Commission Recommendation No 160/78/ECSC of 27 January 1978 imposing a provisional anti-dumping duty on certain sheets and plates, of iron or steel, originating in the German Democratic Republic, Romania and Spain, *O.J.*, 28 January 1978, No L 23/33; Commission Recommendation No 161/78/ECSC of 27 January 1978 imposing a provisional anti-dumping duty on certain sheets and plates, of iron or steel, originating in Japan, *O.J.*, 28 January 1978, No L 23/35; Commission Recommendation No 245/78/ECSC of 2 February 1978 imposing a provisional anti-dumping duty on imports of iron or steel coils for re-rolling originating in Japan and Bulgaria, *O.J.*, 7 February 1978, No L 37/13; Commission Recommendation No 262/78/ECSC of 7 February 1978 imposing a provisional anti-dumping duty on certain sheets and plates, of iron or steel, originating in Poland, *O.J.*, 9 February 1978, No L 39/13; Commission Recommendation No 263/78/ECSC of 7 February 1978 imposing a provisional anti-dumping duty on certain angles, shapes and sections, of iron or steel, not further worked than hot-rolled or extruded, originating in Japan, *O.J.*, 9 February 1978, No L 39/15; Commission Recommendation No 307/78/ECSC of 14 February 1978 imposing a provisional anti-dumping duty on imports of iron or steel coils for re-rolling originating in Australia, *O.J.*, 16 February 1978, No L 45/17; Commission Recommendation No 811/78/ECSC of 21 April 1978 imposing a definitive anti-dumping duty on certain sheets and plates, of iron or

not exhaustive, the broad interpretation placed on the economic factors enumerated in European

steel, originating in Bulgaria, the German Democratic Republic and Romania, *O.J.*, 22 April 1978, No L 108/26 ; Commission Recommendation No 932/78/ECSC of 2 May 1978 imposing a definitive anti-dumping duty on iron or steel coils for re-rolling originating in Bulgaria, *O.J.*, 4 May 1978, No L 120/22 ; Commission Recommendation No 1006/78/ECSC of 18 May 1978 imposing a definitive anti-dumping duty on certain galvanized sheets and plates originating in the German Democratic Republic, *O.J.*, 19 May 1978, No L 131/8 ; Commission Recommendation No 1704/78/ECSC of 19 July 1978 imposing a definitive anti-dumping duty on certain sheets and plates, of iron or steel, originating in Czechoslovakia, Japan, Poland and Spain, *O.J.*, 20 July 1978, No L 195/17 ; Commission Recommendation No 1715/78/ECSC of 20 July 1978 imposing a definitive anti-dumping duty on certain galvanized sheets and plates originating in Japan, *O.J.*, 22 July 1978, No L 198/1 ; Commission Recommendation No 1758/78/ECSC of 26 July 1978 imposing a definitive anti-dumping duty on certain angles, shapes and sections of iron or steel, originating in Spain, *O.J.*, 27 July 1978, No L 203/28 ; Commission Recommendation No 267/79/ECSC of 9 February 1979 imposing a provisional anti-dumping duty on certain angles, shapes and U, I or H sections of iron or steel, not further worked than hot-rolled or extruded, originating in Spain, *O.J.*, 13 February 1979, No L 37/21 ; Commission Recommendation No 294/79/ECSC of 13 February 1979 imposing a provisional anti-dumping duty on certain hematite pig iron originating in Brazil, *O.J.*, 16 February 1979, No L 41/29 ; Commission Recommendation No 433/79/ECSC of 27 February 1979 imposing a provisional anti-dumping duty on certain sheets and plates of iron or steel originating in Spain and repealing certain suspended anti-dumping duties, *O.J.*, 3 March 1979, No L 53/21 ; Commission Recommendation No 496/79/ECSC of 13 March 1979 imposing a provisional anti-dumping duty on iron or steel coils for re-rolling originating in Greece, *O.J.*, 15 March 1979, No L 65/16 ; Commission Recommendation No 935/79/ECSC of 8 May 1979 imposing a definitive anti-dumping duty on certain angles, shapes and U, I or H sections of iron or steel, not further worked than hot-rolled or extruded, originating in Spain but imported from some other non-member country, *O.J.*, 12 May 1979, No L 117/16 ; Commission Recommendation No 950/79/ECSC of 14 May 1979 imposing a definitive anti-dumping duty on certain hematite pig iron originating in Brazil but imported from some other non-member country, *O.J.*, 16 May 1979, No L 120/11 ; Commission Recommendation No 1083/79/ECSC of 30 May 1979 imposing a definitive anti-dumping duty on certain plates of iron or steel originating in Spain but imported from some other non-member country, *O.J.*, 1 June 1979, No L 135/54 ; Commission Recommendation No 1104/82/ECSC of 6 May 1982 imposing a provisional anti-dumping duty on certain sheets and plates, of iron or steel, originating in Brazil, *O.J.*, 11 May 1982, No L 128/9 ; Commission Recommendation No 2242/82/ECSC of 10 August 1982 imposing a provisional anti-dumping duty on broad-flanged beams originating in Spain, *O.J.*, 13 August 1982, No L 238/32 ; Commission Recommendation No 2975/82/ECSC of 8 November 1982 imposing a definitive anti-dumping duty on certain sheets and plates, of iron or steel, originating in Brazil, *O.J.*, 9 November 1982, No L 312/10 ; Commission Recommendation No 259/83/ECSC of 27 January 1983 imposing a definitive anti-dumping duty on broad-flanged beams originating in Spain, *O.J.*, 1 February 1983, No L 30/61 (corrigendum, *O.J.*, 8 February 1983, No L 36/10) ; Commission Recommendation No 376/83/ECSC of 14 February 1983 imposing a provisional anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Brazil, *O.J.*, 17 February 1983, No L 45/14 ; Commission Decision No 702/83/ECSC of 24 March 1983 imposing provisional anti-dumping duties on certain iron or steel coils for re-rolling originating in Argentina, Brazil, Canada and Venezuela and accepting price undertakings from two Canadian exporters, *O.J.*, 29 March 1983, No L 82/9 ; Commission Decision No 3113/83/ECSC of 4 November 1983 imposing a provisional anti-dumping duty on imports of concrete reinforcing bars originating in Spain, *O.J.*, 5 November 1983, No L 303/13 ; Commission Decision No 295/84/ECSC of 2 February 1984 imposing a definitive anti-dumping duty on imports of concrete reinforcing bars originating in Spain, *O.J.*, 4 February 1984, No L 33/15 (corrigendum, *O.J.*, 7 March 1984, No L 65/15) ; Commission Decision No 2767/86/ECSC of 5 September 1986 imposing a provisional anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Yugoslavia, *O.J.*, 6 September 1986, No L 254/18 ; Commission Decision No 2247/87/ECSC of 28 July 1987 imposing a provisional anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Mexico, *O.J.*, 29 July 1987, No L 207/21 ; Commission Decision No 163/88/ECSC of 20 January 1988 imposing a provisional anti-dumping duty on imports of certain iron or steel coils, originating in Algeria, Mexico and Yugoslavia, *O.J.*, 22 January 1988, No L 18/31).

The fact that the dumped imports hamper the removal of those crisis measures towards liberalising of the steel market has also been considered as evidence for the injurious effect of the dumping (Commission Decision No 2247/87/ECSC of 28 July 1987 imposing a provisional anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Mexico, *O.J.*, 29 July 1987, No L 207/21 ; Commission Decision No 163/88/ECSC of 20 January 1988 imposing a provisional anti-dumping duty on imports of certain iron or steel coils, originating in Algeria, Mexico and Yugoslavia, *O.J.*, 22 January 1988, No L 18/31).

Similarly, if the production aid granted to the Community industry, amounting to the difference between the Community producers' production costs and the import price of non-EEC products, neutralizes the injurious effects of the dumped imports on the Community market, the increased burden on production aid caused by the dumped imports will be an indication of injury (Commission Decision 83/360/EEC of 18 July 1983 terminating the anti-dumping proceeding in respect of imports of certain pears in syrup, originating in Australia, the People's Republic of China and the Republic of South Africa, *O.J.*, 20 July 1983, No L 196/22). The fact that the dumped imports endanger the general minimum price system of the Council, is also evidence of injury (Commission Decision 84/407/EEC of 10 August 1984 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain kraft liner paper and board originating in Spain and terminating that proceeding, *O.J.*, 21 August 1984, No L 224/30).

anti-dumping law¹²¹⁰ cannot be criticized. If no broad interpretation should be applied, a non-

1210 The factor «production» comprises :
in findings of injury :

- the suppression of production (i.e., the fact that Community production would have been higher in the absence of the dumped imports) (Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5) ;
- the temporary cessation or reduction of production (Commission Regulation (EEC) No 1355/78 of 20 June 1978 imposing a provisional anti-dumping duty on ferro-chromium originating in the Republic of South Africa and Sweden, *O.J.*, 22 June 1978, No L 165/20 (corrigendum, *O.J.*, 29 June 1978, No L 173/31) ; Council Decision 87/104/EEC of 9 February 1987 accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China, and terminating the investigation, *O.J.*, 14 February 1987, No L 46/45 ; Commission Regulation (EEC) No 547/90 of 2 March 1990 imposing a provisional anti-dumping duty on imports of certain glutamic acid and its salts originating in Indonesia, the Republic of Korea, Taiwan and Thailand, and accepting undertakings in connection with imports of certain glutamic acid and its salts originating in these countries, *O.J.*, 3 March 1990, No L 56/23 ; Commission Regulation (EEC) No 1537/90 of 28 May 1990 imposing a provisional anti-dumping duty on imports of potassium permanganate originating in the USSR, *O.J.*, 8 June 1990, No L 145/9) ;
- the total suspension of production for several periods (Commission Regulation (EEC) No 2495/86 of 1 August 1986 imposing a provisional anti-dumping duty on imports of potassium permanganate originating in Czechoslovakia, the German Democratic Republic and the People's Republic of China, *O.J.*, 5 August 1986, No L 217/12. See also : Commission Regulation (EEC) No 348/83 of 10 February 1983 imposing a provisional anti-dumping duty on imports of hexamethylenetetramine originating in the German Democratic Republic and the Soviet Union, and accepting undertakings and terminating the proceeding in respect of imports of hexamethylenetetramine originating in Czechoslovakia and Romania, *O.J.*, 12 February 1983, No L 40/24 ; Commission Decision 85/443/EEC of 23 September 1985 accepting an undertaking given in connection with the anti-dumping investigation concerning imports of container corner fittings of worked cast steel originating in Austria and terminating that investigation, *O.J.*, 27 September 1985, No L 256/44) ;
- the closure of several plants (Commission Regulation (EEC) No 2818/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports of cotton yarn originating in Brazil, Egypt and Turkey and terminating the anti-dumping proceeding in respect of cotton yarn originating in India and Thailand, *O.J.*, 27 September 1991, No L 271/17 ; Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7 ; Council Regulation (EEC) No 738/92 of 23 March 1992 imposing a definitive anti-dumping duty on imports of cotton yarn originating in Brazil and Turkey, *O.J.*, 27 March 1992, No L 82/1 ; Council Regulation (EEC) No 830/92 of 30 March 1992 imposing a definitive anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and collecting definitively the provisional duty, *O.J.*, 3 April 1992, No L 88/1 (corrigendum, *O.J.*, 5 June 1992, No L 153/16) ;
- the reduction in production capacity (Commission Decision 82/881/EEC of 23 December 1982 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of perchlorethylene originating in Czechoslovakia, Romania, Spain and the United States of America and terminating that proceeding, *O.J.*, 30 December 1982, No L 371/47 ; Commission Decision 83/192/EEC of 19 April 1983 accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of certain cellulose ester resins (cellulose-acetobutyrate and cellulose-acetopropionate) originating in the United States of America and terminating that proceeding, *O.J.*, 23 April 1983, No L 106/24 ; Commission Regulation (EEC) No 2253/84 of 31 July 1984 imposing a provisional anti-dumping duty on certain imports of certain sodium carbonate originating in the United States of America and accepting undertakings in respect of other imports of the same product, *O.J.*, 2 August 1984, No L 206/15 ; Council Regulation (EEC) No 725/89 of 20 March 1989 imposing a definitive anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty on such imports, *O.J.*, 22 March 1989, No L 79/24 ; Council Regulation (EEC) No 341/90 of 5 February 1990 accepting undertakings and imposing a definitive anti-dumping duty on imports of ferro-silicon originating in Iceland, Norway, Sweden, Venezuela or Yugoslavia, except those sold for export to the Community by companies whose undertakings have been accepted, *O.J.*, 10 February 1990, No L 38/1) ;
- the fact that the output of manufacturing and assembly facilities built in the Community and owned by non-dumping exporters, shows a rate of increase lower than the rate of decrease of the imports of the non-dumping exporters/owners into the Community (Commission Regulation (EEC) No 2684/88 of 26 August 1988 imposing a provisional anti-dumping duty on certain imports of video cassette recorders originating in Japan and the Republic of Korea, *O.J.*, 31 August 1988, No L 240/5) ;
- the relocation of a considerable and increasing proportion of the Community producers' production outside the Community (Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1 ; Council Regulation (EEC) No 117/91 of 16 January 1991 imposing a definitive anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 19 January 1991, No L 14/1) ;

- the fact that planned increases in production capacity are curtailed (Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79; corrigendum, *O.J.*, 10 February 1990, No L 38/44).
- in findings of no injury :
 - normal scheduled plant shut-downs for maintenance (Council Regulation (EEC) No 2702/87 of 4 September 1987 repealing a definitive anti-dumping duty on styrene monomer originating in the United States of America and terminating the investigation, *O.J.*, 8 September 1987, No L 258/20);
 - the fact that the heavy downturn of the markets has led to several plant closures (Commission Decision 89/56/EEC of 20 January 1989 terminating the anti-dumping proceeding concerning imports of certain seamless tubes of iron or non-alloy steel originating in Austria, *O.J.*, 28 January 1989, No L 25/87);
 - the decision of the Community producers to halt or curb their production of the like product and to obtain supplies from the dumping country (Commission Decision 90/154/EEC of 26 March 1990 terminating the anti-dumping proceeding concerning imports of ammonium paratungstate originating in the People's Republic of China and the Republic of Korea, *O.J.*, 30 March 1990, No L 83/117).

See also : *supra*, 389-391

The factor «stocks» comprises the development in the duration of stock clearance (Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50).

The factor «sales» comprises :

- the suppression of sales (i.e., the fact that sales would have been higher in the absence of the dumped imports) (Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5);
- the development in the volume of rentals (Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12);
- the shift of sales from one sub-market to another (Commission Regulation (EEC) No 2221/85 of 29 July 1985 imposing a provisional anti-dumping duty on imports of basic chromium sulphate originating in Yugoslavia, *O.J.*, 3 August 1985, No L 205/12; Council Regulation (EEC) No 1058/86 of 8 April 1986 imposing a definitive anti-dumping duty on imports of certain electronic scales originating in Japan, *O.J.*, 12 April 1986, No L 97/1; Commission Regulation (EEC) No 2516/86 of 4 August 1986 imposing a provisional anti-dumping duty on imports of housed bearing units originating in Japan, *O.J.*, 7 August 1986, No L 221/16).

The factor «market share» comprises projected, but not obtained market shares (Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79; corrigendum, *O.J.*, 10 February 1990, No L 38/44)).

The factor «prices» comprises :

- the fact that the prices started to climb in the Community but also worldwide (Council Regulation (EEC) No 2702/87 of 4 September 1987 repealing a definitive anti-dumping duty on styrene monomer originating in the United States of America and terminating the investigation, *O.J.*, 8 September 1987, No L 258/20);
- the suspension of production by subsidiaries of the dumping exporters in the Community, as evidence of the stiff price competition on the Community market (Commission Regulation (EEC) No 2516/86 of 4 August 1986 imposing a provisional anti-dumping duty on imports of housed bearing units originating in Japan, *O.J.*, 7 August 1986, No L 221/16).

The factor «profits» comprises :

- the fact that producers are forced to use profits from other sectors to finance their operations in the sector of the like product (Commission Regulation (EEC) No 2516/86 of 4 August 1986 imposing a provisional anti-dumping duty on imports of housed bearing units originating in Japan, *O.J.*, 7 August 1986, No L 221/16; Council Regulation (EEC) No 864/87 of 23 March 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union, and definitively collecting the amounts secured as provisional duties, *O.J.*, 27 March 1987, No L 83/1; Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12);
- the fact that producers are not able to cross-subsidize between different sectors, because they produce only the like product (Commission Regulation (EEC) No 2464/84 of 24 August 1984 imposing a provisional anti-dumping duty on imports of certain shovels originating in Brazil, *O.J.*, 29 August 1984, No L 231/29);
- the bankruptcy of a Community producer (Commission Regulation (EEC) No 2464/84 of 24 August 1984 imposing a provisional anti-dumping duty on imports of certain shovels originating in Brazil, *O.J.*, 29 August 1984, No L 231/29; Commission Decision 90/241/EEC of 22 May 1990 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of photo albums originating in South Korea and Hong Kong, and terminating the investigation,

O.J., 31 May 1990, No L 138/48).

The factor «employment» comprises :

the adoption of short-time working (Commission Regulation (EEC) No 2757/76 of 12 November 1976 imposing a provisional anti-dumping duty on cycle chains originating in Taiwan, *O.J.*, 13 November 1976, No L 312/41 ; Commission Regulation (EEC) No 261/77 of 4 February 1977 imposing a provisional anti-dumping duty on ball bearings, tapered roller bearings and parts thereof originating in Japan, *O.J.*, 5 February 1977, No L 34/60 ; Council Regulation (EEC) No 1778/77 of 26 July 1977 concerning the application of the anti-dumping duty on ball bearings and tapered roller bearings, originating in Japan, *O.J.*, 3 August 1977, No L 196/1 ; Commission Recommendation No 112/78/ECSC of 18 January 1978 imposing a provisional anti-dumping duty on imports of iron or steel coils for re-rolling, originating in Czechoslovakia and South Korea, *O.J.*, 21 January 1978, No L 17/27 ; Commission Recommendation No 118/78/ECSC of 18 January 1978 imposing a provisional anti-dumping duty on certain galvanized steel sheets and plates originating in Poland and Spain, *O.J.*, 24 January 1978, No L 19/3 ; Commission Recommendation No 119/78/ECSC of 18 January 1978 imposing a provisional anti-dumping duty on wire rod originating in Czechoslovakia, *O.J.*, 24 January 1978, No L 19/5 ; Commission Recommendation No 161/78/ECSC of 27 January 1978 imposing a provisional anti-dumping duty on certain sheets and plates, of iron or steel, originating in Japan, *O.J.*, 28 January 1978, No L 23/35 ; Commission Recommendation No 245/78/ECSC of 2 February 1978 imposing a provisional anti-dumping duty on imports of iron or steel coils for re-rolling originating in Japan and Bulgaria, *O.J.*, 7 February 1978, No L 37/13 ; Commission Recommendation No 262/78/ECSC of 7 February 1978 imposing a provisional anti-dumping duty on certain sheets and plates, of iron or steel, originating in Poland, *O.J.*, 9 February 1978, No L 39/13 ; Commission Recommendation No 263/78/ECSC of 7 February 1978 imposing a provisional anti-dumping duty on certain angles, shapes and sections, of iron or steel, not further worked than hot-rolled or extruded, originating in Japan, *O.J.*, 9 February 1978, No L 39/15 ; Commission Recommendation No 307/78/ECSC of 14 February 1978 imposing a provisional anti-dumping duty on imports of iron or steel coils for re-rolling originating in Australia, *O.J.*, 16 February 1978, No L 45/17 ; Commission Recommendation No 359/78/ECSC of 20 February 1978 imposing a provisional anti-dumping duty on certain galvanized sheets and plates originating in the German Democratic Republic and Japan, *O.J.*, 22 February 1978, No L 50/13 ; Commission Regulation (EEC) No 511/78 of 7 March 1978 imposing a provisional anti-dumping duty on kraft liner paper and board originating in the United States of America, *O.J.*, 11 March 1978, No L 69/9 ; Commission Recommendation No 790/78/ECSC of 19 April 1978 imposing a definitive anti-dumping duty on iron or steel coils for re-rolling originating in South Korea, *O.J.*, 20 April 1978, No L 106/21 ; Commission Recommendation No 811/78/ECSC of 21 April 1978 imposing a definitive anti-dumping duty on certain sheets and plates, of iron or steel, originating in Bulgaria, the German Democratic Republic and Romania, *O.J.*, 22 April 1978, No L 108/26 ; Commission Recommendation No 932/78/ECSC of 2 May 1978 imposing a definitive anti-dumping duty on iron or steel coils for re-rolling originating in Bulgaria, *O.J.*, 4 May 1978, No L 120/22 ; Commission Recommendation No 1006/78/ECSC of 18 May 1978 imposing a definitive anti-dumping duty on certain galvanized sheets and plates originating in the German Democratic Republic, *O.J.*, 19 May 1978, No L 131/8 ; Commission Regulation (EEC) No 1355/78 of 20 June 1978 imposing a provisional anti-dumping duty on ferro-chromium originating in the Republic of South Africa and Sweden, *O.J.*, 22 June 1978, No L 165/20 (corrigendum, *O.J.*, 29 June 1978, No L 173/31) ; Commission Recommendation No 1704/78/ECSC of 19 July 1978 imposing a definitive anti-dumping duty on certain sheets and plates, of iron or steel, originating in Czechoslovakia, Japan, Poland and Spain, *O.J.*, 20 July 1978, No L 196/17 ; Commission Recommendation No 1768/78/ECSC of 26 July 1978 imposing a definitive anti-dumping duty on certain angles, shapes and sections of iron or steel, originating in Spain, *O.J.*, 27 July 1978, No L 203/28 ; Council Regulation (EEC) No 2133/78 of 8 September 1978 imposing a definitive anti-dumping duty on kraft liner paper and board originating in the United States of America, *O.J.*, 9 September 1978, No L 247/22 ; Commission Recommendation No 267/79/ECSC of 9 February 1979 imposing a provisional anti-dumping duty on certain angles, shapes and U, I or H sections of iron or steel, not further worked than hot-rolled or extruded, originating in Spain, *O.J.*, 13 February 1979, No L 37/21 ; Commission Recommendation No 294/79/ECSC of 13 February 1979 imposing a provisional anti-dumping duty on certain hematite pig iron originating in Brazil, *O.J.*, 16 February 1979, No L 41/29 ; Commission Recommendation No 433/79/ECSC of 27 February 1979 imposing a provisional anti-dumping duty on certain sheets and plates of iron or steel originating in Spain and repealing certain suspended anti-dumping duties, *O.J.*, 3 March 1979, No L 53/21 ; Commission Recommendation No 496/79/ECSC of 13 March 1979 imposing a provisional anti-dumping duty on iron or steel coils for re-rolling originating in Greece, *O.J.*, 15 March 1979, No L 65/16 ; Commission Recommendation No 935/79/ECSC of 8 May 1979 imposing a definitive anti-dumping duty on certain angles, shapes and U, I or H sections of iron or steel, not further worked than hot-rolled or extruded, originating in Spain but imported from some other non-member country, *O.J.*, 12 May 1979, No L 117/16 ; Commission Recommendation No 950/79/ECSC of 14 May 1979 imposing a definitive anti-dumping duty on certain hematite pig iron originating in Brazil but imported from some other non-member country, *O.J.*, 16 May 1979, No L 120/11 ; Commission Recommendation No 1083/79/ECSC of 30 May 1979 imposing a definitive anti-dumping duty on certain plates of iron or steel originating in Spain but imported from some other non-member country, *O.J.*, 1 June 1979, No L 135/54 ; Commission Regulation (EEC) No 1579/80 of 19 June 1980 imposing a provisional anti-dumping duty on mechanical alarm clocks (other than travel alarms) originating in the German Democratic Republic and the USSR, and repealing a national anti-dumping duty on mechanical alarm clocks originating in China imposed under the transitional provisions of the Act of Accession, *O.J.*, 25 June 1980, No L 158/5 ; Commission Decision 80/600/EEC of 19 June 1980 accepting undertakings offered by the Chinese and Czechoslovak exporters in connection with the anti-dumping proceeding concerning imports of mechanical alarm clocks (other than travel alarms) originating in China, Czechoslovakia, the German Democratic Republic, Hong Kong and the USSR, terminating the proceeding in respect of China, Czechoslovakia and Hong Kong, and withdrawing acceptance of undertakings previously accepted by the United Kingdom Government from the exporters in the German Democratic Republic, *O.J.*, 25 June 1980, No L 158/18 ; Commission Regulation (EEC) No 2297/80 of 29 August 1980 imposing a provisional anti-dumping duty on imports of certain polyester yarn originating in the United States of America, *O.J.*, 2 September 1980, No L 231/5 ; Commission Decision 80/1175/EEC of 15 December 1980 terminating the anti-dumping

proceeding concerning imports of pressure sensitive paper masking tape originating in the United States of America, *O.J.*, 19 December 1980, No L 344/57; Commission Regulation (EEC) No 1337/81 of 18 May 1981 imposing a provisional anti-dumping duty on imports of certain textured polyester fabrics originating in the United States of America, *O.J.*, 20 May 1981, No L 133/17; Commission Decision 81/366/EEC of 18 May 1981 accepting an undertaking given in connection with the anti-dumping proceedings concerning louvre doors originating in Malaysia and Singapore and terminating the proceedings, *O.J.*, 22 May 1981, No L 135/33; Commission Regulation (EEC) No 1591/81 of 10 June 1981 imposing a provisional anti-dumping duty on paraxylene (*p*-xylene) originating in Puerto Rico, the United States of America and the US Virgin Islands, *O.J.*, 16 June 1981, No L 158/7; Commission Regulation (EEC) No 250/82 of 29 January 1982 imposing a provisional anti-dumping duty on certain welded iron or steel tubes originating in Romania, *O.J.*, 3 February 1982, No L 26/5; Commission Regulation (EEC) No 871/82 of 14 April 1982 imposing a provisional anti-dumping duty on upright pianos originating in the USSR, *O.J.*, 16 April 1982, No L 101/30 (corrigendum, *O.J.*, 29 April 1982, No L 115/22); Council Decision 82/220/EEC of 14 April 1982 terminating an anti-dumping proceeding in respect of imports of upright pianos originating in Czechoslovakia, the German Democratic Republic and Poland, *O.J.*, 16 April 1982, No L 101/45; Commission Decision 82/398/EEC of 14 June 1982 accepting undertakings given in connection with the anti-dumping procedure concerning cylinder vacuum cleaners originating in Czechoslovakia, the German Democratic Republic and Poland and terminating the procedure, *O.J.*, 18 June 1982, No L 172/47; Commission Regulation (EEC) No 2317/85 of 12 August 1985 imposing a provisional anti-dumping duty on imports of roller chains for cycles originating in the USSR and the People's Republic of China, *O.J.*, 14 August 1985, No L 217/7; Commission Decision 86/497/EEC of 7 October 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of silicon carbide originating in the People's Republic of China, Norway, Poland and the USSR, and terminating the investigation regarding imports of that product originating in the People's Republic of China, Norway, Poland, Czechoslovakia, the USSR and Yugoslavia, *O.J.*, 10 October 1986, No L 287/25; Commission Regulation (EEC) No 1937/90 of 4 July 1990 imposing a provisional anti-dumping duty on imports of pure silk typewriter ribbon fabrics originating in the People's Republic of China, and accepting an undertaking offered by the exporter, *O.J.*, 7 July 1990, No L 174/27; Commission Regulation (EEC) No 3798/90 of 21 December 1990 imposing a provisional anti-dumping duty on imports of espadrilles originating in the People's Republic of China, *O.J.*, 28 December 1990, No L 365/25; Commission Regulation (EEC) No 2818/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports of cotton yarn originating in Brazil, Egypt and Turkey and terminating the anti-dumping proceeding in respect of cotton yarn originating in India and Thailand, *O.J.*, 27 September 1991, No L 271/17; Commission Regulation (EEC) No 3296/92 of 12 November 1992 imposing a provisional anti-dumping duty on imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in Czechoslovakia, Hungary, Poland and the Republic of Croatia and terminating the anti-dumping proceeding with regard to the Republics of Serbia and of Montenegro, the former Yugoslav Republic of Macedonia, the Republic of Bosnia-Herzegovina and the Republic of Slovenia, *O.J.*, 14 November 1992, No L 328/15; Council Regulation (EC) No 2819/94 of 17 November 1994 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in the People's Republic of China, *O.J.*, 19 November 1994, No L 298/32;

- technical lay-offs (Commission Decision 86/497/EEC of 7 October 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of silicon carbide originating in the People's Republic of China, Norway, Poland and the USSR, and terminating the investigation regarding imports of that product originating in the People's Republic of China, Norway, Poland, Czechoslovakia, the USSR and Yugoslavia, *O.J.*, 10 October 1986, No L 287/25);

- temporary lay-offs (Council Regulation (EC) No 2819/94 of 17 November 1994 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in the People's Republic of China, *O.J.*, 19 November 1994, No L 298/32);

- the transfer of personnel to other production lines (internal redeployment) (Commission Decision 80/1175/EEC of 15 December 1980 terminating the anti-dumping proceeding concerning imports of pressure sensitive paper masking tape originating in the United States of America, *O.J.*, 19 December 1980, No L 344/57; Commission Regulation (EEC) No 744/84 of 19 March 1984 imposing a provisional anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 23 March 1984, No L 79/8 (corrigendum, *O.J.*, 29 March 1984, No L 86/31); Council Decision 87/104/EEC of 9 February 1987 accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China, and terminating the investigation, *O.J.*, 14 February 1987, No L 46/45; Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79; corrigendum, *O.J.*, 10 February 1990, No L 38/44); Council Regulation (EEC) No 385/90 of 12 February 1990 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in Czechoslovakia and definitively collecting the provisional anti-dumping duty imposed on those imports, *O.J.*, 16 February 1990, No L 42/1; Commission Regulation (EEC) No 1537/90 of 28 May 1990 imposing a provisional anti-dumping duty on imports of potassium permanganate originating in the USSR, *O.J.*, 8 June 1990, No L 145/9. See also: Commission Regulation (EEC) No 1361/87 of 18 May 1987 imposing a provisional anti-dumping duty on imports of ferro-silico-calcium/calcium silicide originating in Brazil, *O.J.*, 19 May 1987, No L 129/5, where the available figures on employment were not found to provide meaningful information because the Community producers manufactured a variety of products for which their workforce would be equally available);

- shift cancellations (Commission Regulation (EEC) No 3296/92 of 12 November 1992 imposing a provisional anti-dumping duty on imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in Czechoslovakia, Hungary, Poland and the Republic of Croatia and terminating the anti-dumping proceeding with regard to the Republics of Serbia and of Montenegro, the former Yugoslav Republic of Macedonia, the Republic of Bosnia-Herzegovina and the Republic of Slovenia, *O.J.*, 14 November 1992, No L 328/15);

- alternate production on two production units by the same shift (Commission Regulation (EEC) No 3296/92 of 12 November 1992 imposing a provisional anti-dumping duty on imports of certain seamless pipes and tubes, of iron or non-alloy steel,

originating in Czechoslovakia, Hungary, Poland and the Republic of Croatia and terminating the anti-dumping proceeding with regard to the Republics of Serbia and of Montenegro, the former Yugoslav Republic of Macedonia, the Republic of Bosnia-Herzegovina and the Republic of Slovenia, *O.J.*, 14 November 1992, No L 328/15);

- the fact that workers are paid out of social welfare funds (Commission Regulation (EEC) No 2297/80 of 29 August 1980 imposing a provisional anti-dumping duty on imports of certain polyester yarn originating in the United States of America, *O.J.*, 2 September 1980, No L 231/5);
- the retraining of staff personnel (Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79; corrigendum, *O.J.*, 10 February 1990, No L 38/44)).

The factor «ability to raise capital or investments» comprises :

- in findings of no injury :
 - the continued increase of the level of capital expenditure (Commission Decision 89/111/EEC of 9 February 1989 terminating the anti-dumping proceeding concerning imports of wheeled loaders originating in Japan, *O.J.*, 11 February 1989, No L 39/35);
 - the increase in production capacity (Commission Decision 89/511/EEC of 22 August 1989 terminating the anti-dumping proceeding concerning imports of hydraulic excavators originating in Japan, *O.J.*, 25 August 1989, No L 249/71; Commission Decision 89/537/EEC of 27 September 1989 terminating the anti-dumping proceeding concerning imports of mica originating in Japan, *O.J.*, 3 October 1989, No L 284/45; Commission Decision 93/325/EEC of 18 May 1993 terminating the anti-dumping proceeding concerning imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China, *O.J.*, 25 May 1993, No L 127/15);
 - the fact that investments are made resulting in improved efficiency (Commission Decision 93/325/EEC of 18 May 1993 terminating the anti-dumping proceeding concerning imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China, *O.J.*, 25 May 1993, No L 127/15);
 - the existence of ongoing or imminent investment programmes (Commission Decision 90/85/EEC of 1 March 1990 terminating the review of anti-dumping measures applying to imports of certain glass textile fibres (rovings) originating in Czechoslovakia and the German Democratic Republic and confirming the expiry of the said measures, *O.J.*, 8 March 1990, No L 59/45).
- in findings of injury :
 - the downgrading of investments (see e.g., Commission Regulation (EEC) No 2581/93 of 20 September 1993 imposing provisional anti-dumping duties on imports of ferro-silicon originating in South Africa and the People's Republic of China, *O.J.*, 22 September 1993, No L 237/2);
 - the reduction of investments necessary to ensure the Community industry's viability (Commission Regulation (EC) No 1076/94 of 6 May 1994 imposing a provisional anti-dumping duty on imports of certain watch movements originating in Malaysia and Thailand, *O.J.*, 11 May 1994, No L 120/3);
 - the fact that the dumping has induced a low rate of depreciation because a low rate of depreciation discourages the investment in continued efficiency, especially in a capital-intensive industry (Council Regulation (EEC) No 1306/89 of 11 May 1989 imposing a definitive anti-dumping duty on imports of light sodium carbonate originating in Bulgaria, the German Democratic Republic, Poland and Romania, *O.J.*, 13 May 1989, No L 131/4);
 - the drop in the average investments in buildings and machinery by the Community producers (Commission Regulation (EEC) No 3542/82 of 22 December 1982 imposing a provisional anti-dumping duty on imports of natural magnesite, dead-burned (sintered), originating in the People's Republic of China and in North Korea, *O.J.*, 30 December 1982, No L 371/25);
 - the closure of production plants (see e.g., Commission Regulation (EEC) No 1103/93 of 30 April 1993 imposing a provisional anti-dumping duty on imports into the Community of certain electronic weighing scales originating in Singapore and the Republic of Korea, *O.J.*, 6 May 1993, No L 112/20);
 - the fact that the Community industry incurred losses, though they had made investments in order to reduce costs (Commission Regulation (EEC) No 2172/93 of 30 July 1993 imposing provisional anti-dumping duties on imports of ethanolamine originating in the United States of America, *O.J.*, 4 August 1993, No L 195/5; Commission Regulation (EEC) No 3029/93 of 29 October 1993 imposing provisional antidumping duties on imports of television camera systems originating in Japan, *O.J.*, 30 October 1993, No L 271/1);
 - the fact that investments did not bring gains in productivity or efficiency, but were aimed at substituting the loss of internal links caused by the separation of formerly integrated chemical processes; this separation was necessary to prepare for privatisation of plants in the eastern part of Germany (Council Regulation (EC) No 2819/94 of 17 November 1994 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in the People's Republic of China, *O.J.*, 19 November 1994, No L 298/32).

However, the capacity to make investments does not prevent the finding of injury (Commission Regulation (EEC) No 550/93 of 5 March 1993 imposing a provisional anti-dumping duty on imports of bicycles originating in the People's Republic of China, *O.J.*, 11 March 1993, No L 58/12; Commission Regulation (EEC) No 3029/93 of 29 October 1993 imposing provisional antidumping duties on imports of television camera systems originating in Japan, *O.J.*, 30 October 1993, No L 271/1).

In findings of injury the inability to make investments has practically always been put forward in combination with either the profitability or the return on investment. Either the profitability or the return on investment were found to be at such a level that

enumerated factor might be taken into account.

investments in research and development in facilities which are vital to the sector under consideration, were not envisaged or threatened (Commission Regulation (EEC) No 2599/79 of 22 November 1979 imposing a provisional anti-dumping duty on certain sodium carbonate originating in the Soviet Union, *O.J.*, 24 November 1979, No L 297/12 ; Council Regulation (EEC) No 407/80 of 18 February 1980 imposing a definitive anti-dumping duty on certain sodium carbonate originating in the Soviet Union, *O.J.*, 22 February 1980, No L 48/1 ; Commission Regulation (EEC) No 3643/84 of 20 December 1984 imposing a provisional anti-dumping duty on imports of electronic typewriters originating in Japan and terminating the anti-dumping proceeding with regard to Nakajima All Co. Ltd, *O.J.*, 22 December 1984, No L 335/43 ; Commission Regulation (EEC) No 2865/85 of 14 October 1985 imposing a provisional anti-dumping duty on imports of certain electronic scales originating in Japan and accepting undertakings and terminating the proceeding in respect of certain imports of such products originating in Japan, *O.J.*, 16 October 1985, No L 275/5 ; Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5 ; Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12 ; Commission Regulation (EEC) No 1361/87 of 18 May 1987 imposing a provisional anti-dumping duty on imports of ferro-silico-calcium/calcium silicide originating in Brazil, *O.J.*, 19 May 1987, No L 129/5 ; Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12 ; Council Regulation (EEC) No 176/89 of 23 January 1989 imposing a definitive anti-dumping duty on imports of copper sulphate originating in Bulgaria or the Soviet Union, *O.J.*, 27 January 1989, No L 23/1 ; Commission Regulation (EEC) No 3262/90 of 5 November 1990 imposing a provisional anti-dumping duty on imports of audio tapes in cassettes originating in Japan, the Republic of Korea and Hong Kong, *O.J.*, 13 November 1990, No L 313/5 (corrigendum, *O.J.*, 12 January 1991, No L9/36) ; Council Regulation (EEC) No 117/91 of 16 January 1991 imposing a definitive anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 19 January 1991, No L 14/1). Moreover, the Community producers have been found to suffer injury when they incurred losses despite the investments they had made in order to increase their efficiency (Commission Regulation (EEC) No 2818/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports of cotton yarn originating in Brazil, Egypt and Turkey and terminating the anti-dumping proceeding in respect of cotton yarn originating in India and Thailand, *O.J.*, 27 September 1991, No L 271/17 ; Commission Decision No 891/92/ECSC of 30 March 1992 imposing a provisional anti-dumping duty on imports of certain semi-finished products of alloy steel, originating in Turkey and Brazil, *O.J.*, 9 April 1992, No L 95/26 ; Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5 ; Commission Regulation (EEC) No 2172/93 of 30 July 1993 imposing provisional anti-dumping duties on imports of ethanolamine originating in the United States of America, *O.J.*, 4 August 1993, No L 195/5 ; Council Regulation (EEC) No 2455/93 of 2 September 1993 amending Regulation (EEC) No 1798/90 in respect of the definitive anti-dumping duty on imports of monosodium glutamate originating in Indonesia, the Republic of Korea, Taiwan and Thailand, *O.J.*, 4 September 1993, No L 225/1 ; Commission Decision 93/479/EEC of 30 July 1993 accepting undertakings offered in connection with the review of anti-dumping measures applicable to certain imports of monosodium glutamate originating in Indonesia, the Republic of Korea, Taiwan and Thailand, *O.J.*, 4 September 1993, No L 225/35 ; Commission Regulation (EC) No 371/94 of 17 February 1994 imposing a provisional anti-dumping duty on imports into the Community of large aluminium electrolytic capacitors originating in the Republic of Korea and Taiwan, *O.J.*, 19 February 1994, No L 48/10 ; Commission Regulation (EC) No 534/94 of 9 March 1994 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, *O.J.*, 11 March 1994, No L 68/5 ; Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries ; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24).

The non-exhaustive character does not make it illegal either to take account of the absolute value of relevant economic factors, as European anti-dumping case law does¹²¹¹, although GATT and European anti-dumping law treat only of developments as to those factors.

According to GATT and European anti-dumping law, not only the actual, but also the potential development of relevant economic factors may be taken into consideration in an actual injury examination (Article 3.4. GATT Anti-dumping Code ; Article 3(5) basic EC Regulation ; Article 4(2)(c) basic ECSC Decision). Thus, if a certain relevant economic factor has not (yet) actually deteriorated (improved), the risk of a deterioration (the expectation of an improvement) may support a finding of (no) injury¹²¹².

¹²¹¹ The Court of Justice held, though, that the actual wording of former EC and present ECSC anti-dumping law (Article 4(2)(c) basic ECSC Decision), according to which the impact of the imports on the Community industry must be assessed on the basis of the trends in the relevant economic factors, implies that «it is possible to draw valid conclusions on the impact of the imports only if the Community producers' (...) situation at the time of the investigation can be compared with that of preceding years» (C.J.E.C., case C-315/90, 27 November 1991, *Groupeement des Industries de Matériels d'Equipement Electrique et de l'Electronique Industrielle Associée (Gimelec) a.o. v Commission, E.C.R.*, 1991, I, (5589), 5620). This statement of the Court, however, should not be understood as a general prohibition of the use of absolute data, as it was only a specific answer to the complaint that the European anti-dumping authorities did not take account of the evolution in certain economic factors. The Court, in particular, maintained that the European anti-dumping authorities cannot be blamed for not using trends when the Community producers concerned do not provide the necessary data. However, Advocate General VAN GERVEN was more affirmative in stating that European anti-dumping law implies «that the impact of imports must be assessed in terms of trends in the relevant economic factors» (C.J.E.C., case C-315/90, 27 November 1991, *Groupeement des Industries de Matériels d'Equipement Electrique et de l'Electronique Industrielle Associée (Gimelec) a.o. v Commission, E.C.R.*, 1991, I, (5589), 5609 (Opinion of Advocate General VAN GERVEN). But, even if the interpretation that only trends in the relevant economic factors may be taken into account, was correct under former EC and present ECSC anti-dumping law, it certainly does not hold anymore under prevailing EC anti-dumping law which, pursuant to GATT anti-dumping law (see : Article 3.4. GATT Anti-dumping Code), requires «an evaluation of all relevant economic factors and indices having a bearing on the state of the industry» (Article 3(5) basic EC Regulation).

¹²¹² The following elements have, for example, been raised in findings of injury :

- the fact that the cessation of production is feared or envisaged (Commission Regulation (EEC) No 2391/79 of 26 October 1979 imposing a provisional anti-dumping duty on lithium hydroxide originating in the United States of America and the Soviet Union, *O.J.*, 31 October 1979, No L 274/26 ; Council Regulation (EEC) No 191/80 of 29 January 1980 imposing a definitive anti-dumping duty on lithium hydroxide originating in the United States of America and the Soviet Union, *O.J.*, 30 January 1980, No L 23/19 (corrigendum, *O.J.*, 8 February 1980, No L 31/23) ; Commission Regulation (EEC) No 2999/80 of 20 November 1980 imposing a provisional anti-dumping duty on vinyl acetate monomer originating in the United States of America, *O.J.*, 21 November 1980, No L 311/13 ; Commission Regulation (EEC) No 1101/81 of 23 April 1981 imposing a provisional anti-dumping duty on potato granules originating in Canada, *O.J.*, 28 April 1981, No L 116/11 ; Council Regulation (EEC) No 2370/83 of 19 August 1983 imposing a definitive anti-dumping duty on imports of barium chloride originating in the People's Republic of China and in the German Democratic Republic, *O.J.*, 20 August 1983, No L 228/28 ; Council Regulation (EEC) No 2978/83 of 24 October 1983 amending Regulation (EEC) No 191/80 imposing a definitive anti-dumping duty on lithium hydroxide originating in the United States of America and the Soviet Union, *O.J.*, 26 October 1983, No L 294/3 ; Commission Decision 83/522/EEC of 24 October 1983 accepting the undertaking given in connection with the anti-dumping proceeding in respect of imports of lithium hydroxide originating in the People's Republic of China and terminating that proceeding, *O.J.*, 26 October 1983, No L 294/29 ; Commission Regulation (EEC) No 4062/88 of 23 December 1988 imposing a provisional anti-dumping duty on imports of video cassettes and video tape reels originating in the Republic of Korea and Hong Kong, *O.J.*, 24 December 1988, No L 356/47) ;
- the fact that the Community producers are threatened with complete closure (Commission Decision 80/603/EEC of 23 June 1980 accepting undertakings given in connection with the anti-dumping proceedings concerning mounted piezo-electric quartz crystal units, originating in Japan, South Korea and the United States of America, and terminating the proceedings, *O.J.*, 27 June 1980, No L 162/62 ; Council Regulation (EEC) No 1391/91 of 27 May 1991 imposing a definitive anti-dumping duty on imports of aspartame originating in Japan and the United States of America, *O.J.*, 29 May 1991, No L 134/1) or with the closure of production facilities (Commission Regulation (EEC) No 2409/87 of 6 August 1987 imposing a provisional anti-dumping duty on imports of ferro-silicon originating in Brazil and accepting undertakings offered by Italmagnesio SA of Brazil and from Promsyrio-Import of the USSR, *O.J.*, 8 August 1987, No L 219/24) ;
- the potential sales of the Community producers, the Italian producer excluded, in the markets in which the Italian producer was obliged, as reaction to the competition of the dumped imports on the Italian market, to seek to sell increasing quantities (Commission Decision 84/404/EEC of 25 July 1984 accepting undertakings given in connection with the anti-dumping procee-

ding concerning imports of copper sulphate originating in Yugoslavia and terminating the proceeding, *O.J.*, 11 August 1984, No L 215/16);

elements which in the near future will have a negative bearing on the sales volume, such as :

- the near-absence of new orders (Commission Regulation (EEC) No 322/79 of 16 February 1979 imposing a provisional anti-dumping duty on a certain herbicide originating in Romania, *O.J.*, 21 February 1979, No L 44/8; Council Regulation (EEC) No 955/79 of 15 May 1979 imposing a definitive anti-dumping duty on a certain herbicide originating in Romania, *O.J.*, 17 May 1979, No L 121/5);
- the cancellation of contracts (Commission Regulation (EEC) No 1411/81 of 25 May 1981 imposing a provisional anti-dumping duty on orthoxylene (*o*-Xylene) originating in Puerto Rico and the United States of America, *O.J.*, 27 May 1981, No L 141/29; Commission Regulation (EEC) No 1591/81 of 10 June 1981 imposing a provisional anti-dumping duty on paraxylene (*p*-xylene) originating in Puerto Rico, the United States of America and the US Virgin Islands, *O.J.*, 16 June 1981, No L 158/7; Commission Regulation (EEC) No 2017/81 of 15 July 1981 imposing a provisional anti-dumping duty on phenol originating in the United States of America, *O.J.*, 18 July 1981, No L 195/22);
- the failing of negotiations on a sales contract (Commission Regulation (EEC) No 2812/85 of 7 October 1985 imposing a provisional anti-dumping duty on imports of electronic typewriters manufactured by Nakajima All Co. Ltd originating in Japan, *O.J.*, 9 October 1985, No L 266/5);

the fact that the new orders acquired are less than the orders obtained in a previous period (Commission Recommendation No 2242/82/ECSC of 10 August 1982 imposing a provisional anti-dumping duty on broad-flanged beams originating in Spain, *O.J.*, 13 August 1982, No L 238/32);

the move from long-term contracts to spot purchases which increases the Community producers' uncertainty about future sales (Commission Regulation (EEC) No 2450/87 of 12 August 1987 imposing a provisional anti-dumping duty on imports of mercury originating in the Union of Soviet Socialist Republics, *O.J.*, 14 August 1987, No L 227/8);

projected losses or threatened losses (Council Regulation (EEC) No 551/83 of 8 March 1983 imposing a definitive anti-dumping duty on kraftliner paper and board originating in the United States of America and accepting undertakings given in connection with the review of the anti-dumping proceeding on kraftliner paper and board originating in Austria, Canada, Finland, Portugal, the Soviet Union and Sweden, *O.J.*, 10 March 1983, No L 64/25);

the outlook for strongly improving profit margins (Council Regulation (EEC) No 2702/87 of 4 September 1987 repealing a definitive anti-dumping duty on styrene monomer originating in the United States of America and terminating the investigation, *O.J.*, 8 September 1987, No L 258/20);

the threat of future lay-offs (Commission Regulation (EEC) No 322/79 of 16 February 1979 imposing a provisional anti-dumping duty on a certain herbicide originating in Romania, *O.J.*, 21 February 1979, No L 44/8; Council Regulation (EEC) No 955/79 of 15 May 1979 imposing a definitive anti-dumping duty on a certain herbicide originating in Romania, *O.J.*, 17 May 1979, No L 121/5; Commission Regulation (EEC) No 2391/79 of 26 October 1979 imposing a provisional anti-dumping duty on lithium hydroxide originating in the United States of America and the Soviet Union, *O.J.*, 31 October 1979, No L 274/26; Council Regulation (EEC) No 191/80 of 29 January 1980 imposing a definitive anti-dumping duty on lithium hydroxide originating in the United States of America and the Soviet Union, *O.J.*, 30 January 1980, No L 23/19 (corrigendum, *O.J.*, 8 February 1980, No L 31/23); Commission Regulation (EEC) No 2999/80 of 20 November 1980 imposing a provisional anti-dumping duty on vinyl acetate monomer originating in the United States of America, *O.J.*, 21 November 1980, No L 311/13; Commission Regulation (EEC) No 1101/81 of 23 April 1981 imposing a provisional anti-dumping duty on potato granules originating in Canada, *O.J.*, 28 April 1981, No L 116/11; Commission Regulation (EEC) No 2936/82 of 28 October 1982 imposing a provisional anti-dumping duty on copper sulphate originating in Yugoslavia, *O.J.*, 4 November 1982, No L 308/7; Commission Regulation (EEC) No 985/83 of 26 April 1983 imposing a provisional anti-dumping duty on imports of barium chloride originating in the People's Republic of China and the German Democratic Republic, *O.J.*, 27 April 1983, No L 110/11; Commission Decision 83/306/EEC of 16 June 1983 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of low carbon ferro-chromium originating in South Africa, Sweden, Turkey and Zimbabwe, and terminating that proceeding, *O.J.*, 21 June 1983, No L 161/15; Council Regulation (EEC) No 2370/83 of 19 August 1983 imposing a definitive anti-dumping duty on imports of barium chloride originating in the People's Republic of China and in the German Democratic Republic, *O.J.*, 20 August 1983, No L 228/28; Commission Decision 87/210/EEC of 23 March 1987 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of outboard motors originating in Japan and terminating the investigation, *O.J.*, 26 March 1987, No L 82/36; Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia, *O.J.*, 9 May 1987, No L 121/11; Commission Regulation (EEC) No 2409/87 of 6 August 1987 imposing a provisional anti-dumping duty on imports of ferro-silicon originating in Brazil and accepting undertakings offered by Italmagnesio SA of Brazil and from Promysrio-Import of the USSR, *O.J.*, 8 August 1987, No L 219/24; Council Regulation (EEC) No 385/90 of 12 February 1990 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in Czechoslovakia and definitively collecting the provisional anti-dumping duty imposed on those imports, *O.J.*, 16 February 1990, No L 42/1);

the fact that total employment in the Community industry is seriously at stake (Commission Regulation (EEC) No 2064/90 of 17 July 1990 imposing a provisional anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 20 July 1990, No L 188/10 (corrigendum, *O.J.*, 21 November 1990, No L 321/19)).

Both GATT and European anti-dumping law stipulate that none of the enlisted factors can necessarily give decisive guidance (Article 3.4. GATT Anti-dumping Code ; Article 3(5) basic EC Regulation ; Article 4(2) basic ECSC Decision)¹²¹³. Although there is no obligation to take into account all these factors¹²¹⁴, an examination of injury may not be based on a single factor, but must consider a whole series of factors¹²¹⁵. But, once they have taken into account various factors, it is only up to the European anti-dumping authorities to decide which of these factors are essential¹²¹⁶. All the factors which they consider essential, must be assessed correctly : if some of these factors are assessed inaccurately, it is impossible to claim that the examination of injury will be valid as regards the other factors taken into account¹²¹⁷.

Thus, the European anti-dumping authorities enjoy a broad margin of discretion : they may take into account all the factors which they consider relevant¹²¹⁸, they are not obliged to take into account certain factors¹²¹⁹, and it is up to them to decide which factors are decisive¹²²⁰

Conversely, the outlook for further price increases has been raised in a finding of no injury (Council Regulation (EEC) No 2702/87 of 4 September 1987 repealing a definitive anti-dumping duty on styrene monomer originating in the United States of America and terminating the investigation, *O.J.*, 8 September 1987, No L 258/20).

¹²¹³ See e.g. : *video tapes in cassettes from the People's Republic of China*, where it was considered «that Article 4(2) (former basic EC Regulation (and present ECSC Decision)) does not require that all the factors listed therein show a negative trend (Council Regulation (EEC) No 3091/91 of 21 October 1991 imposing a definitive anti-dumping duty on imports of video tapes in cassettes originating in the People's Republic of China and definitively collecting the provisional duty, *O.J.*, 24 October 1991, No L 293/2. See also : Council Regulation (EC) No 3319/94 of 22 December 1994 imposing a definitive anti-dumping duty on imports of urea ammonium nitrate solution originating in Bulgaria and Poland, exported by companies not exempted from the duty, and collecting definitively the provisional duty imposed, *O.J.*, 31 December 1994, No L 350/20). Undoubtedly, the same holds for present GATT and EC anti-dumping law.

¹²¹⁴ C.J.E.C., joined cases 277 and 300/85, 5 October 1988, *Canon Inc. a.o. v Council*, *E.C.R.*, 1988, (5731), 5808 ; C.J.E.C., joined cases 273/85 and 107/86, 5 October 1988, *Silver Seiko Limited a.o. v Council*, *E.C.R.*, 1988, (5927), 5980.

¹²¹⁵ C.J.E.C., joined cases C-304/86 and C-185/87, 11 July 1990, *Enital SpA v Commission and Council*, *E.C.R.*, 1990, I, (2939), 2940-2941 ; C.J.E.C., joined cases C-305/86 and C-160/87, 11 July 1990, *Neotype Techmashexport GmbH v Commission and Council*, *E.C.R.*, 1990, I, (2945), 3005 ; C.J.E.C., joined cases C-320/86 and C-188/87, 11 July 1990, *Stanko France v Commission and Council*, *E.C.R.*, 1990, I, (3013), 3015 ; C.J.E.C., case C-157/87, 11 July 1990, *Electroimpex a.o. v Council*, *E.C.R.*, 1990, I, (3021), 3023 ; C.J.E.C., case C-323/88, 11 July 1990, *SA Sermes v Directeur des services des douanes de Strasbourg*, *E.C.R.*, 1990, I, (3027), 3052 ; C.J.E.C., case C-315/90, 27 November 1991, *Groupeement des Industries de Matériels d'Equipement Electrique et de l'Electronique Industrielle Associée (Gimelec) a.o. v Commission*, *E.C.R.*, 1991, I, (5589), 5617.

¹²¹⁶ C.J.E.C., case C-315/90, 27 November 1991, *Groupeement des Industries de Matériels d'Equipement Electrique et de l'Electronique Industrielle Associée (Gimelec) a.o. v Commission*, *E.C.R.*, 1991, I, (5589), 5604 (Opinion of Advocate General VAN GERVEN) and 5617.

¹²¹⁷ C.J.E.C., case C-315/90, 27 November 1991, *Groupeement des Industries de Matériels d'Equipement Electrique et de l'Electronique Industrielle Associée (Gimelec) a.o. v Commission*, *E.C.R.*, 1991, I, (5589), 5604 (Opinion of Advocate General VAN GERVEN) and 5615.

¹²¹⁸ C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, *E.C.R.*, 1992, I, (1335), 1402 ; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, *E.C.R.*, 1992, I, (1409), 1485 ; C.J.E.C., case C-176/87, 10 March 1992, *Konishiroku Photo Industry Co. Ltd v Council*, *E.C.R.*, 1992, I, (1493), 1529 ; C.J.E.C., case C-177/87, 10 March 1992, *Sanyo Electric Co. Ltd v Council*, *E.C.R.*, 1992, I, (1535), 1570 ; C.J.E.C., case C-179/87, 10 March 1992, *Sharp Corporation v Council*, *E.C.R.*, 1992, I, (1635), 1682.

¹²¹⁹ C.J.E.C., case C-171/87, 10 March 1992, *Canon Inc. v Council*, *E.C.R.*, 1992, I, (1237), 1277 (Opinion of Advocate General MISCHO).

and how they are to be interpreted¹²²¹. The only thing they cannot do is base their decision on one single factor and disregard all the others. The risk for «one-way flexibility» is clearly present, especially in cases where the various relevant economic factors show divergent developments¹²²². Indeed, in such cases it is entirely up to the European anti-dumping authorities to establish why a deterioration in some factors prevails over the improvement in other factors or *vice versa*. Since certain factors are decisive in some cases, whereas they are not in other cases, it is hard to discern some critical thresholds in European anti-dumping case law¹²²³. No threshold can be deduced, not even from cases where the various relevant factors show the same trend. In such cases an injury finding may be based solely on a sharp deterioration in one of the factors, thereby making it impossible to ascertain whether a slight deterioration in another factor was also decisive to reach this conclusion. Even when all factors have only slightly deteriorated, this is not conclusive to determine that a slight deterioration in a specific factor suffices, as the combination of several slight deteriorations may have been decisive. As a consequence, the same development in a relevant economic factor may result in an injury finding as well as in a finding of no injury, as is being shown in table 5.

1220 C.J.E.C., case C-315/90, 27 November 1991, *Groupeement des Industries de Matériels d'Equipement Electrique et de l'Electronique Industrielle Associée (Gimelec) a.o. v Commission, E.C.R.*, 1991, I, (5589), 5605 and 5609 (Opinion of Advocate General VAN GERVEN).

1221 C.J.E.C., case C-315/90, 27 November 1991, *Groupeement des Industries de Matériels d'Equipement Electrique et de l'Electronique Industrielle Associée (Gimelec) a.o. v Commission, E.C.R.*, 1991, I, (5589), 5609 (Opinion of Advocate General VAN GERVEN).

1222 See e.g. :

- *housed bearing units from Japan*, where it was noted that «(a)lthough the information collected by the Commission on production, sales, stocks, employment and market share trends for the whole of the Community industry concerned over the reference period is not in itself sufficient to warrant the conclusion that the volume of imports and the level of price undercutting in respect of housed bearing units originating in Japan have had a visible negative effect on the industry, the same cannot be said for the information on the other relevant factors, such as the selling prices of Community housed bearing units, the utilization of capacity, and profits and return on investment of Community producers in the housed bearing units sector.» (Commission Regulation (EEC) No 2516/86 of 4 August 1986 imposing a provisional anti-dumping duty on imports of housed bearing units originating in Japan, *O.J.*, 7 August 1986, No L 221/16) ;
- *video tapes in cassettes from the People's Republic of China*, where it was considered «that Article 4(2) (former basic EC Regulation (and present ECSC Decision)) does not require that all the factors listed therein show a negative trend (Council Regulation (EEC) No 3091/91 of 21 October 1991 imposing a definitive anti-dumping duty on imports of video tapes in cassettes originating in the People's Republic of China and definitively collecting the provisional duty, *O.J.*, 24 October 1991, No L 293/2) (undoubtedly, the same holds for present GATT and EC anti-dumping law) ;
- *cotton yarn from Brazil and Turkey*, where it was stated that «the figures concerning the evolution of the Community producers' output as well as their market share were not substantially negative» and that «these figures must be analyzed in close conjunction with those relating to other important factors such as profitability, investment, plant closure, employment, etc.» (Council Regulation (EEC) No 738/92 of 23 March 1992 imposing a definitive anti-dumping duty on imports of cotton yarn originating in Brazil and Turkey, *O.J.*, 27 March 1992, No L 82/1).

1223 The only guideline in European anti-dumping case law to which no exception has yet been made is that, in connection with the factor «utilization of capacity», no injury will be found if the Community industry is producing at full capacity (Commission Decision 83/493/EEC of 28 September 1983 terminating the anti-dumping proceeding concerning imports of xanthan gum originating in the United States of America, *O.J.*, 30 September 1983, No L 268/60 ; Council Regulation (EEC) No 2702/87 of 4 September 1987 repealing a definitive anti-dumping duty on styrene monomer originating in the United States of America and terminating the investigation, *O.J.*, 8 September 1987, No L 258/20) or if its total capacity cannot satisfy the entire Community consumption (Commission Decision 81/493/EEC of 6 July 1981 terminating the anti-dumping procedure concerning imports of furfural originating in the Dominican Republic, Spain and the People's Republic of China, *O.J.*, 11 July 1981, No L 189/57).

Table 5 - Evolution in production, utilization of capacity, sales, market share and prices - minimum and maximum average increase/decrease on one-year basis

Evolution in :	Injury		No injury	
	from	up to	from	up to
Production	-59.0 % ^a	+129.5 % ^b	-18.1 % ^c	+28.0 % ^d
Utilization of capacity	-40.0 % ^e	+23.2 % ^f	-40.0 % ^g	+11.1 % ^h
Sales	-45.0 % ⁱ	+42.1 % ^j	-68.4 % ^k	+77.3 % ^l
Market share	-44.2 % ^m	+6.7 % ⁿ	-8.8 % ^o	+33.7 % ^p
Prices	-22.3 % ^q	+5.0 % ^r	-36.0 % ^s	+22.6 % ^t
Employment	-29.3 % ^u	-2.1 % ^v	-29.3 % ^w	+6.3 % ^x

Source : Official Journal of the European Communities ; own calculations¹²²⁴.

1224 In particular :

- ^a Commission Regulation (EEC) No 1613/83 of 15 June 1983 imposing a provisional anti-dumping duty on imports of unwrought nickel, not alloyed, in the form of cathodes produced by electrolysis, either uncut or cut into squares, originating in the Soviet Union, *O.J.*, 17 June 1983, No L 159/43 ;
- ^b Commission Regulation (EEC) No 4062/88 of 23 December 1988 imposing a provisional anti-dumping duty on imports of video cassettes and video tape reels originating in the Republic of Korea and Hong Kong, *O.J.*, 24 December 1988, No L 356/47 ;
- ^c Commission Decision 85/143/EEC of 18 February 1985 terminating the anti-dumping proceeding concerning imports of certain boots with fitted ice skates originating in Czechoslovakia, Yugoslavia, Romania and Hungary, *O.J.*, 22 February 1985, No L 52/48 ;
- ^d Commission Decision 86/344/EEC of 17 July 1986 terminating the anti-dumping proceeding concerning imports of Portland cement originating in the German Democratic Republic, Poland and Yugoslavia, *O.J.*, 25 July 1986, No L 202/43 ;
- ^e Council Regulation (EEC) No 1570/81 of 11 June 1981 imposing a definitive anti-dumping duty on styrene monomer originating in the United States of America, *O.J.*, 13 June 1981, No L 154/10 ;
- ^f Commission Regulation (EC) No 534/94 of 9 March 1994 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, *O.J.*, 11 March 1994, No L 68/5 ;
- ^g Council Regulation (EEC) No 2907/83 of 17 October 1983 terminating the anti-dumping proceeding concerning imports of unwrought nickel, not alloyed, in the form of cathodes produced by electrolysis, either uncut or cut into squares, originating in the Soviet Union, *O.J.*, 19 October 1983, No L 286/29 ;
- ^h Commission Decision No 2158/88/ECSC of 20 July 1988 imposing a provisional anti-dumping duty on imports of certain iron or steel sections originating in Yugoslavia or Turkey, *O.J.*, 21 July 1988, No L 190/5 ;
- ⁱ Commission Regulation (EEC) No 171/82 of 25 January 1982 imposing a provisional anti-dumping duty on imports of oxalic acid originating in China and Czechoslovakia, *O.J.*, 27 January 1982, No L 19/26 (corrigendum, *O.J.*, 9 February 1982, No L 34/11) ;
- ^j Commission Decision 91/142/EEC of 15 March 1991 terminating the anti-dumping proceeding concerning imports of Atlantic salmon originating in Norway, *O.J.*, 16 March 1991, No L 69/32 (corrigendum, *O.J.*, 21 March 1991, No L 75/64) ;
- ^k Council Decision 83/9/EEC of 17 January 1983 terminating the anti-dumping proceeding concerning imports of codeine and its salts originating in Czechoslovakia, Hungary, Poland and Yugoslavia, *O.J.*, 20 January 1983, No L 16/30 ;
- ^l Commission Decision 89/511/EEC of 22 August 1989 terminating the anti-dumping proceeding concerning imports of hydraulic excavators originating in Japan, *O.J.*, 25 August 1989, No L 249/71 ;
- ^m Commission Decision 80/783/EEC of 27 August 1980 accepting undertakings in connection with the anti-dumping proceedings concerning imports of studded welded-link chain, originating in Spain and Sweden and terminating those proceedings, *O.J.*, 2 September 1980, No L 231/10 ;
- ⁿ Commission Decision 83/360/EEC of 18 July 1983 terminating the anti-dumping proceeding in respect of imports of certain pears in syrup, originating in Australia, the People's Republic of China and the Republic of South Africa, *O.J.*, 20 July 1983, No L 196/22. See also : C.J.E.C., case C-171/87, 10 March 1992, *Canon Inc. v Council*, E.C.R., 1992, I, (1237), 1277 (Opinion of Advocate General MISCHO), where Advocate General MISCHO stated that «even an increase in the market share of

No critical thresholds can be deduced from European anti-dumping case law in respect of the absolute value of the relevant economic factors (see table 6).

Community manufacturers does not necessarily exclude a finding of injury» ;

- ° Commission Decision 86/86/EEC of 18 March 1986 terminating the anti-dumping proceeding concerning imports of stainless steel household cooking ware originating in South Korea, *O.J.*, 19 March 1986, No L 74/33 (an even sharper decrease in market share of 47.7 % has been determined, but this concerned the market share held by the German producers on the German market, see : Council Decision 83/9/EEC of 17 January 1983 terminating the anti-dumping proceeding concerning imports of codeine and its salts originating in Czechoslovakia, Hungary, Poland and Yugoslavia, *O.J.*, 20 January 1983, No L 16/30) ;
- P Commission Decision 89/511/EEC of 22 August 1989 terminating the anti-dumping proceeding concerning imports of hydraulic excavators originating in Japan, *O.J.*, 25 August 1989, No L 249/71 ;
- q Commission Regulation (EEC) No 2720/93 of 28 September 1993 imposing a provisional anti-dumping duty on imports of isobutanol originating in the Russian Federation, *O.J.*, 2 October 1993, No L 246/12 ;
- r Commission Regulation (EEC) No 2463/93 of 1 September 1993 imposing a provisional anti-dumping duty on imports of fluorspar originating in the People's Republic of China, *O.J.*, 7 September 1993, No L 226/3 (in another anti-dumping case even a price increase of 4.6 % on a one-year basis was found, but that increase had been caused by the anti-dumping measures under review, see : Commission Regulation (EEC) No 1472/91 of 29 May 1991 imposing a provisional anti-dumping duty on imports of oxalic acid originating in India or China and terminating the anti-dumping proceeding in respect of imports of oxalic acid originating in Czechoslovakia, *O.J.*, 1 June 1991, No L 138/62) ;
- ° Council Regulation (EEC) No 2907/83 of 17 October 1983 terminating the anti-dumping proceeding concerning imports of unwrought nickel, not alloyed, in the form of cathodes produced by electrolysis, either uncut or cut into squares, originating in the Soviet Union, *O.J.*, 19 October 1983, No L 286/29 ;
- t Commission Decision 88/125/EEC of 4 March 1988 terminating the anti-dumping proceeding concerning imports of kraftliner paper and board originating in Brazil and the Republic of South Africa, *O.J.*, 8 March 1988, No L 62/39 ;
- u Commission Regulation (EEC) No 707/89 of 17 March 1989 imposing a provisional anti-dumping duty on imports of calcium metal originating in the People's Republic of China or the Soviet Union, *O.J.*, 21 March 1989, No L 78/10 ;
- v Commission Decision 83/559/EEC of 15 November 1983 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of sanitary fixtures of porcelain or china originating in Czechoslovakia and Hungary and terminating that proceeding, *O.J.*, 22 November 1983, No L 325/18 (in another anti-dumping case an even lower decline in employment of 1.1 % on a one-year basis was observed, but it was noted that automation was the principal cause of this decline, see : Commission Decision 80/410/EEC of 10 April 1980 accepting undertakings given in connection with the anti-dumping proceedings concerning certain filament lamps for lighting exceeding 28 volts, originating in Czechoslovakia, the German Democratic Republic, Hungary and Poland, and terminating those proceedings, *O.J.*, 15 April 1980, No L 97/59) ;
- w Council Decision 83/9/EEC of 17 January 1983 terminating the anti-dumping proceeding concerning imports of codeine and its salts originating in Czechoslovakia, Hungary, Poland and Yugoslavia, *O.J.*, 20 January 1983, No L 16/30 ;
- x Council Decision 86/59/EEC of 6 March 1986 terminating the anti-dumping proceeding concerning imports of dead-burned (sintered) natural magnesite originating in the People's Republic of China and North Korea, *O.J.*, 13 March 1986, No L 70/41.

Table 6 - Maximum and minimum value of utilization of capacity and market share during the investigation period

	Injury		No injury	
	minimum	maximum	minimum	maximum
Utilization of capacity	0 % ^a	85 % ^b	50 % ^c	97 % ^d
Market share	13.14 % ^e	92.6 % ^f	9.4 % ^g	99.4 % ^h

Source : Official Journal of the European Communities ; own calculations¹²²⁵.

Nevertheless, it must be recognized that overlapping values (or evolutions) in economic factors in findings of injury and no injury, as illustrated in tables 5 and 6, are not always proof of «one-way flexibility». First, an interconnection may exist between different economic factors, so that the

1225 In particular :

- ^a Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79 ; corrigendum, *O.J.*, 10 February 1990, No L 38/44), where it was mentioned that «available production capacity was never utilized for commercial production» ;
- ^b Commission Regulation (EEC) No 2681/84 of 18 September 1984 imposing a provisional anti-dumping duty on imports of pentaerythritol originating in Canada and accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of pentaerythritol originating in Sweden and terminating that proceeding, *O.J.*, 22 September 1984, No L 254/5 ;
- ^c Commission Decision 80/1175/EEC of 15 December 1980 terminating the anti-dumping proceeding concerning imports of pressure sensitive paper masking tape originating in the United States of America, *O.J.*, 19 December 1980, No L 344/57 ;
- ^d Commission Decision 90/240/EEC of 22 May 1990 terminating the proceeding in connection with a review of anti-dumping measures regarding imports of fibre building-board (hardboard) originating in Finland, Argentina, Switzerland and Yugoslavia and repealing Decisions 86/35/EEC and 86/232/EEC accepting the undertakings given by the exporters concerned, *O.J.*, 31 May 1990, No L 138/44 ;
- ^e Commission Decision 94/82/EC of 10 January 1994 terminating the anti-dumping proceeding concerning imports of gum rosin originating in the People's Republic of China, *O.J.*, 12 February 1994, No L 41/50 ;
- ^f Commission Regulation (EEC) No 2127/82 of 28 July 1982 imposing a provisional anti-dumping duty on trichloroethylene originating in the German Democratic Republic and Poland and terminating the anti-dumping proceeding in respect of trichloroethylene originating in Czechoslovakia, Romania, Spain and the United States of America, *O.J.*, 31 July 1982, No L 223/76 ;
- ^g Commission Decision 86/86/EEC of 18 March 1986 terminating the anti-dumping proceeding concerning imports of stainless steel household cooking ware originating in South Korea, *O.J.*, 19 March 1986, No L 74/33 (an even lower market share of 6.3 % has been determined, but this concerned the market share held by the German producers on the German market, see : Council Decision 83/9/EEC of 17 January 1983 terminating the anti-dumping proceeding concerning imports of codeine and its salts originating in Czechoslovakia, Hungary, Poland and Yugoslavia, *O.J.*, 20 January 1983, No L 16/30 ; a market share of only 2 % has also been mentioned, but this pertained to the share of the Community producers on the free market (thus the captive market excluded), see : Commission Decision 90/154/EEC of 26 March 1990 terminating the anti-dumping proceeding concerning imports of ammonium paratungstate originating in the People's Republic of China and the Republic of Korea, *O.J.*, 30 March 1990, No L 83/117) ;
- ^h Commission Decision 86/344/EEC of 17 July 1986 terminating the anti-dumping proceeding concerning imports of Portland cement originating in the German Democratic Republic, Poland and Yugoslavia, *O.J.*, 25 July 1986, No L 202/43.

improvement in one factor reflects the deterioration in another¹²²⁶. This might explain why injury is found in spite of substantial improvements in certain factors. In European anti-dumping case law, however, the improvement of factor x in combination with the deterioration of factor y, as well as the deterioration of factor x in combination with the improvement of factor y may lead

1226 An interconnection may exist between :

- production capacity and the rate of capacity utilization : a reduction in production capacity may avoid a reduction in the rate of capacity utilization (Commission Decision 83/192/EEC of 19 April 1983 accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of certain cellulose ester resins (cellulose-acetobutyrate and cellulose-acetopropionate) originating in the United States of America and terminating that proceeding, *O.J.*, 23 April 1983, No L 106/24 ; Commission Regulation (EEC) No 1103/93 of 30 April 1993 imposing a provisional anti-dumping duty on imports into the Community of certain electronic weighing-scales originating in Singapore and the Republic of Korea, *O.J.*, 6 May 1993, No L 112/20 ; see further : *infra*, p. 492-493, note 1227) ;
- stocks and production : a reduction in production may result in a reduction of stocks (Commission Regulation (EEC) No 2172/93 of 30 July 1993 imposing provisional anti-dumping duties on imports of ethanolamine originating in the United States of America, *O.J.*, 4 August 1993, No L 195/5 ; Commission Regulation (EEC) No 2463/93 of 1 September 1993 imposing a provisional anti-dumping duty on imports of fluorspar originating in the People's Republic of China, *O.J.*, 7 September 1993, No L 226/3 ; Council Regulation (EC) No 2819/94 of 17 November 1994 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in the People's Republic of China, *O.J.*, 19 November 1994, No L 298/32) or stock may increase despite a decrease in production (Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50) ;
- stocks and the rate of capacity utilization : a reduction in the rate of capacity utilization : a reduction in the rate of capacity utilization may result in lower production and eventually in lower stocks (Commission Regulation (EEC) No 313/92 of 4 February 1992 imposing a provisional anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in South Korea, *O.J.*, 11 February 1992, No L 34/8) ;
- prices and the rate of capacity utilization : a reduction in prices may prevent a reduction in sales and, thus, in the rate of capacity utilization (Commission Regulation (EEC) No 3669/84 of 21 December 1984 imposing a provisional anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan, *O.J.*, 28 December 1984, No L 340/37 ; Commission Regulation (EEC) No 595/85 of 7 March 1985 imposing a provisional anti-dumping duty on imports of certain hydraulic excavators originating in Japan, *O.J.*, 8 March 1985, No L 68/13 ; Council Decision 86/468/EEC of 22 September 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain acrylic fibres originating in Israel, Mexico, Romania and Turkey and terminating the investigation, *O.J.*, 24 September 1986, No L 272/29 ; Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7 ; Commission Regulation (EC) No 1076/94 of 6 May 1994 imposing a provisional anti-dumping duty on imports of certain watch movements originating in Malaysia and Thailand, *O.J.*, 11 May 1994, No L 120/3 ; Commission Regulation (EC) No 1648/94 of 6 July 1994 imposing a provisional anti-dumping duty on imports of furazolidone originating in the People's Republic of China, *O.J.*, 8 July 1994, No L 174/4) ;
- stocks and prices : lower prices may result in higher sales and, thus, in lower stocks (Commission Regulation (EEC) No 313/92 of 4 February 1992 imposing a provisional anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in South Korea, *O.J.*, 11 February 1992, No L 34/8) ;
- prices and market share : by means of a reduction in prices, the market share may be preserved at a considerable level or a decrease in it prevented (Commission Regulation (EEC) No 1500/83 of 9 June 1983 imposing a provisional anti-dumping duty on imports of outboard motors originating in Japan, *O.J.*, 10 June 1983, No L 152/18 ; Commission Decision 91/512/EEC of 25 July 1991 accepting undertakings given in connection with the review of anti-dumping measures concerning imports of artificial corundum originating in the Soviet Union, Hungary, Poland, Czechoslovakia and the People's Republic of China and in connection with the anti-dumping proceeding concerning imports of artificial corundum originating in Brazil and Yugoslavia, and terminating the investigation, *O.J.*, 2 October 1991, No L 275/27 ; Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7 ; Commission Regulation (EEC) No 1451/92 of 2 June 1992 imposing a provisional anti-dumping duty on imports into the Community of certain large electrolytic aluminium capacitors originating in Japan, *O.J.*, 4 June 1992, No L 152/22 (corrigendum, *O.J.*, 17 June 1992, No L 163/27) ; Commission Regulation (EC) No 1076/94 of 6 May 1994 imposing a provisional anti-dumping duty on imports of certain watch movements originating in Malaysia and Thailand, *O.J.*, 11 May 1994, No L 120/3 ; Commission Regulation (EC) No 1648/94 of 6 July 1994 imposing a provisional anti-dumping duty on imports of furazolidone originating in the People's Republic of China, *O.J.*, 8 July 1994, No L 174/4 ; Commission Regulation (EC) No 1783/94 of 18 July 1994 imposing a provisional anti-dumping duty on imports of furfuraldehyde originating in the People's Republic of China, *O.J.*, 21 July 1994, No L 186/11).

to the same result¹²²⁷. In addition, it is never explained why in some cases factor x was

¹²²⁷ See e.g., the relationship between production capacity and its rate of utilization. As noted in several anti-dumping cases, a low rate of capacity utilization is economically not advantageous because it leads to high unit costs of production (Commission Decision 84/404/EEC of 25 July 1984 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of copper sulphate originating in Yugoslavia and terminating the proceeding, *O.J.*, 11 August 1984, No L 215/16; Commission Regulation (EEC) No 2553/84 of 4 September 1984 imposing a provisional anti-dumping duty on imports of oxalic acid originating in Brazil, accepting an undertaking offered by the exporter in the German Democratic Republic of oxalic acid and terminating the proceeding regarding imports of oxalic acid from the German Democratic Republic and Spain, *O.J.*, 7 September 1984, No L 239/8; Commission Regulation (EEC) No 2317/85 of 12 August 1985 imposing a provisional anti-dumping duty on imports of roller chains for cycles originating in the USSR and the People's Republic of China, *O.J.*, 14 August 1985, No L 217/7; Commission Decision 86/36/EEC of 26 February 1986 accepting undertakings entered into in connection with the anti-dumping proceeding concerning imports into Greece of certain categories of glass originating in Turkey, Yugoslavia, Romania, Bulgaria, Hungary and Czechoslovakia and terminating the investigation, *O.J.*, 28 February 1986, No L 51/73; Council Regulation (EEC) No 2512/87 of 18 August 1987 amending Regulation (EEC) No 2786/83 imposing a definitive anti-dumping duty on imports of copper sulphate originating in Czechoslovakia and the USSR, *O.J.*, 20 August 1987, No L 235/18 (corrigendum, *O.J.*, 9 September 1987, No L 259/7); Commission Decision 87/443/EEC of 30 July 1987 amending an undertaking and accepting an undertaking given in connection with the anti-dumping review investigation concerning imports of copper sulphate originating in Poland and the USSR respectively, and terminating the investigation as it concerns these countries, *O.J.*, 20 August 1987, No L 235/22; Commission Regulation (EEC) No 3617/90 of 11 December 1990 imposing a provisional anti-dumping duty on imports of certain welded tubes of iron or non-alloy steel, originating in Turkey or in Venezuela and accepting undertakings offered in connection with such imports, *O.J.*, 15 December 1990, No L 351/17; Commission Regulation (EEC) No 3296/92 of 12 November 1992 imposing a provisional anti-dumping duty on imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in Czechoslovakia, Hungary, Poland and the Republic of Croatia and terminating the anti-dumping proceeding with regard to the Republics of Serbia and of Montenegro, the former Yugoslav Republic of Macedonia, the Republic of Bosnia-Herzegovina and the Republic of Slovenia, *O.J.*, 14 November 1992, No L 328/15; Council Regulation (EEC) No 55/93 of 8 January 1993 imposing a definitive anti-dumping duty on imports of outer rings of tapered roller bearings originating in Japan, *O.J.*, 15 January 1993, No L 9/7; Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5; Council Regulation (EC) No 3359/93 of 2 December 1993 imposing amended anti-dumping measures on imports of ferro-silicon originating in Russia, Kazakhstan, Ukraine, Iceland, Norway, Sweden, Venezuela and Brazil, *O.J.*, 9 December 1993, No L 302/1). This explains why Community producers want to avoid further reductions of capacity utilization and, therefore, reduce their production capacity (Commission Decision 83/192/EEC of 19 April 1983 accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of certain cellulose ester resins (cellulose-acetobutyrate and cellulose-acetopropionate) originating in the United States of America and terminating that proceeding, *O.J.*, 23 April 1983, No L 106/24; Council Regulation (EC) No 643/94 of 21 March 1994 amending Regulation (EEC) No 3068/92 in respect of definitive anti-dumping duties on imports of potassium chloride originating in Belarus, Russia and Ukraine, *O.J.*, 24 March 1994, No L 80/1; Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24; Commission Regulation (EC) No 1506/94 of 27 June 1994 imposing provisional duties on imports of urea ammonium nitrate solution originating in Bulgaria and Poland, *O.J.*, 30 June 1994, No L 162/16).

As a consequence, in several findings of injury the reduction in production capacity is advanced to explain why the rate of capacity utilization did not decline (Commission Decision 82/881/EEC of 23 December 1982 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of perchlorethylene originating in Czechoslovakia, Romania, Spain and the United States of America and terminating that proceeding, *O.J.*, 30 December 1982, No L 371/47; Commission Regulation (EEC) No 2253/84 of 31 July 1984 imposing a provisional anti-dumping duty on certain imports of certain sodium carbonate originating in the United States of America and accepting undertakings in respect of other imports of the same product, *O.J.*, 2 August 1984, No L 206/15; Commission Regulation (EEC) No 2681/84 of 18 September 1984 imposing a provisional anti-dumping duty on imports of pentaerythritol originating in Canada and accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of pentaerythritol originating in Sweden and terminating that proceeding, *O.J.*, 22 September 1984, No L 254/5; Commission Decision No 2158/88/ECSC of 20 July 1988 imposing a provisional anti-dumping duty on imports of certain iron or steel sections originating in Yugoslavia or Turkey, *O.J.*, 21 July 1988, No L 190/5; Council Regulation (EEC) No 1306/89 of 11 May 1989 imposing a definitive anti-dumping duty on imports of light sodium carbonate originating in Bulgaria, the German Democratic Republic, Poland and Romania, *O.J.*, 13 May 1989, No L 131/4; Commission Regulation (EEC) No 720/90 of 22 March 1990 imposing a provisional anti-dumping duty on imports of silicon metal originating in the People's Republic of China, *O.J.*, 27 March 1990, No L 80/9; Council Regulation (EEC) No 117/91 of 16 January 1991 imposing a definitive anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 19 January 1991, No L 14/1; Commission Regulation (EEC) No 2818/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports of cotton yarn originating in Brazil, Egypt and Turkey and terminating the anti-dumping proceeding in respect of cotton yarn originating in India and Thailand, *O.J.*, 27 September 1991, No L 271/17) or declined by less (Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24); similarly, restructuring measures allowing better, though not satisfactory capacity utilization have also been raised in

positive findings of injury (Council Regulation (EEC) No 341/90 of 5 February 1990 accepting undertakings and imposing a definitive anti-dumping duty on imports of ferro-silicon originating in Iceland, Norway, Sweden, Venezuela or Yugoslavia, except those sold for export to the Community by companies whose undertakings have been accepted, *O.J.*, 10 February 1990, No L 38/1 ; Commission Decision No 891/92/ECSC of 30 March 1992 imposing a provisional anti-dumping duty on imports of certain semi-finished products of alloy steel, originating in Turkey and Brazil, *O.J.*, 9 April 1992, No L 95/26 ; Commission Regulation (EEC) No 1103/93 of 30 April 1993 imposing a provisional anti-dumping duty on imports into the Community of certain electronic weighing scales originating in Singapore and the Republic of Korea, *O.J.*, 6 May 1993, No L 112/20 ; Commission Decision 93/521/EEC of 3 September 1993 accepting undertakings given in connection with the anti-dumping review in respect of imports of binder and baler twine originating in Brazil, terminating the anti-subsidy review proceeding with regard to these imports and terminating the anti-dumping and anti-subsidy review in respect of imports of binder and baler twine originating in Mexico, *O.J.*, 8 October 1993, No L 251/28).

Conversely, the increase in production capacity has been advanced to explain why no injury was found though the rate of capacity utilization had decreased (Council Decision 83/162/EEC of 18 April 1983 terminating the anti-dumping proceeding in respect of imports of acrylonitrile originating in the United States of America, *O.J.*, 20 April 1983, No L 101/29 ; Commission Decision 86/86/EEC of 18 March 1986 terminating the anti-dumping proceeding concerning imports of stainless steel household cooking ware originating in South Korea, *O.J.*, 19 March 1986, No L 74/33 ; Commission Regulation (EEC) No 2800/86 of 9 September 1986 imposing a provisional anti-dumping duty on imports of certain deep freezers originating in the USSR, accepting the undertakings in connection with the investigation of imports of certain deep freezers originating in Yugoslavia or in the German Democratic Republic and terminating the investigation, and terminating the proceeding concerning imports of certain deep freezers, *O.J.*, 11 September 1986, No L 259/14 ; Commission Decision 90/399/EEC of 26 July 1990 terminating an anti-dumping proceeding concerning imports of certain single phase, two-speed electric motors originating in Bulgaria, Romania and Czechoslovakia, *O.J.*, 31 July 1990, No L 202/47 ; Commission Decision 91/29/EEC of 11 January 1991 terminating the anti-dumping proceeding concerning imports of Portland cement originating in Yugoslavia, *O.J.*, 22 January 1991, No L 16/34 ; Commission Decision 93/325/EEC of 18 May 1993 terminating the anti-dumping proceeding concerning imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China, *O.J.*, 25 May 1993, No L 127/15 ; Commission Decision 94/389/EC of 6 June 1994 terminating the anti-dumping proceeding regarding imports of refined antimony trioxide originating in the People's Republic of China, *O.J.*, 9 July 1994, No L 176/41).

However, an increase in production capacity coinciding with a decline in the rate of capacity utilization does not prevent findings of injury (Commission Regulation (EEC) No 4062/88 of 23 December 1988 imposing a provisional anti-dumping duty on imports of video cassettes and video tape reels originating in the Republic of Korea and Hong Kong, *O.J.*, 24 December 1988, No L 356/47 ; Commission Regulation (EEC) No 707/89 of 17 March 1989 imposing a provisional anti-dumping duty on imports of calcium metal originating in the People's Republic of China or the Soviet Union, *O.J.*, 21 March 1989, No L 78/10 ; Council Regulation (EEC) No 1768/89 of 19 June 1989 imposing a definitive anti-dumping duty on imports of video cassettes originating in the Republic of Korea and Hong Kong, collecting definitively the provisional duty and terminating the anti-dumping proceeding with regard to the imports of video tape reels originating in the Republic of Korea, *O.J.*, 22 June 1989, No L 174/1 ; Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27) ; Council Regulation (EEC) No 112/90 of 16 January 1990 imposing a definitive anti-dumping duty on imports of certain compact disc players originating in Japan and the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 17 January 1990, No L 13/21 ; Commission Regulation (EEC) No 762/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungstic oxide and tungstic acid originating in the People's Republic of China, *O.J.*, 30 March 1990, No L 83/29 ; Commission Regulation (EEC) No 1613/90 of 13 June 1990 imposing a provisional anti-dumping duty on imports of ball bearings with a greatest external diameter not exceeding 30 mm originating in Thailand, *O.J.*, 16 June 1990, No L 152/24 ; Commission Regulation (EEC) No 2051/90 of 17 July 1990 imposing a temporary anti-dumping duty on imports of woven polyolefin bags originating in the People's Republic of China, *O.J.*, 19 July 1990, No L 187/36 (corrigendum, *O.J.*, 20 September 1990, No L 256/38) ; Commission Regulation (EEC) No 3262/90 of 5 November 1990 imposing a provisional anti-dumping duty on imports of audio tapes in cassettes originating in Japan, the Republic of Korea and Hong Kong, *O.J.*, 13 November 1990, No L 313/5 (corrigendum, *O.J.*, 12 January 1991, No L 9/36) ; Commission Regulation (EEC) No 1034/91 of 23 April 1991 imposing a provisional anti-dumping duty on imports of video tapes in cassettes originating in the People's Republic of China, *O.J.*, 26 April 1991, No L 106/15 ; Commission Regulation (EEC) No 2805/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports into the Community of certain thermal paper originating in Japan, *O.J.*, 26 September 1991, No L 270/15 ; Commission Regulation (EEC) No 1031/92 of 23 April 1992 imposing a provisional anti-dumping duty on imports of potassium chloride (potash) originating in Belarus, Russia or Ukraine, *O.J.*, 28 April 1992, No L 110/5 ; Commission Regulation (EEC) No 1451/92 of 2 June 1992 imposing a provisional anti-dumping duty on imports into the Community of certain large electrolytic aluminium capacitors originating in Japan, *O.J.*, 4 June 1992, No L 152/22 (corrigendum, *O.J.*, 17 June 1992, No L 163/27) ; Commission Regulation (EEC) No 1994/92 of 14 July 1992 imposing a provisional anti-dumping duty on imports into the Community of outer rings of tapered roller bearings originating in Japan, *O.J.*, 18 July 1992, No L 199/8 ; Council Regulation (EEC) No 55/93 of 8 January 1993 imposing a definitive anti-dumping duty on imports of outer rings of tapered roller bearings originating in Japan, *O.J.*, 15 January 1993, No L 9/7 ; Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50). In only one anti-dumping case, it has been explained why such a combination of the factors «production capacity» and «rate of capacity utilization» resulted in a finding of injury. It was noted that the rate of capacity utilization would have dropped even if production capacity had not increased (Commission Regulation (EEC) No 1386/91 of 23 May 1991 imposing a provisional anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in Japan, the People's Republic of China, the Republic of Korea and Thailand, *O.J.*, 28 May 1991, No L 133/20).

decisive and in other cases factor y^{1228} . Moreover, an improvement (a deterioration) in both the interconnected factors has not prevented findings of (no) injury¹²²⁹. Thus, the interconnection between economic factors is probably only advanced if it is useful to the envisaged result of the injury examination.

Second, the fact that the development of the relevant economic factors may have been caused by another factor than the dumping, might also explain why improvements (deteriorations) in an economic factor are compatible with findings of (no) injury. For European anti-dumping case law mentions only the overall evolution in the relevant economic factors, without any specification about the impact of dumping on them. Moreover, it usually establishes the evolution in a relevant economic factor by comparing the value of that economic factor at the beginning of a certain period with the value reached at the end of that period. Fluctuations during that period are not given much attention. As a consequence, injury is found in cases where relevant economic factors have improved during the investigation period after a serious deterioration during the preceding period. This seems rather peculiar because the choice of the period of an injury examination, covering the investigation period and a preceding period, is undoubtedly based on the assumption that dumping has been practised during the investigation period, but not during the preceding

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One exception should be pointed out : in *polyester yarns from Taiwan, Indonesia, India, the People's Republic of China and Turkey* the European anti-dumping authorities held that injury had to be assessed mainly on the basis of parameters such as prices, profitability and employment. Economic factors such as production, sales, stocks and market share did not clearly reflect the difficult market conditions in which the Community producers had to operate, since the Community producers had decided to maintain capacity utilization as high as possible in an attempt to avoid greater deterioration of profitability (Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7 ; Council Regulation (EEC) No 830/92 of 30 March 1992 imposing a definitive anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and collecting definitively the provisional duty, *O.J.*, 3 April 1992, No L 88/1 (corrigendum, *O.J.*, 5 June 1992, No L 153/16)).

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For example, it might normally be expected that the decrease in both production capacity and rate of capacity utilization is conclusive evidence of injury (Commission Decision 84/465/EEC of 26 September 1984 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of asbestos-cement corrugated sheets originating in Czechoslovakia and the German Democratic Republic and terminating that proceeding, *O.J.*, 28 September 1984, No L 259/48 ; Commission Decision No 2247/87/ECSC of 28 July 1987 imposing a provisional anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Mexico, *O.J.*, 29 July 1987, No L 207/21), and that an increase in both factors is strong proof of no injury (Council Regulation (EEC) No 1786/89 of 19 June 1989 terminating the proceeding in connection with a review of anti-dumping measures concerning imports of fibre building board (hardboard) originating in Czechoslovakia, Poland and the USSR, confirming the expiry of the definitive anti-dumping duties imposed on imports from Czechoslovakia and Poland, and repealing the definitive anti-dumping duty imposed on imports from the USSR, *O.J.*, 23 June 1989, No L 176/1 ; Commission Decision 89/377/EEC of 19 June 1989 terminating the proceeding in connection with a review of anti-dumping measures concerning imports of fibre building board (hardboard) originating in Romania, Brazil and Sweden, confirming the expiry of the undertakings given by Romanian, Brazilian and certain Swedish exporters, and repealing the undertaking given by another Swedish exporter, *O.J.*, 23 June 1989, No L 176/51 ; Commission Decision 89/511/EEC of 22 August 1989 terminating the anti-dumping proceeding concerning imports of hydraulic excavators originating in Japan, *O.J.*, 25 August 1989, No L 249/71).

Nevertheless, injury has been found in cases where both the production capacity and the rate of capacity utilization increased (Commission Regulation (EEC) No 665/90 of 16 March 1990 imposing a provisional anti-dumping duty on imports of ferroboron alloy originating in Japan, *O.J.*, 20 March 1990, No L 73/6 ; Commission Regulation (EEC) No 2064/90 of 17 July 1990 imposing a provisional anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 20 July 1990, No L 188/10 (corrigendum, *O.J.*, 21 November 1990, No L 321/19)) or, at least, did not decline (Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12 ; Commission Regulation (EEC) No 2005/88 of 5 July 1988 imposing a provisional anti-dumping duty on imports of serial impact fully formed character printers originating in Japan, *O.J.*, 8 July 1988, No L 177/1).

period¹²³⁰. However, if necessary, an explanation may always be put forward why injury is found, notwithstanding the improvement. Indeed, in such cases, the injury finding is based on the consideration that the dumping has prevented the recovery of the relevant economic factor to its original level¹²³¹, that the increase did not constitute a considerable improvement¹²³², that the increase was insufficient¹²³³, or that it was the result of the levying of a provisional anti-dumping duty on the dumped imports¹²³⁴.

3.4. THREAT OF INJURY

The Community industry may not actually have suffered injury, but there may be indications that injury will be suffered. In view of the fact that anti-dumping relief is, in principle, granted with an eye to the future, it is not very appropriate to terminate the anti-dumping proceeding because of lack of actual injury and later on to start a new anti-dumping proceeding as soon as there is actual injury. Moreover, a threat of injury may also affect the actual performance and strategy of a producer (e.g., disinvestment and plant closures). Threat of injury too should, thus, be an injury standard.

However, the standard «threat of injury» should not be used as an excuse for granting anti-dumping relief when the Community industry does not suffer actual injury¹²³⁵. In order to prevent such circumvention, GATT and EC anti-dumping law stipulate that «(a) determination of threat of injury (must) be based on facts and not merely on allegation, conjecture or remote possibility», whereby «(t)he change in circumstances (...) must be clearly foreseen and imminent»

¹²³⁰ *Supra*, 439-442.

¹²³¹ Commission Decision 84/229/EEC of 13 April 1984 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of propan-1-ol (propyl alcohol) originating in the United States of America, and terminating that proceeding, *O.J.*, 19 April 1984, No L 106/55; Commission Decision 86/464/EEC of 17 September 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of artificial corundum originating in Hungary, Poland and the USSR, and terminating the investigation, *O.J.*, 23 September 1986, No L 271/26.

¹²³² Commission Regulation (EEC) No 744/84 of 19 March 1984 imposing a provisional anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 23 March 1984, No L 79/8 (corrigendum, *O.J.*, 29 March 1984, No L 86/31). It is interesting to mention in this respect is that in this anti-dumping case the production level at the end of the period taken into consideration was only 1.25 % below its original level.

¹²³³ Commission Regulation (EC) No 534/94 of 9 March 1994 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, *O.J.*, 11 March 1994, No L 68/5.

¹²³⁴ Commission Regulation (EEC) No 744/84 of 19 March 1984 imposing a provisional anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 23 March 1984, No L 79/8 (corrigendum, *O.J.*, 29 March 1984, No L 86/31).

¹²³⁵ BESELER, J.F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 163; BOUDANT, J., *L'anti-dumping communautaire*, Paris, Economica, 1991, 131.

(Article 3.7. GATT Anti-dumping Code ; Article 3(9) basic EC Regulation). In the same sense, ECSC anti-dumping law provides that «(a) determination of threat of injury may only be made where a particular situation is likely to develop into actual injury» (Article 4(3) basic ECSC Decision). In other words, the indications for a future injury must be reasonable and reliable («clearly foreseen»), whereas the time at which the injury will actually materialize can not be too remote («imminent»)¹²³⁶.

Compared to the number of findings of actual injury, relatively few findings of threat of injury have been arrived at in European anti-dumping case law. This is undoubtedly due to the fact that in the majority of the anti-dumping cases no investigation into threat of injury is made when actual injury is found. Nevertheless, threat of injury is practically always found in cases where also

¹²³⁶ GATT Doc. No ADP/25, 31 October 1985.

actual injury is found¹²³⁷, or in cases in which prevailing anti-dumping measures are under

1237 There are only two exceptions :

- in *barium chloride from the German Democratic Republic* the Council found threat of injury without investigating whether the dumping also caused actual injury (Council Regulation (EEC) No 2370/83 of 19 August 1983 imposing a definitive anti-dumping duty on imports of barium chloride originating in the People's Republic of China and in the German Democratic Republic, *O.J.*, 20 August 1983, No L 228/28) ;
- in *ammonium nitrate from Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan*, the Commission found that, during the investigation period, there were no imports from those countries and investigated whether there was evidence of any imminent change in circumstances which could lead to an influx of dumped imports from those countries (Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries ; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24).

See also : Commission Recommendation No 118/78/ECSC of 18 January 1978 imposing a provisional anti-dumping duty on certain galvanized steel sheets and plates originating in Poland and Spain, *O.J.*, 24 January 1978, No L 19/3 ; Commission Recommendation No 119/78/ECSC of 18 January 1978 imposing a provisional anti-dumping duty on wire rod originating in Czechoslovakia, *O.J.*, 24 January 1978, No L 19/5 ; Commission Recommendation No 120/78/ECSC of 18 January 1978 imposing a provisional duty on certain sheets and plates, of iron or steel, originating in Czechoslovakia, *O.J.*, 24 January 1978, No L 19/7. In these three cases a finding of threat of injury was made, though nothing is mentioned concerning possible actual injury. This conclusion may, however, not be warranted since these cases show careless usage. Indeed, the English version of *wire rod from Czechoslovakia* states that the price undercutting «causes material injury», whereas the Dutch version states that the price undercutting «aanzienlijke schade dreigen toe te brengen» (translated in English : «threatens to cause material injury»).

All the other cases in which an investigation into threat of injury has been initiated after that the dumping was found not to cause actual injury, were terminated by a finding of no threat of injury (Commission Regulation (EEC) No 2599/79 of 22 November 1979 imposing a provisional anti-dumping duty on certain sodium carbonate originating in the Soviet Union, *O.J.*, 24 November 1979, No L 297/12 ; Council Regulation (EEC) No 407/80 of 18 February 1980 imposing a definitive anti-dumping duty on certain sodium carbonate originating in the Soviet Union, *O.J.*, 22 February 1980, No L 48/1 ; Commission Decision 82/808/EEC of 25 November 1982 terminating the anti-dumping procedure concerning imports of aluminium foil for household and catering use originating in Austria, the German Democratic Republic, Hungary and Israel, *O.J.*, 1 December 1982, No L 339/58 ; Commission Decision 85/501/EEC of 11 November 1985 terminating the anti-dumping proceeding concerning imports of wire rod originating in Brazil, Portugal, Trinidad and Tobago and Venezuela, *O.J.*, 13 November 1985, No L 299/18 ; Commission Decision 86/344/EEC of 17 July 1986 terminating the anti-dumping proceeding concerning imports of Portland cement originating in the German Democratic Republic, Poland and Yugoslavia, *O.J.*, 25 July 1986, No L 202/43 ; Council Regulation (EEC) No 1786/89 of 19 June 1989 terminating the proceeding in connection with a review of anti-dumping measures concerning imports of fibre building board (hardboard) originating in Czechoslovakia, Poland and the USSR, confirming the expiry of the definitive anti-dumping duties imposed on imports from Czechoslovakia and Poland, and repealing the definitive anti-dumping duty imposed on imports from the USSR, *O.J.*, 23 June 1989, No L 176/1 ; Commission Decision 89/377/EEC of 19 June 1989 terminating the proceeding in connection with a review of anti-dumping measures concerning imports of fibre building board (hardboard) originating in Romania, Brazil and Sweden, confirming the expiry of the undertakings given by Romanian, Brazilian and certain Swedish exporters, and repealing the undertaking given by another Swedish exporter, *O.J.*, 23 June 1989, No L 176/51 ; Commission Decision 89/537/EEC of 27 September 1989 terminating the anti-dumping proceeding concerning imports of mica originating in Japan, *O.J.*, 3 October 1989, No L 284/45 ; Commission Decision 90/155/EEC of 26 March 1990 terminating the anti-dumping proceeding concerning imports of tungsten metal powder originating in the People's Republic of China or the Republic of Korea, *O.J.*, 30 March 1990, No L 83/124 ; Commission Decision 90/196/EEC of 10 April 1990 terminating the anti-dumping proceeding concerning imports of methenamine (hexamethylenetetramine) originating in Hungary and Yugoslavia and accepting undertakings offered in connection with the proceeding concerning imports of methenamine (hexamethylenetetramine) originating in Bulgaria, Czechoslovakia, Poland and Romania, *O.J.*, 24 April 1990, No L 104/14 ; Commission Decision 90/240/EEC of 22 May 1990 terminating the proceeding in connection with a review of anti-dumping measures regarding imports of fibre building-board (hardboard) originating in Finland, Argentina, Switzerland and Yugoslavia and repealing Decisions 86/35/EEC and 86/232/EEC accepting the undertakings given by the exporters concerned, *O.J.*, 31 May 1990, No L 138/44 ; Commission Decision 90/399/EEC of 26 July 1990 terminating an anti-dumping proceeding concerning imports of certain single phase, two-speed electric motors originating in Bulgaria, Romania and Czechoslovakia, *O.J.*, 31 July 1990, No L 202/47 ; Council Regulation (EEC) No 541/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of barium chloride originating in the People's Republic of China, *O.J.*, 7 March 1991, No L 60/1 ; Commission Decision 91/303/EEC of 12 June 1991 terminating the anti-dumping proceeding concerning imports of thin polyester film originating in the Republic of Korea, *O.J.*, 15 June 1991, No L 151/89 ; Commission Decision 94/389/EC of 6 June 1994 terminating the anti-dumping proceeding regarding imports of refined antimony trioxide originating in the People's Republic of China, *O.J.*, 9 July 1994, No L 176/41).

Moreover, in several anti-dumping cases, findings of threat of injury are based on the same economic factors as findings of actual injury, such as : the absolute volume, the market share and the prices of the dumped imports, and, in connection with the impact on the Community industry, production, utilization of capacity, stocks, sales, market share, profits, employment and structural adjustment¹²³⁹. GATT and EC anti-dumping law, however, enumerate other factors for a

¹²³⁸ See e.g. : Commission Decision 89/573/EEC of 30 October 1989 terminating the investigation concerning imports of dicumyl peroxide originating in Taiwan and accepting an undertaking offered in the context of the review concerning imports of dicumyl peroxide originating in Japan and terminating the proceeding, *O.J.*, 31 October 1989, No L 317/49 ; Council Regulation (EC) No 1318/94 of 6 June 1994 terminating the review of anti-dumping measures concerning imports of certain acrylic fibres originating in Mexico and repealing the measures applying to such imports, *O.J.*, 8 June 1994, No L 143/1.

¹²³⁹ Commission Recommendation No 112/78/ECSC of 18 January 1978 imposing a provisional anti-dumping duty on imports of iron or steel coils for re-rolling, originating in Czechoslovakia and South Korea, *O.J.*, 21 January 1978, No L 17/27 ; Commission Recommendation No 118/78/ECSC of 18 January 1978 imposing a provisional anti-dumping duty on certain galvanized steel sheets and plates originating in Poland and Spain, *O.J.*, 24 January 1978, No L 19/3 ; Commission Recommendation No 119/78/ECSC of 18 January 1978 imposing a provisional anti-dumping duty on wire rod originating in Czechoslovakia, *O.J.*, 24 January 1978, No L 19/5 ; Commission Recommendation No 120/78/ECSC of 18 January 1978 imposing a provisional duty on certain sheets and plates, of iron or steel, originating in Czechoslovakia, *O.J.*, 24 January 1978, No L 19/7 ; Commission Recommendation No 245/78/ECSC of 2 February 1978 imposing a provisional anti-dumping duty on imports of iron or steel coils for re-rolling originating in Japan and Bulgaria, *O.J.*, 7 February 1978, No L 37/13 ; Commission Recommendation No 262/78/ECSC of 7 February 1978 imposing a provisional anti-dumping duty on certain sheets and plates, of iron or steel, originating in Poland, *O.J.*, 9 February 1978, No L 39/13 ; Commission Recommendation No 263/78/ECSC of 7 February 1978 imposing a provisional anti-dumping duty on certain angles, shapes and sections, of iron or steel, not further worked than hot-rolled or extruded, originating in Japan, *O.J.*, 9 February 1978, No L 39/15 ; Commission Recommendation No 307/78/ECSC of 14 February 1978 imposing a provisional anti-dumping duty on imports of iron or steel coils for re-rolling originating in Australia, *O.J.*, 16 February 1978, No L 45/17 ; Commission Recommendation No 359/78/ECSC of 20 February 1978 imposing a provisional anti-dumping duty on certain galvanized sheets and plates originating in the German Democratic Republic and Japan, *O.J.*, 22 February 1978, No L 50/13 ; Commission Regulation (EEC) No 511/78 of 7 March 1978 imposing a provisional anti-dumping duty on kraft liner paper and board originating in the United States of America, *O.J.*, 11 March 1978, No L 69/9 ; Commission Recommendation No 811/78/ECSC of 21 April 1978 imposing a definitive anti-dumping duty on certain sheets and plates, of iron or steel, originating in Bulgaria, the German Democratic Republic and Romania, *O.J.*, 22 April 1978, No L 108/26 ; Commission Recommendation No 932/78/ECSC of 2 May 1978 imposing a definitive anti-dumping duty on iron or steel coils for re-rolling originating in Bulgaria, *O.J.*, 4 May 1978, No L 120/22 ; Commission Regulation (EEC) No 1355/78 of 20 June 1978 imposing a provisional anti-dumping duty on ferro-chromium originating in the Republic of South Africa and Sweden, *O.J.*, 22 June 1978, No 165/20 (corrigendum, *O.J.*, 29 June 1978, No L 173/31) ; Commission Recommendation No 1704/78/ECSC of 19 July 1978 imposing a definitive anti-dumping duty on certain sheets and plates, of iron or steel, originating in Czechoslovakia, Japan, Poland and Spain, *O.J.*, 20 July 1978, No L 195/17 ; Commission Recommendation No 1758/78/ECSC of 26 July 1978 imposing a definitive anti-dumping duty on certain angles, shapes and sections of iron or steel, originating in Spain, *O.J.*, 27 July 1978, No L 203/28 ; Council Regulation (EEC) No 2133/78 of 8 September 1978 imposing a definitive anti-dumping duty on kraft liner paper and board originating in the United States of America, *O.J.*, 9 September 1978, No L 247/22 ; Commission Recommendation No 267/79/ECSC of 9 February 1979 imposing a provisional anti-dumping duty on certain angles, shapes and U, I or H sections of iron or steel, not further worked than hot-rolled or extruded, originating in Spain, *O.J.*, 13 February 1979, No L 37/21 ; Commission Recommendation No 294/79/ECSC of 13 February 1979 imposing a provisional anti-dumping duty on certain hematite pig iron originating in Brazil, *O.J.*, 16 February 1979, No L 41/29 ; Commission Regulation (EEC) No 322/79 of 16 February 1979 imposing a provisional anti-dumping duty on a certain herbicide originating in Romania, *O.J.*, 21 February 1979, No L 44/8 ; Commission Recommendation No 433/79/ECSC of 27 February 1979 imposing a provisional anti-dumping duty on certain sheets and plates of iron or steel originating in Spain and repealing certain suspended anti-dumping duties, *O.J.*, 3 March 1979, No L 53/21 ; Commission Recommendation No 496/79/ECSC of 13 March 1979 imposing a provisional anti-dumping duty on iron or steel coils for re-rolling originating in Greece, *O.J.*, 15 March 1979, No L 65/16 ; Council Regulation (EEC) No 955/79 of 15 May 1979 imposing a definitive anti-dumping duty on a certain herbicide originating in Romania, *O.J.*, 17 May 1979, No L 121/5 ; Council Regulation (EEC) No 2294/80 of 28 August 1980 amending Regulation (EEC) No 191/80 imposing a definitive anti-dumping duty on lithium hydroxide originating in the United States of America and the Soviet Union, *O.J.*, 30 August 1980, No L 228/59 ; Commission Recommendation No 1104/82/ECSC of 6 May 1982 imposing a provisional anti-dumping duty on certain sheets and plates, of iron or steel, originating in Brazil, *O.J.*, 11 May 1982, No L 128/9 ; Commission Recommendation No 2242/82/ECSC of 10 August 1982 imposing a provisional anti-dumping duty on broad-flanged beams originating in Spain, *O.J.*, 13 August 1982, No L 238/32 ; Council Decision 86/468/EEC of 22 September 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain acrylic fibres originating in Israel, Mexico, Romania and Turkey and terminating the investigation, *O.J.*, 24 September 1986, No L 272/29 ; Commission Decision 87/236/EEC of 10 April 1987 terminating the anti-dumping proceeding on imports of synthetic fibres of polyesters originating in the German Democratic Republic, Romania, Turkey and Yugoslavia, *O.J.*, 15 April 1987, No

determination of threat of injury : the likelihood of substantially increased dumped imports into the Community as indicated by the rate of increase of dumped imports ; the likelihood of increased exports to the Community indicated by the freely disposable or imminently increasing capacity of the exporter and taking into account of the availability of other export markets to absorb any additional exports ; the likelihood of increasing demand for further imports caused by imports at prices having price- depressive or price-surpressive effects ; and inventories of the product (Article 3.7. GATT Anti-dumping Code ; Article 3(9) basic EC Regulation). In ECSC anti-dumping law, the rate of increase in the dumped exports to the Community, the export capacity in the country of origin or export, already in existence or which will be operational in the foreseeable future, and the likelihood that the resulting exports will be directed to the Community, are set forth as evidence of threat of injury (Article 4(3) basic ECSC Decision). The factors mentioned in European anti-dumping law are not exclusive : they are not decisive and other factors may be taken into account (Article 3.7. GATT Anti-dumping Code ; Article 3(9) basic EC Regulation ; Article 4(3) basic ECSC Decision). As a consequence, no violation of European anti-dumping law is committed if other economic factors are used for showing a threat of injury.

The same high flexibility, therefore, characterizes an examination of actual injury as well as of threat of injury¹²⁴⁰. In respect of the latter, the degree of flexibility may even be higher.

L 103/38 ; Council Regulation (EEC) No 2702/87 of 4 September 1987 repealing a definitive anti-dumping duty on styrene monomer originating in the United States of America and terminating the investigation, *O.J.*, 8 September 1987, No L 258/20 ; Commission Decision 88/175/EEC of 22 March 1988 on the closure of anti-dumping proceedings in respect of Spanish imports from France of refrigerating units for transports (IV/AD/86/2 - Reftrans), *O.J.*, 24 March 1988, No L 79/35 ; Council Regulation (EEC) No 1306/89 of 11 May 1989 imposing a definitive anti-dumping duty on imports of light sodium carbonate originating in Bulgaria, the German Democratic Republic, Poland and Romania, *O.J.*, 13 May 1989, No L 131/4 ; Commission Decision 90/378/EEC of 13 July 1990 accepting an undertaking given in connection with the anti-dumping review concerning imports of oxalic acid originating in Brazil and terminating the investigation, *O.J.*, 17 July 1990, No L 184/16 ; Commission Decision 91/303/EEC of 12 June 1991 terminating the anti-dumping proceeding concerning imports of thin polyester film originating in the Republic of Korea, *O.J.*, 15 June 1991, No L 151/89 ; Council Regulation (EC) No 3359/93 of 2 December 1993 imposing amended anti-dumping measures on imports of ferro-silicon originating in Russia, Kazakhstan, Ukraine, Iceland, Norway, Sweden, Venezuela and Brazil, *O.J.*, 9 December 1993, No L 302/1 ; Council Regulation (EC) No 1318/94 of 6 June 1994 terminating the review of anti-dumping measures concerning imports of certain acrylic fibres originating in Mexico and repealing the measures applying to such imports, *O.J.*, 8 June 1994, No L 143/1 ; Commission Decision 94/389/EC of 6 June 1994 terminating the anti-dumping proceeding regarding imports of refined antimony trioxide originating in the People's Republic of China, *O.J.*, 9 July 1994, No L 176/41.

1240 With regard to the economic factors which are taken into account in an examination of threat of injury, some guidelines or critical thresholds can not be deducted. For example, with regard to the evolution in the volume of dumped imports, the following minimum and maximum average increases on a one-year basis are found in examinations of threat of injury :

Evolution in :	Threat of injury		No threat of injury	
	from	up to	from	up to
Volume of dumped exports	+4.8 % ^a	+202.6 % ^b	- x % ^c	+49.5 % ^d

Source : Official Journal of the European Communities ; own calculations. In particular :

- ^a Commission Regulation (EEC) No 512/84 of 27 February 1984 imposing a provisional anti-dumping duty on imports of vinyl acetate monomer originating in Canada, *O.J.*, 29 February 1984, No L 58/17 ;
- ^b Council Regulation (EEC) No 1048/90 of 25 April 1990 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in the Republic of Korea and collecting

Indeed, besides the economic factors which are relevant in the examination of actual injury, other economic factors may also be taken into account. Thus, European anti-dumping case law considers and, moreover, places a broad interpretation not only on the factors mentioned in European anti-dumping law, such as the export capacity in the dumping country¹²⁴¹ and the

definitively the provisional duty, *O.J.*, 27 April 1990, No L 107/56 (corrigendum, *O.J.*, 24 May 1990, No L 133/92);

c A fall in the volume of the dumped exports, without any further numerical specifications being provided, has been invoked in a finding of no threat of injury in : Commission Decision 90/155/EEC of 26 March 1990 terminating the anti-dumping proceeding concerning imports of tungsten metal powder originating in the People's Republic of China or the Republic of Korea, *O.J.*, 30 March 1990, No L 83/124 ; Commission Decision 90/399/EEC of 26 July 1990 terminating an anti-dumping proceeding concerning imports of certain single phase, two-speed electric motors originating in Bulgaria, Romania and Czechoslovakia, *O.J.*, 31 July 1990, No L 202/47 ;

d Commission Decision 86/344/EEC of 17 July 1986 terminating the anti-dumping proceeding concerning imports of Portland cement originating in the German Democratic Republic, Poland and Yugoslavia, *O.J.*, 25 July 1986, No L 202/43.

As in examinations of actual injury, a market share of 0.47 % held by the dumped exports on the Community market is considered too low to support a finding of threat of injury (Commission Decision 86/344/EEC of 17 July 1986 terminating the anti-dumping proceeding concerning imports of Portland cement originating in the German Democratic Republic, Poland and Yugoslavia, *O.J.*, 25 July 1986, No L 202/43). A market share of 4.5 % held by the dumped exports on the Community market, however, is sufficient to support a finding of threat of injury (Commission Regulation (EEC) No 512/84 of 27 February 1984 imposing a provisional anti-dumping duty on imports of vinyl acetate monomer originating in Canada, *O.J.*, 29 February 1984, No L 58/17).

¹²⁴¹ In order to know the export capacity of the dumping country to the Community a thorough examination should be made of the production capacity of the producers in the dumping country, their spare production capacity, their exports to the Community and other countries, their export facilities and their import facilities within the Community. In only one anti-dumping case such a profound examination has actually been made (Commission Decision 86/344/EEC of 17 July 1986 terminating the anti-dumping proceeding concerning imports of Portland cement originating in the German Democratic Republic, Poland and Yugoslavia, *O.J.*, 25 July 1986, No L 202/43).

The other anti-dumping cases consider at least one of these aspects to be sufficient to determine the export capacity :

- existing or projected production capacity (Commission Regulation (EEC) No 2599/79 of 22 November 1979 imposing a provisional anti-dumping duty on certain sodium carbonate originating in the Soviet Union, *O.J.*, 24 November 1979, No L 297/12 ; Council Regulation (EEC) No 407/80 of 18 February 1980 imposing a definitive anti-dumping duty on certain sodium carbonate originating in the Soviet Union, *O.J.*, 22 February 1980, No L 48/1 ; Commission Regulation (EEC) No 2243/82 of 12 August 1982 imposing a provisional anti-dumping duty on imports of methylamine, dimethylamine and trimethylamine originating in the German Democratic Republic and accepting an undertaking and terminating the procedure in respect of imports of methylamine, dimethylamine and trimethylamine originating in Romania, *O.J.*, 13 August 1982, No L 238/35 ; Commission Regulation (EEC) No 512/84 of 27 February 1984 imposing a provisional anti-dumping duty on imports of vinyl acetate monomer originating in Canada, *O.J.*, 29 February 1984, No L 58/17 ; Commission Regulation (EEC) No 3643/84 of 20 December 1984 imposing a provisional anti-dumping duty on imports of electronic typewriters originating in Japan and terminating the anti-dumping proceeding with regard to Nakajima All Co. Ltd, *O.J.*, 22 December 1984, No L 335/43 ; Commission Decision 88/305/EEC of 27 May 1988 accepting undertakings given in connection with the anti-dumping investigation concerning imports of inner tubes and new tyre cases for bicycles originating in the Republic of Korea and Taiwan and terminating the investigation, *O.J.*, 31 May 1988, No L 134/61 ; Commission Regulation (EEC) No 1745/88 of 21 June 1988 imposing a provisional anti-dumping duty on imports of paracetamol originating in the People's Republic of China, *O.J.*, 22 June 1988, No L 155/29 ; Commission Decision 88/623/EEC of 12 December 1988 accepting undertakings given in connection with the anti-dumping review concerning imports of oxalic acid originating in China or Czechoslovakia and terminating the review, *O.J.*, 13 December 1988, No L 343/34 ; Council Regulation (EEC) No 1306/89 of 11 May 1989 imposing a definitive anti-dumping duty on imports of light sodium carbonate originating in Bulgaria, the German Democratic Republic, Poland and Romania, *O.J.*, 13 May 1989, No L 131/4 ; Commission Regulation (EEC) No 2402/89 of 31 July 1989 imposing a provisional anti-dumping duty on imports of barium chloride originating in the People's Republic of China or the German Democratic Republic, *O.J.*, 4 August 1989, No L 227/24 ; Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1 ; Council Regulation (EEC) No 341/90 of 5 February 1990 accepting undertakings and imposing a definitive anti-dumping duty on imports of ferro-silicon originating in Iceland, Norway, Sweden, Venezuela or Yugoslavia, except those sold for export to the Community by companies whose undertakings have been accepted, *O.J.*, 10 February 1990, No L 38/1 ; Council Regulation (EEC) No 1048/90 of 25 April 1990 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 27 April 1990, No L 107/56 (corrigendum, *O.J.*, 24 May 1990, No L 133/92) ; Commission Decision 90/240/EEC of 22 May 1990 terminating the proceeding in connection with a review of anti-dumping measures regarding imports of fibre building-board (hardboard) originating in Finland, Argentina, Switzerland and

Yugoslavia and repealing Decisions 86/35/EEC and 86/232/EEC accepting the undertakings given by the exporters concerned, *O.J.*, 31 May 1990, No L 138/44; Commission Decision 90/378/EEC of 13 July 1990 accepting an undertaking given in connection with the anti-dumping review concerning imports of oxalic acid originating in Brazil and terminating the investigation, *O.J.*, 17 July 1990, No L 184/16; Commission Decision 91/29/EEC of 11 January 1991 terminating the anti-dumping proceeding concerning imports of Portland cement originating in Yugoslavia, *O.J.*, 22 January 1991, No L 16/34; Council Regulation (EC) No 3359/93 of 2 December 1993 imposing amended anti-dumping measures on imports of ferro-silicon originating in Russia, Kazakhstan, Ukraine, Iceland, Norway, Sweden, Venezuela and Brazil, *O.J.*, 9 December 1993, No L 302/1;

- the fact that the dumping exporter has the capacity to meet the entire demand in the Community (Council Regulation (EC) No 2819/94 of 17 November 1994 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in the People's Republic of China, *O.J.*, 19 November 1994, No L 298/32);
- the recent expansion of the dumping exporters' production capacity (Council Regulation (EEC) No 2849/92 of 28 September 1992 modifying the definitive anti-dumping duty on imports of ball bearings with a greatest external diameter exceeding 30 mm originating in Japan imposed by Regulation (EEC) No 1739/85, *O.J.*, 1 October 1992, No L 286/2 (corrigendum, *O.J.*, 25 March 1993, No L 72/36); Council Regulation (EEC) No 993/93 of 26 April 1993 imposing a definitive anti-dumping duty on imports of certain electronic weighing scales originating in Japan, *O.J.*, 29 April 1993, No L 104/4);
- the anticipation, by the dumping exporter, of a rise in his production (Commission Decision 89/573/EEC of 30 October 1989 terminating the investigation concerning imports of dicumyl peroxide originating in Taiwan and accepting an undertaking offered in the context of the review concerning imports of dicumyl peroxide originating in Japan and terminating the proceeding, *O.J.*, 31 October 1989, No L 317/49);
- the absence of growth or the decline in production capacity (Commission Decision 85/501/ECSC of 11 November 1985 terminating the anti-dumping proceeding concerning imports of wire rod originating in Brazil, Portugal, Trinidad and Tobago and Venezuela, *O.J.*, 13 November 1985, No L 299/18; Commission Decision No 1056/89/ECSC of 19 April 1989 terminating the review of anti-dumping measures concerning imports of certain iron or steel coils, hot-rolled, originating in Argentina and Canada and confirming the expiry of those measures, *O.J.*, 25 April 1989, No L 112/5; Council Regulation (EEC) No 1786/89 of 19 June 1989 terminating the proceeding in connection with a review of anti-dumping measures concerning imports of fibre building board (hardboard) originating in Czechoslovakia, Poland and the USSR, confirming the expiry of the definitive anti-dumping duties imposed on imports from Czechoslovakia and Poland, and repealing the definitive anti-dumping duty imposed on imports from the USSR, *O.J.*, 23 June 1989, No L 176/1; Commission Decision 89/377/EEC of 19 June 1989 terminating the proceeding in connection with a review of anti-dumping measures concerning imports of fibre building board (hardboard) originating in Romania, Brazil and Sweden, confirming the expiry of the undertakings given by Romanian, Brazilian and certain Swedish exporters, and repealing the undertaking given by another Swedish exporter, *O.J.*, 23 June 1989, No L 176/51; Commission Decision No 3692/91/ECSC of 12 December 1991 repealing Decision No 2132/88/ECSC imposing definitive anti-dumping duties on imports of certain iron or steel coils, originating in Algeria, Mexico and Yugoslavia, *O.J.*, 19 December 1991, No L 350/11; Commission Decision No 322/92/ECSC of 7 February 1992 repealing Decision No 3499/87/ECSC imposing a definitive anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Mexico, *O.J.*, 12 February 1992, No L 35/9; Commission Decision 93/325/EEC of 18 May 1993 terminating the anti-dumping proceeding concerning imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China, *O.J.*, 25 May 1993, No L 127/15; Commission Decision 93/376/EEC of 16 June 1993 terminating the review of anti-dumping measures adopted under Council Regulation (EEC) 1698/85 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 29 June 1993, No L 157/76);
- the fact that the plant established in the exporter country has been seriously damaged and will be out of operation for a significant period of time (Council Regulation (EC) No 3359/93 of 2 December 1993 imposing amended anti-dumping measures on imports of ferro-silicon originating in Russia, Kazakhstan, Ukraine, Iceland, Norway, Sweden, Venezuela and Brazil, *O.J.*, 9 December 1993, No L 302/1);
- the fact that no additional capacities (*sic*) were to be expected in the near future (Commission Decision 90/85/EEC of 1 March 1990 terminating the review of anti-dumping measures applying to imports of certain glass textile fibres (rovings) originating in Czechoslovakia and the German Democratic Republic and confirming the expiry of the said measures, *O.J.*, 8 March 1990, No L 59/45);
- the availability of spare production capacity (Commission Decision 90/240/EEC of 22 May 1990 terminating the proceeding in connection with a review of anti-dumping measures regarding imports of fibre building-board (hardboard) originating in Finland, Argentina, Switzerland and Yugoslavia and repealing Decisions 86/35/EEC and 86/232/EEC accepting the undertakings given by the exporters concerned, *O.J.*, 31 May 1990, No L 138/44; Council Regulation (EEC) No 1115/91 of 29 April 1991 imposing definitive anti-dumping duties in connection with the review of anti-dumping measures concerning imports of ferro-silicon originating in Brazil, *O.J.*, 3 May 1991, No L 111/1; Commission Decision 91/240/EEC of 29 April 1991 accepting undertakings offered by certain exporters in connection with the review of anti-dumping measures concerning imports of ferro-silicon originating in Brazil and terminating the investigation as regards those exporters, *O.J.*, 3 May 1991, No L 111/47; Commission Decision 93/521/EEC of 3 September 1993 accepting undertakings given in connection with the anti-dumping review in respect of imports of binder and baler twine originating in Brazil, terminating the anti-subsidy review proceeding with regard to these imports and terminating the anti-dumping and anti-subsidy review in respect of imports of binder and baler twine originating in Mexico, *O.J.*, 8 October 1993, No L 251/28);
- the absence of spare production capacity (Council Regulation (EEC) No 2553/93 of 13 September 1993 amending Regulation (EEC) No 2089/84 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 18 September 1993, No L 235/3);
- underutilization of capacity (Commission Decision 88/47/EEC of 26 January 1988 accepting an undertaking given in connection with the anti-dumping review proceeding concerning imports of a herbicide originating in Romania, *O.J.*, 30 January 1988, No L 26/107);

likelihood of exports to the Community¹²⁴², but also on the possible recurrences to

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- the possibility of making greater use of the present facilities (Council Regulation (EEC) No 341/90 of 5 February 1990 accepting undertakings and imposing a definitive anti-dumping duty on imports of ferro-silicon originating in Iceland, Norway, Sweden, Venezuela or Yugoslavia, except those sold for export to the Community by companies whose undertakings have been accepted, *O.J.*, 10 February 1990, No L 38/1);
 - high rates of capacity utilization (Council Regulation (EEC) No 1786/89 of 19 June 1989 terminating the proceeding in connection with a review of anti-dumping measures concerning imports of fibre building board (hardboard) originating in Czechoslovakia, Poland and the USSR, confirming the expiry of the definitive anti-dumping duties imposed on imports from Czechoslovakia and Poland, and repealing the definitive anti-dumping duty imposed on imports from the USSR, *O.J.*, 23 June 1989, No L 176/1; Commission Decision 89/377/EEC of 19 June 1989 terminating the proceeding in connection with a review of anti-dumping measures concerning imports of fibre building board (hardboard) originating in Romania, Brazil and Sweden, confirming the expiry of the undertakings given by Romanian, Brazilian and certain Swedish exporters, and repealing the undertaking given by another Swedish exporter, *O.J.*, 23 June 1989, No L 176/51; Commission Decision 90/540/EEC of 29 October 1990 terminating the anti-dumping review proceeding concerning imports of propanolol originating in the United States of America, *O.J.*, 6 November 1990, No L 306/23);
 - the fact that output reaches capacity limits, together with the fact that output levels are limited by bottlenecks in the production of the raw material (Commission Decision No 1056/89/ECSC of 19 April 1989 terminating the review of anti-dumping measures concerning imports of certain iron or steel coils, hot-rolled, originating in Argentina and Canada and confirming the expiry of those measures, *O.J.*, 25 April 1989, No L 112/5);
 - the fact that the production of the like product is only taken up occasionally with a limited capacity attributed depending on the orders of non-like products (Commission Decision 89/56/EEC of 20 January 1989 terminating the anti-dumping proceeding concerning imports of certain seamless tubes of iron or non-alloy steel originating in Austria, *O.J.*, 28 January 1989, No L 25/87);
 - the absence of representative production (Commission Decision 90/196/EEC of 10 April 1990 terminating the anti-dumping proceeding concerning imports of methenamine (hexamethylenetetramine) originating in Hungary and Yugoslavia and accepting undertakings offered in connection with the proceeding concerning imports of methenamine (hexamethylenetetramine) originating in Bulgaria, Czechoslovakia, Poland and Romania, *O.J.*, 24 April 1990, No L 104/14);
 - the existence of newly built import facilities in the Community (Commission Regulation (EEC) No 3018/82 of 11 November 1982 imposing a provisional anti-dumping duty on imports of certain sodium carbonate originating in the United States of America and accepting certain undertakings concerning the imports of certain sodium carbonate originating in the United States of America, *O.J.*, 13 November 1982, No L 317/5).

None of these factors are conclusive. For example, recently built and planned production facilities for the product do not preclude a finding of no threat of injury (Commission Regulation (EEC) No 2599/79 of 22 November 1979 imposing a provisional anti-dumping duty on certain sodium carbonate originating in the Soviet Union, *O.J.*, 24 November 1979, No L 297/12; Council Regulation (EEC) No 407/80 of 18 February 1980 imposing a definitive anti-dumping duty on certain sodium carbonate originating in the Soviet Union, *O.J.*, 22 February 1980, No L 48/1).

Some anti-dumping cases mention only the export capacity of the dumping country as such without any further explanation (Council Regulation (EEC) No 2370/83 of 19 August 1983 imposing a definitive anti-dumping duty on imports of barium chloride originating in the People's Republic of China and in the German Democratic Republic, *O.J.*, 20 August 1983, No L 228/28; Council Regulation (EEC) No 2357/87 of 31 July 1987 amending Regulation (EEC) No 1282/81 imposing a definitive anti-dumping duty on imports of vinyl acetate monomer originating in the United States of America, *O.J.*, 4 August 1987, No L 213/32). Moreover, in other anti-dumping cases, reference is made to the capacity of the dumping country, without providing any specification whether it concerns export or production capacity (Council Decision 86/468/EEC of 22 September 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain acrylic fibres originating in Israel, Mexico, Romania and Turkey and terminating the investigation, *O.J.*, 24 September 1986, No L 272/29; Council Decision 87/66/EEC of 19 January 1987 accepting undertakings given in connection with imports of binder and baler twine originating in Brazil and Mexico, and terminating the investigations, *O.J.*, 5 February 1987, No L 34/55; Council Regulation (EEC) No 1786/89 of 19 June 1989 terminating the proceeding in connection with a review of anti-dumping measures concerning imports of fibre building board (hardboard) originating in Czechoslovakia, Poland and the USSR, confirming the expiry of the definitive anti-dumping duties imposed on imports from Czechoslovakia and Poland, and repealing the definitive anti-dumping duty imposed on imports from the USSR, *O.J.*, 23 June 1989, No L 176/1; Commission Decision 89/377/EEC of 19 June 1989 terminating the proceeding in connection with a review of anti-dumping measures concerning imports of fibre building board (hardboard) originating in Romania, Brazil and Sweden, confirming the expiry of the undertakings given by Romanian, Brazilian and certain Swedish exporters, and repealing the undertaking given by another Swedish exporter, *O.J.*, 23 June 1989, No L 176/51; Commission Decision 90/85/EEC of 1 March 1990 terminating the review of anti-dumping measures applying to imports of certain glass textile fibres (rovings) originating in Czechoslovakia and the German Democratic Republic and confirming the expiry of the said measures, *O.J.*, 8 March 1990, No L 59/45).

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It seems that in European anti-dumping case law the likelihood of exports to the Community is assumed to be zero, unless the contrary is proved (Commission Regulation (EEC) No 2599/79 of 22 November 1979 imposing a provisional anti-dumping duty on certain sodium carbonate originating in the Soviet Union, *O.J.*, 24 November 1979, No L 297/12; Council Regulation (EEC) No 407/80 of 18 February 1980 imposing a definitive anti-dumping duty on certain sodium carbonate originating in the Soviet Union, *O.J.*, 22 February 1980, No L 48/1; Commission Decision 86/344/EEC of 17 July 1986 terminating the anti-dumping proceeding concerning imports of Portland cement originating in the German Democratic Republic, Poland and Yugoslavia, *O.J.*, 25 July 1986, No L 202/43; Commission Decision 89/537/EEC of 27 September 1989 terminating the anti-dumping proceeding concerning imports of mica originating in Japan, *O.J.*, 3 October 1989, No L 284/45; Commission Decision 90/399/EEC of 26 July 1990 terminating an anti-dumping proceeding concerning imports of certain single phase, two-speed electric motors originating in Bulgaria, Romania and Czechoslovakia, *O.J.*, 31 July 1990, No L 202/47; Commission Decision 91/303/EEC of 12 June 1991 terminating the anti-dumping proceeding concerning imports of thin polyester film originating in the Republic of Korea, *O.J.*, 15 June 1991, No L 151/89; Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24; Council Regulation (EC) No 1318/94 of 6 June 1994 terminating the review of anti-dumping measures concerning imports of certain acrylic fibres originating in Mexico and repealing the measures applying to such imports, *O.J.*, 8 June 1994, No L 143/1; Commission Decision 94/389/EC of 6 June 1994 terminating the anti-dumping proceeding regarding imports of refined antimony trioxide originating in the People's Republic of China, *O.J.*, 9 July 1994, No L 176/41).

Thus, at first sight a restrictive interpretation is placed on the factor «likelihood of exports to the Community». However, in European anti-dumping case law, it is not so difficult to reverse the assumption of zero likelihood. For proof to the contrary may be based on a number of facts, such as :

- the fact that no special facilities are required for exporting larger quantities (Council Decision 87/66/EEC of 19 January 1987 accepting undertakings given in connection with imports of binder and baler twine originating in Brazil and Mexico, and terminating the investigations, *O.J.*, 5 February 1987, No L 34/55);
- the fact that the existing price level of Community producers in their market is attractive or considerably higher than the price level in the other possible export markets of the dumping country (Council Decision 86/468/EEC of 22 September 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain acrylic fibres originating in Israel, Mexico, Romania and Turkey and terminating the investigation, *O.J.*, 24 September 1986, No L 272/29; Council Regulation (EEC) No 1306/89 of 11 May 1989 imposing a definitive anti-dumping duty on imports of light sodium carbonate originating in Bulgaria, the German Democratic Republic, Poland and Romania, *O.J.*, 13 May 1989, No L 131/4; Council Regulation (EEC) No 341/90 of 5 February 1990 accepting undertakings and imposing a definitive anti-dumping duty on imports of ferro-silicon originating in Iceland, Norway, Sweden, Venezuela or Yugoslavia, except those sold for export to the Community by companies whose undertakings have been accepted, *O.J.*, 10 February 1990, No L 38/1; Commission Decision 90/507/EEC of 7 September 1990 terminating the review of the anti-dumping measures concerning dense sodium carbonate originating in the United States of America, *O.J.*, 16 October 1990, No L 283/38);
- the attractiveness of the Community market by virtue of its price levels, its terms of payment and the strength of its currencies (Council Regulation (EEC) No 1115/91 of 29 April 1991 imposing definitive anti-dumping duties in connection with the review of anti-dumping measures concerning imports of ferro-silicon originating in Brazil, *O.J.*, 3 May 1991, No L 111/1; Commission Decision 91/240/EEC of 29 April 1991 accepting undertakings offered by certain exporters in connection with the review of anti-dumping measures concerning imports of ferro-silicon originating in Brazil and terminating the investigation as regards those exporters, *O.J.*, 3 May 1991, No L 111/47);
- the substantial fall in the value of the currency of the dumping country (Council Regulation (EEC) No 2357/87 of 31 July 1987 amending Regulation (EEC) No 1282/81 imposing a definitive anti-dumping duty on imports of vinyl acetate monomer originating in the United States of America, *O.J.*, 4 August 1987, No L 213/32);
- the actual and prospective fall in the value of the currency of the country which is the main market for their sales to the rest of the world (Commission Decision 88/305/EEC of 27 May 1988 accepting undertakings given in connection with the anti-dumping investigation concerning imports of inner tubes and new tyre cases for bicycles originating in the Republic of Korea and Taiwan and terminating the investigation, *O.J.*, 31 May 1988, No L 134/61);
- the fact that contracts for the supply of large quantities at dumping prices have been concluded or renewed (Council Regulation (EEC) No 2370/83 of 19 August 1983 imposing a definitive anti-dumping duty on imports of barium chloride originating in the People's Republic of China and in the German Democratic Republic, *O.J.*, 20 August 1983, No L 228/28; Council Regulation (EEC) No 227/85 of 29 January 1985 repealing the definitive anti-dumping duty on imports of upright pianos originating in the Soviet Union, *O.J.*, 31 January 1985, No L 26/5; Commission Decision 88/47/EEC of 26 January 1988 accepting an undertaking given in connection with the anti-dumping review proceeding concerning imports of a herbicide originating in Romania, *O.J.*, 30 January 1988, No L 26/107), unless the Community producers are also party to these contracts on the basis of which they are able to control the imports of the dumped product, its distribution and marketing (Commission Decision 86/344/EEC of 17 July 1986 terminating the anti-dumping proceeding concerning imports of Portland cement originating in the German Democratic Republic, Poland and Yugoslavia, *O.J.*, 25 July 1986, No L 202/43);
- the aggressive marketing tactics applied by the dumping exporter in the Community over the last few years (Commission Regulation (EEC) No 1745/88 of 21 June 1988 imposing a provisional anti-dumping duty on imports of paracetamol originating in the People's Republic of China, *O.J.*, 22 June 1988, No L 155/29);
- the fact that the domestic market of the country of origin is limited and that the domestic markets of third countries are more developed than the Community market (Commission Regulation (EEC) No 3643/84 of 20 December 1984 imposing a provisional anti-dumping duty on imports of electronic typewriters originating in Japan and terminating the anti-dumping

- proceeding with regard to Nakajima All Co. Ltd, *O.J.*, 22 December 1984, No L 335/43 ;
- the fact that all the markets outside the Community are limited (Commission Decision 89/573/EEC of 30 October 1989 terminating the investigation concerning imports of dicumyl peroxide originating in Taiwan and accepting an undertaking offered in the context of the review concerning imports of dicumyl peroxide originating in Japan and terminating the proceeding, *O.J.*, 31 October 1989, No L 317/49) ;
 - the fact that exports to other traditional markets of the dumping exporter are expected to decline as a result of new capacity developed those markets (Council Regulation (EEC) No 2357/87 of 31 July 1987 amending Regulation (EEC) No 1282/81 imposing a definitive anti-dumping duty on imports of vinyl acetate monomer originating in the United States of America, *O.J.*, 4 August 1987, No L 213/32 ; Council Regulation (EEC) No 1306/89 of 11 May 1989 imposing a definitive anti-dumping duty on imports of light sodium carbonate originating in Bulgaria, the German Democratic Republic, Poland and Romania, *O.J.*, 13 May 1989, No L 131/4 ; Commission Decision 90/507/EEC of 7 September 1990 terminating the review of the anti-dumping measures concerning dense sodium carbonate originating in the United States of America, *O.J.*, 16 October 1990, No L 283/38) ;
 - the fact that the saturation point has been reached in the other traditional markets of the dumping exporter (Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1 ; Council Regulation (EEC) No 1048/90 of 25 April 1990 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 27 April 1990, No L 107/56 (corrigendum, *O.J.*, 24 May 1990, No L 133/92)) ;
 - the strengthening of the competition on the domestic market of the dumping country because of the entry of new competitors on that market (Commission Decision 90/378/EEC of 13 July 1990 accepting an undertaking given in connection with the anti-dumping review concerning imports of oxalic acid originating in Brazil and terminating the investigation, *O.J.*, 17 July 1990, No L 184/16) ;
 - the fact that domestic demand is showing a downward tendency (Council Regulation (EEC) No 1306/89 of 11 May 1989 imposing a definitive anti-dumping duty on imports of light sodium carbonate originating in Bulgaria, the German Democratic Republic, Poland and Romania, *O.J.*, 13 May 1989, No L 131/4) ;
 - the fact that there is excess capacity with regard to domestic demand (Commission Regulation (EEC) No 2402/89 of 31 July 1989 imposing a provisional anti-dumping duty on imports of barium chloride originating in the People's Republic of China or the German Democratic Republic, *O.J.*, 4 August 1989, No L 227/24 ; Commission Decision 90/507/EEC of 7 September 1990 terminating the review of the anti-dumping measures concerning dense sodium carbonate originating in the United States of America, *O.J.*, 16 October 1990, No L 283/38 ; Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1) ;
 - the fact that the technical problems which were the reason why in the past the exports to the Community had been stopped, are no longer there (Council Regulation (EEC) No 2370/83 of 19 August 1983 imposing a definitive anti-dumping duty on imports of barium chloride originating in the People's Republic of China and in the German Democratic Republic, *O.J.*, 20 August 1983, No L 228/28) ;
 - difficulties in transporting the product by sea which make it highly likely that the product will be exported to the Community where there is no such transport problem (Commission Regulation (EEC) No 2243/82 of 12 August 1982 imposing a provisional anti-dumping duty on imports of methylamine, dimethylamine and trimethylamine originating in the German Democratic Republic and accepting an undertaking and terminating the procedure in respect of imports of methylamine, dimethylamine and trimethylamine originating in Romania, *O.J.*, 13 August 1982, No L 238/35) ;
 - the geographical proximity of the dumping exporter (Commission Decision 88/623/EEC of 12 December 1988 accepting undertakings given in connection with the anti-dumping review concerning imports of oxalic acid originating in China or Czechoslovakia and terminating the review, *O.J.*, 13 December 1988, No L 343/34 ; Council Regulation (EEC) No 1306/89 of 11 May 1989 imposing a definitive anti-dumping duty on imports of light sodium carbonate originating in Bulgaria, the German Democratic Republic, Poland and Romania, *O.J.*, 13 May 1989, No L 131/4 ; Council Regulation (EEC) No 341/90 of 5 February 1990 accepting undertakings and imposing a definitive anti-dumping duty on imports of ferro-silicon originating in Iceland, Norway, Sweden, Venezuela or Yugoslavia, except those sold for export to the Community by companies whose undertakings have been accepted, *O.J.*, 10 February 1990, No L 38/1) ;
 - the fact that the dumping country's exports have always been oriented towards the Community (Council Regulation (EEC) No 3017/92 of 19 October 1992 modifying the anti-dumping duties following the review of the anti-dumping measures applicable to imports of synthetic polyester fibres originating in Romania, Taiwan, Turkey and the Republics of Serbia and of Montenegro and the former Yugoslav Republic of Macedonia and terminating the said review in respect of imports of synthetic polyester fibres originating in Mexico and the United States of America, *O.J.*, 22 October 1992, No L 306/1 (corrigendum, *O.J.*, 6 February 1993, No L 30/68)) ;
 - the fact that substantial quantities are held in the Community under the T1 regime (i.e., the inward processing regime) because imports under the T1 regime may be cleared at the customs and put into free circulation in the Community at very short notice (Council Regulation (EEC) No 2370/83 of 19 August 1983 imposing a definitive anti-dumping duty on imports of barium chloride originating in the People's Republic of China and in the German Democratic Republic, *O.J.*, 20 August 1983, No L 228/28) ;
 - the fact that dumped products imported for free circulation on the Community market have been replaced by imports under the inward processing regime (Commission Decision 88/623/EEC of 12 December 1988 accepting undertakings given in connection with the anti-dumping review concerning imports of oxalic acid originating in China or Czechoslovakia and terminating the review, *O.J.*, 13 December 1988, No L 343/34) ;
 - the evasion of the anti-dumping measures by substituting the dumped product by another product which is interchangeable with the dumped product, though it is not subject to anti-dumping relief. This was considered to be an indication of the

exporters' intention to maintain their position on the Community market for this category of products, especially because the other product was sold at the same price as the dumped product, though its production costs were higher (Council Regulation (EEC) No 1306/89 of 11 May 1989 imposing a definitive anti-dumping duty on imports of light sodium carbonate originating in Bulgaria, the German Democratic Republic, Poland and Romania, *O.J.*, 13 May 1989, No L 131/4);

- the fact that the dumped imports, subject to anti-dumping measures, had maintained an important market share; this enhanced the fear that, after the expiration of the anti-dumping measures, the dumped imports in question might increase again (Commission Recommendation No 267/79/ECSC of 9 February 1979 imposing a provisional anti-dumping duty on certain angles, shapes and U, I or H sections of iron or steel, not further worked than hot-rolled or extruded, originating in Spain, *O.J.*, 13 February 1979, No L 37/21; Commission Recommendation No 294/79/ECSC of 13 February 1979 imposing a provisional anti-dumping duty on certain hematite pig iron originating in Brazil, *O.J.*, 16 February 1979, No L 41/29; Commission Recommendation No 433/79/ECSC of 27 February 1979 imposing a provisional anti-dumping duty on certain sheets and plates of iron or steel originating in Spain and repealing certain suspended anti-dumping duties, *O.J.*, 3 March 1979, No L 53/21; Commission Recommendation No 496/79/ECSC of 13 March 1979 imposing a provisional anti-dumping duty on iron or steel coils for re-rolling originating in Greece, *O.J.*, 15 March 1979, No L 65/16; Council Decision 87/66/EEC of 19 January 1987 accepting undertakings given in connection with imports of binder and baler twine originating in Brazil and Mexico, and terminating the investigations, *O.J.*, 5 February 1987, No L 34/55; Council Regulation (EEC) No 3017/92 of 19 October 1992 modifying the anti-dumping duties following the review of the anti-dumping measures applicable to imports of synthetic polyester fibres originating in Romania, Taiwan, Turkey and the Republics of Serbia and of Montenegro and the former Yugoslav Republic of Macedonia and terminating the said review in respect of imports of synthetic polyester fibres originating in Mexico and the United States of America, *O.J.*, 22 October 1992, No L 306/1 (corrigendum, *O.J.*, 6 February 1993, No L 30/68));

- the fact that import and anti-dumping duties are or will be used by the Community against other exporting countries, which makes it very likely that the exports of the dumping country will be directed towards the Community (Council Regulation (EEC) No 2370/83 of 19 August 1983 imposing a definitive anti-dumping duty on imports of barium chloride originating in the People's Republic of China and in the German Democratic Republic, *O.J.*, 20 August 1983, No L 228/28; Commission Regulation (EEC) No 512/84 of 27 February 1984 imposing a provisional anti-dumping duty on imports of vinyl acetate monomer originating in Canada, *O.J.*, 29 February 1984, No L 58/17; Council Regulation (EEC) No 2685/90 of 17 September 1990 amending Regulation (EEC) No 2089/84 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 20 September 1990, No L 256/1 (corrigendum, *O.J.*, 10 January 1991, No L 7/38));

- export subsidies of the dumping country, such as a concessionary financing system or income tax relief for exports, making it very likely that the dumped products will be exported to the Community (Council Decision 87/66/EEC of 19 January 1987 accepting undertakings given in connection with imports of binder and baler twine originating in Brazil and Mexico, and terminating the investigations, *O.J.*, 5 February 1987, No L 34/55 (the consideration concerning export subsidies is lacking in the English version of the Decision, but can be found in the Dutch version)).

There are also many reasons explaining why the assumption of zero likelihood is not reversed :

- the fact that, on the basis of the traditional distribution of the exports of the dumping exporters between the Community and third markets, no increase in the volume of the dumped exports to the Community may be predicted (Council Regulation (EEC) No 1786/89 of 19 June 1989 terminating the proceeding in connection with a review of anti-dumping measures concerning imports of fibre building board (hardboard) originating in Czechoslovakia, Poland and the USSR, confirming the expiry of the definitive anti-dumping duties imposed on imports from Czechoslovakia and Poland, and repealing the definitive anti-dumping duty imposed on imports from the USSR, *O.J.*, 23 June 1989, No L 176/1; Commission Decision 89/377/EEC of 19 June 1989 terminating the proceeding in connection with a review of anti-dumping measures concerning imports of fibre building board (hardboard) originating in Romania, Brazil and Sweden, confirming the expiry of the undertakings given by Romanian, Brazilian and certain Swedish exporters, and repealing the undertaking given by another Swedish exporter, *O.J.*, 23 June 1989, No L 176/51; Commission Decision 90/240/EEC of 22 May 1990 terminating the proceeding in connection with a review of anti-dumping measures regarding imports of fibre building-board (hardboard) originating in Finland, Argentina, Switzerland and Yugoslavia and repealing Decisions 86/35/EEC and 86/232/EEC accepting the undertakings given by the exporters concerned, *O.J.*, 31 May 1990, No L 138/44);

- the fact that the domestic market of the dumping country absorbs an increasing amount of that country's production and that the rest of the output is sold to third countries (Council Regulation (EEC) No 2553/93 of 13 September 1993 amending Regulation (EEC) No 2089/84 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 18 September 1993, No L 235/3);

- the fact that the dumping exporters could not satisfy their growing domestic demand, in combination with the fact that, following the lifting of price controls by their Government, price increases on their domestic market were expected to bring production cost and return better in line, which probably will result in higher domestic sales and reduced export possibilities (Commission Decision No 3692/91/ECSC of 12 December 1991 repealing Decision No 2132/88/ECSC imposing definitive anti-dumping duties on imports of certain iron or steel coils, originating in Algeria, Mexico and Yugoslavia, *O.J.*, 19 December 1991, No L 350/11; Commission Decision No 322/92/ECSC of 7 February 1992 repealing Decision No 3499/87/ECSC imposing a definitive anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Mexico, *O.J.*, 12 February 1992, No L 35/9);

- the absence of recent exports to the Community (Commission Decision No 322/92/ECSC of 7 February 1992 repealing Decision No 3499/87/ECSC imposing a definitive anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Mexico, *O.J.*, 12 February 1992, No L 35/9);

- the fact that the current volume of exports of the dumping exporters is very low (Commission Decision 90/507/EEC of 7 September 1990 terminating the review of the anti-dumping measures concerning dense sodium carbonate originating in the United States of America, *O.J.*, 16 October 1990, No L 283/38; Council Regulation (EC) No 1318/94 of 6 June 1994

terminating the review of anti-dumping measures concerning imports of certain acrylic fibres originating in Mexico and repealing the measures applying to such imports, *O.J.*, 8 June 1994, No L 143/1);

- the fact that the exporter located in the dumping country had not been exporting to the Community, notwithstanding his threat to retaliate against the complainant Community producer by selling huge quantities at very low prices in the Community (Commission Decision 89/537/EEC of 27 September 1989 terminating the anti-dumping proceeding concerning imports of mica originating in Japan, *O.J.*, 3 October 1989, No L 284/45);
- the fact that the dumping exporters do not have the kind of sales structure needed to increase their sales significantly (Commission Decision 90/507/EEC of 7 September 1990 terminating the review of the anti-dumping measures concerning dense sodium carbonate originating in the United States of America, *O.J.*, 16 October 1990, No L 283/38);
- with regard to a multinational company having production plants in the dumping country, the Community and another third country, the fact that its plant in the other third country has a competitive advantage over its plant in the dumping country, along with the need to run the Community plant at full capacity to make it profitable (Council Regulation (EEC) No 2553/93 of 13 September 1993 amending Regulation (EEC) No 2089/84 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 18 September 1993, No L 235/3);
- the fact that the increase in demand on the dumping exporters' domestic market and the growth of the market in third countries, in combination with the fact that the prices are higher in third countries than in the Community, reduce the possibility of a sharp increase of exports to the Community (Commission Decision 90/540/EEC of 29 October 1990 terminating the anti-dumping review proceeding concerning imports of propanolol originating in the United States of America, *O.J.*, 6 November 1990, No L 306/23);
- the fact that the dumping exporters could not satisfy their domestic demand together with their export demand in non-EEC countries, in combination with the positive outlook for both markets and the fact that the prices on the domestic market of the exporter are likely to rise (Commission Decision No 1056/89/ECSC of 19 April 1989 terminating the review of anti-dumping measures concerning imports of certain iron or steel coils, hot-rolled, originating in Argentina and Canada and confirming the expiry of those measures, *O.J.*, 25 April 1989, No L 112/5);
- the fact that certain aspects of the products must be adapted in order to switch from one market to another (Council Regulation (EEC) No 1048/90 of 25 April 1990 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 27 April 1990, No L 107/56 (corrigendum, *O.J.*, 24 May 1990, No L 133/92));
- the fact that the dumping country's production is focused on high-cost products intended for the domestic market (Council Regulation (EEC) No 3017/92 of 19 October 1992 modifying the anti-dumping duties following the review of the anti-dumping measures applicable to imports of synthetic polyester fibres originating in Romania, Taiwan, Turkey and the Republics of Serbia and of Montenegro and the former Yugoslav Republic of Macedonia and terminating the said review in respect of imports of synthetic polyester fibres originating in Mexico and the United States of America, *O.J.*, 22 October 1992, No L 306/1 (corrigendum, *O.J.*, 6 February 1993, No L 30/68));
- the fact that the production capacity is mainly used for the production of a non-like product so that only the spare capacity is used for manufacturing the like product, together with the fact that there is a positive outlook for exports of the non-like product to non-EEC countries (Commission Decision 89/56/EEC of 20 January 1989 terminating the anti-dumping proceeding concerning imports of certain seamless tubes of iron or non-alloy steel originating in Austria, *O.J.*, 28 January 1989, No L 25/87);
- the importance attached by the customers of the like product to have their needs met in a constant and regular fashion by their traditional suppliers (Commission Decision 90/507/EEC of 7 September 1990 terminating the review of the anti-dumping measures concerning dense sodium carbonate originating in the United States of America, *O.J.*, 16 October 1990, No L 283/38);
- the depreciation of the dumping country's currency against the ECU, in conjunction with the Community producers' declining sales prices, leading to a situation where exports at the new exchange rate levels left the allegedly dumping producers with relatively uncompetitive import prices (Council Regulation (EC) No 1318/94 of 6 June 1994 terminating the review of anti-dumping measures concerning imports of certain acrylic fibres originating in Mexico and repealing the measures applying to such imports, *O.J.*, 8 June 1994, No L 143/1);
- the fact that the dumping country's production is mainly destined for a third country (Council Regulation (EEC) No 3017/92 of 19 October 1992 modifying the anti-dumping duties following the review of the anti-dumping measures applicable to imports of synthetic polyester fibres originating in Romania, Taiwan, Turkey and the Republics of Serbia and of Montenegro and the former Yugoslav Republic of Macedonia and terminating the said review in respect of imports of synthetic polyester fibres originating in Mexico and the United States of America, *O.J.*, 22 October 1992, No L 306/1 (corrigendum, *O.J.*, 6 February 1993, No L 30/68); Council Regulation (EC) No 1318/94 of 6 June 1994 terminating the review of anti-dumping measures concerning imports of certain acrylic fibres originating in Mexico and repealing the measures applying to such imports, *O.J.*, 8 June 1994, No L 143/1);
- the existence of a free trade agreement between the dumping country and a third country, making trade diversion of the dumped product towards the market of this third country to be expected (Commission Decision No 1056/89/ECSC of 19 April 1989 terminating the review of anti-dumping measures concerning imports of certain iron or steel coils, hot-rolled, originating in Argentina and Canada and confirming the expiry of those measures, *O.J.*, 25 April 1989, No L 112/5; Commission Decision No 3692/91/ECSC of 12 December 1991 repealing Decision No 2132/88/ECSC imposing definitive anti-dumping duties on imports of certain iron or steel coils, originating in Algeria, Mexico and Yugoslavia, *O.J.*, 19 December 1991, No L 350/11; Commission Decision No 322/92/ECSC of 7 February 1992 repealing Decision No 3499/87/ECSC imposing a definitive anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Mexico, *O.J.*, 12 February 1992, No L 35/9; Council Regulation (EC) No 1318/94 of 6 June 1994 terminating the review of anti-dumping measures concerning imports of certain acrylic fibres originating in Mexico and repealing the measures applying to such imports, *O.J.*, 8 June 1994, No L 143/1);

dumping¹²⁴³. Further, other aspects of the economic factors applied in examinations of actual

- the fact that in the near future the dumped imports originating in a prospective Member State of the Community will be subject to special rules agreed in the Act of Accession (Commission Decision 85/501/ECSC of 11 November 1985 terminating the anti-dumping proceeding concerning imports of wire rod originating in Brazil, Portugal, Trinidad and Tobago and Venezuela, *O.J.*, 13 November 1985, No L 299/18);
- in respect of dumping from NME countries, the fact that the export goals of the national plan were not obtained, explaining why the plan could not be invoked as proof of threat of injury (Commission Decision 86/344/EEC of 17 July 1986 terminating the anti-dumping proceeding concerning imports of Portland cement originating in the German Democratic Republic, Poland and Yugoslavia, *O.J.*, 25 July 1986, No L 202/43).

Sometimes, similar reasons entail opposite conclusions. For example :

- trade diversion towards the Community due to trade restrictive measures taken by third countries against the imports of the exporting country has been accepted in some cases as proof of threat of injury (Commission Decision 88/47/EEC of 26 January 1988 accepting an undertaking given in connection with the anti-dumping review proceeding concerning imports of a herbicide originating in Romania, *O.J.*, 30 January 1988, No L 26/107; Commission Regulation (EEC) No 2402/89 of 31 July 1989 imposing a provisional anti-dumping duty on imports of barium chloride originating in the People's Republic of China or the German Democratic Republic, *O.J.*, 4 August 1989, No L 227/24; Council Regulation (EEC) No 2685/90 of 17 September 1990 amending Regulation (EEC) No 2089/84 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 20 September 1990, No L 256/1 (corrigendum, *O.J.*, 10 January 1991, No L 7/38); Council Regulation (EC) No 2819/94 of 17 November 1994 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in the People's Republic of China, *O.J.*, 19 November 1994, No L 298/32), but has been refused in other cases (Commission Decision 85/501/ECSC of 11 November 1985 terminating the anti-dumping proceeding concerning imports of wire rod originating in Brazil, Portugal, Trinidad and Tobago and Venezuela, *O.J.*, 13 November 1985, No L 299/18; Commission Decision 86/344/EEC of 17 July 1986 terminating the anti-dumping proceeding concerning imports of Portland cement originating in the German Democratic Republic, Poland and Yugoslavia, *O.J.*, 25 July 1986, No L 202/43; Commission Decision 91/303/EEC of 12 June 1991 terminating the anti-dumping proceeding concerning imports of thin polyester film originating in the Republic of Korea, *O.J.*, 15 June 1991, No L 151/89);
- the granting of import licences by the Community to the dumping exporter for large quantities, representing a high market share on the Community market, was proof of threat of injury (Commission Recommendation No 1104/82/ECSC of 6 May 1982 imposing a provisional anti-dumping duty on certain sheets and plates, of iron or steel, originating in Brazil, *O.J.*, 11 May 1982, No L 128/9; Commission Recommendation No 2242/82/ECSC of 10 August 1982 imposing a provisional anti-dumping duty on broad-flanged beams originating in Spain, *O.J.*, 13 August 1982, No L 238/32), but the fact that the dumped imports are subject of quantitative restrictions or quotas is proof of the absence of threat of injury because it puts a ceiling on the potential rise of the dumped imports (Commission Regulation (EEC) No 84/82 of 14 January 1982 imposing a provisional anti-dumping duty on mechanical wrist-watches originating in the USSR, *O.J.*, 16 January 1982, No L 11/14; Commission Decision 86/344/EEC of 17 July 1986 terminating the anti-dumping proceeding concerning imports of Portland cement originating in the German Democratic Republic, Poland and Yugoslavia, *O.J.*, 25 July 1986, No L 202/43).

Therefore, European anti-dumping case law cannot be said to be free of arbitrariness.

¹²⁴³ Proof of recurrent dumping practices consists of :

- the fact that there is a history of dumping of the product by a country, which nourishes the fear that this country would dump again as soon as it starts to export again to the Community (Commission Decision 88/47/EEC of 26 January 1988 accepting an undertaking given in connection with the anti-dumping review proceeding concerning imports of a herbicide originating in Romania, *O.J.*, 30 January 1988, No L 26/107), especially if there is proof that the exporters concerned have continued dumping (Council Regulation (EEC) No 1306/89 of 11 May 1989 imposing a definitive anti-dumping duty on imports of light sodium carbonate originating in Bulgaria, the German Democratic Republic, Poland and Romania, *O.J.*, 13 May 1989, No L 131/4);
- the existence of substantial profits on the domestic market of the dumping exporter which permit him to undercut Community prices and to continue to dump exports without risking major losses (Commission Decision 90/378/EEC of 13 July 1990 accepting an undertaking given in connection with the anti-dumping review concerning imports of oxalic acid originating in Brazil and terminating the investigation, *O.J.*, 17 July 1990, No L 184/16);
- the existence of substantial profits of the dumping exporter, on which he can rely in order to align his prices to the prices of other producers or even to undercut them (Commission Decision 89/573/EEC of 30 October 1989 terminating the investigation concerning imports of dicumyl peroxide originating in Taiwan and accepting an undertaking offered in the context of the review concerning imports of dicumyl peroxide originating in Japan and terminating the proceeding, *O.J.*, 31 October 1989, No L 317/49).

Evidence to the contrary as to recurrent dumping practices consists of :

- the fact that the export prices of the allegedly dumping exporters exceeded the minimum price established within the framework of anti-dumping measures, together with the existence of overall shortages on the domestic market of the dumping exporter (Commission Decision 90/85/EEC of 1 March 1990 terminating the review of anti-dumping measures applying to imports of certain glass textile fibres (rovings) originating in Czechoslovakia and the German Democratic Republic and confirming the expiry of the said measures, *O.J.*, 8 March 1990, No L 59/45; Commission Decision 90/240/EEC of 22 May 1990 terminating the proceeding in connection with a review of anti-dumping measures regarding imports of fibre building-board (hardboard) originating in Finland, Argentina, Switzerland and Yugoslavia and repealing Decisions 86/35/EEC and 86/232/EEC accepting the undertakings given by the exporters concerned, *O.J.*, 31 May 1990, No L 138/44);

injury, to which no attention is paid in examinations of actual injury, are relevant for examinations of threat of injury¹²⁴⁴. The more (aspects of) factors are taken into account, the easier it will be to find sufficient indications of (no) threat of injury, because there will practically always be at least one factor showing (no) threat of injury. Thus, as is the case for examinations of actual injury, examinations of threat of injury also incorporate the danger of either arbitrariness or «one-way flexibility».

3.5. MATERIAL RETARDATION

GATT and European anti-dumping law do not require the Community industry to suffer actual injury or to be threatened with injury. The injury requirement is also fulfilled, when the establishment of a Community industry is being materially retarded (Article VI(1) and (6)(a) GATT ; Note 1 *ad* Article 3 GATT Anti-dumping Code ; Article 3(1) basic EC Regulation ; Article 4(1) basic ECSC Decision). GATT and European anti-dumping law hold no further provisions on the material retardation standard. European anti-dumping authorities, thus, have much room for discretion, but they have applied the material retardation standard on but rare occasions.

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- the fact that one exporter maintained a moderate price policy, supporting the presumption that all the exporters would base their export prices on their normal value in order to avoid anti-dumping proceedings (Commission Decision 90/507/EEC of 7 September 1990 terminating the review of the anti-dumping measures concerning dense sodium carbonate originating in the United States of America, *O.J.*, 16 October 1990, No L 283/38) ;
 - the past pricing behaviour of the producers which has led to prices being kept generally in line with those of Community producers, even at the expense of loss of market share (Council Regulation (EC) No 821/94 of 12 April 1994 imposing a definitive anti-dumping duty on imports of silicon carbide, originating in the People's Republic of China, Poland, the Russian Federation and Ukraine, *O.J.*, 13 April 1994, No L 94/21).

1244 Such other aspects are :

- with regard to the volume of dumped exports :
 - the fact that, despite the anti-dumping measures, the volume of the dumped imports has increased (Council Regulation (EEC) No 2357/87 of 31 July 1987 amending Regulation (EEC) No 1282/81 imposing a definitive anti-dumping duty on imports of vinyl acetate monomer originating in the United States of America, *O.J.*, 4 August 1987, No L 213/32) ;
 - the fact that, despite anti-dumping measures, the exports of the dumping country to the Community has shown a much greater volume increase than its exports to the United States of America (Commission Regulation (EEC) No 1745/88 of 21 June 1988 imposing a provisional anti-dumping duty on imports of paracetamol originating in the People's Republic of China, *O.J.*, 22 June 1988, No L 155/29) ;
 - the fact that, with the disappearance of anti-dumping relief, the volume of the dumped imports would rise again, since the dumped imports had decreased in volume due to anti-dumping measures (Commission Decision 88/623/EEC of 12 December 1988 accepting undertakings given in connection with the anti-dumping review concerning imports of oxalic acid originating in China or Czechoslovakia and terminating the review, *O.J.*, 13 December 1988, No L 343/34 ; see also : Council Regulation (EEC) No 541/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of barium chloride originating in the People's Republic of China, *O.J.*, 7 March 1991, No L 60/1) ;
- with regard to the market share of the dumped imports on the Community market : the fact that a stable market share is no proof of absence of threat of injury if the dumped imports are already subject of anti-dumping measures (Commission Decision 90/378/EEC of 13 July 1990 accepting an undertaking given in connection with the anti-dumping review concerning imports of oxalic acid originating in Brazil and terminating the investigation, *O.J.*, 17 July 1990, No L 184/16).

This might be explained by the fact that a Community industry which is not yet established, will only infrequently lodge complaints or that it does not yet have sufficient influence on the European anti-dumping authorities to obtain anti-dumping relief. However, the scarce European anti-dumping case law shows that both reasons do not provide a full explanation. It is wrong to presume that a Community industry the establishment of which is being materially retarded does not exist at all. A restrictive interpretation is indeed placed on the material retardation standard since there must be concrete plans or intentions as to the establishment of a Community industry. By analogy with the threat of injury standard, the material retardation standard must be determined on the basis of facts and not merely of allegation, conjecture or remote possibility¹²⁴⁵. Such facts, *inter alia*, may be the existence of detailed plans on investment, production, costs, marketing and strict time schedules with a view to the commercial production of the like product in the Community, the availability of funds for the implementation of those plans, the fact that the most advanced technological know-how for the production of the like product is acquired, that very costly new facilities are built and that the state-of-the-art machinery is acquired and installed. Also the delay incurred in starting of mass production - which implies that mass production is possible - is invoked as proof of material retardation¹²⁴⁶. Moreover,

¹²⁴⁵ See : *DRAMs from Japan*, where the establishment of a Community industry, consisting of companies revealing the serious commitment to DRAM production in the Community, was found to be materially retarded (Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79 ; corrigendum, *O.J.*, 10 February 1990, No L 38/44)).

See also : BESELER, J.F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 165 ; VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 645.

¹²⁴⁶ See : *DRAMs from Japan*, where material retardation was found because some of the companies had made detailed plans on investment, production, costs, marketing and strict timing schedules with a view to commercial DRAM production in the Community. In order to implement these plans huge amounts of funds were available, all these companies had acquired the most advanced technological know-how for DRAM production, very costly new facilities were built and state-of-the art machinery was acquired and installed. In respect of the other companies also material retardation was found because they had either delayed the start of mass production or temporarily abandoned their DRAM project. The fact that all those companies suffered heavy financial losses as a result of delay/temporary abandonment of their projects and had either no return on investment at all or a smaller return on investment at a later time, together with a negative impact on staff employment, has been invoked to find that a Community industry was being materially retarded (Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79 ; corrigendum, *O.J.*, 10 February 1990, No L 38/44)).

See also :

- *outboard motors from Japan*, where the complainants argued that the low prices of Japanese motors above 85 hp prevented any production. Their claim of material retardation was rejected because it was not proven that any Community production would start in the foreseeable future. Instead the types of motors above 85 hp were excluded from the scope of the investigation (Commission Regulation (EEC) No 1500/83 of 9 June 1983 imposing a provisional anti-dumping duty on imports of outboard motors originating in Japan, *O.J.*, 10 June 1983, No L 152/18) ;
- *saccharin and its salts from China, the Republic of Korea and the United States of America*, where the project of a Community producer to start up a new plant for the production of the like product was not considered to be a sufficient reason to justify anti-dumping relief. It was not made clear why that project did not qualify. The project may not have been concrete enough. The establishment of a new plant by one of the Community producers manufacturing already the like product in the Community may also not meet the definition of «establishment of a Community industry» (Commission Decision 83/626/EEC of 12 December 1983 terminating the anti-dumping proceeding concerning imports of saccharin and its salts originating in

the fact that the like product is already being manufactured in the Community may seemingly not prevent a finding of material retardation¹²⁴⁷.

The restrictive interpretation placed on the material retardation standard may be a two-edged sword. As actual production of the like product in the Community does not constitute an obstacle for finding material retardation, the material retardation standard may be used as a substitute for the standards of actual injury and threat of injury, if no actual injury nor threat of injury can be found. Indeed, the European anti-dumping authorities have already threatened to use the material retardation of a Community industry as injury standard if they had not found actual injury¹²⁴⁸. However, because of the broad interpretation placed on both injury standards, only exceptionally no actual injury or threat of injury will be found. As a consequence, there is little need to rely on the material retardation standard.

China, the Republic of Korea and the United States of America, *O.J.*, 15 December 1983, No L 352/49); *mechanical wrist-watches from the USSR*, where it was claimed that, in view of the revival of the demand for mechanical watches, the repeal of the existing anti-dumping measures would cause a major problem in the event of a Community company wanting to start mechanical watch production. The Council found that the revival in demand was limited to the medium and high-quality segment of the market. Given the virtual demise of the Community industry during the period when anti-dumping measures were effective, the Council found it unlikely that any new Community production would focus on the low-quality end of the market where the dumped product was positioned (Council Regulation (EEC) No 2686/90 of 17 September 1990 repealing Regulation (EEC) No 2347/87 imposing a definitive anti-dumping duty on mechanical wrist-watches originating in the USSR, *O.J.*, 20 September 1990, No L 256/10). In view of this anti-dumping case, it seems that a change in the market conditions is no sufficient evidence of the material retardation of a Community industry, especially not if its effects on the establishment of a Community industry are rather unlikely.

¹²⁴⁷ See: *plain paper photocopiers from Japan*, where the Council considered it possible to grant anti-dumping relief because of material retardation with regard to the process of building up a Community producer's production of low-volume copiers. However, a Community industry already existed and the like product category included all types of copiers, with the exception of the highest segment of the market, being high-volume copiers. It, thus, comprised low-volume copiers, which were already - though not generally - manufactured within the Community (Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12).

See, however: *saccharin and its salts from China, the Republic of Korea and the United States of America*, where no explanation was offered for the project of a Community producer of starting up a new plant for the production of the like product not being considered to be a sufficient reason to justify anti-dumping relief (Commission Decision 83/626/EEC of 12 December 1983 terminating the anti-dumping proceeding concerning imports of saccharin and its salts originating in China, the Republic of Korea and the United States of America, *O.J.*, 15 December 1983, No L 352/49). Perhaps the establishment of a new plant by one of the Community producers manufacturing already the like product in the Community does not meet the definition of «establishment of a Community industry».

¹²⁴⁸ In *plain paper photocopiers from Japan* the Council underscored that if the anti-dumping relief could not have been granted for actual injury, it would have been granted for material retardation with regard to the process of building up a Community producer's production of low-volume copiers (Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12).

4. CAUSALITY

4.1. INTRODUCTION

The injury suffered by the Community industry will only trigger anti-dumping relief if it is caused by the dumping (Article 3.5. GATT Anti-dumping Code ; Article 3(6) basic EC Regulation ; Article 4(1) basic ECSC Decision). Injury caused by other factors must not be attributed to the dumped imports (Article 3.5. GATT Anti-dumping Code ; Article 3(7) basic EC Regulation ; Article 4(1) basic ECSC Decision). The causality test under GATT and European anti-dumping law, thus, comprises two elements : first, dumping must be distinguished from other possible injurious factors (section 4.2.) and, second, injury must be attributed to either the dumping or the other injurious factors (section 4.3.).

This section will show that it is easy to find a causal relationship between dumping and injury. First, the dumped imports coming from different sources are cumulated, *i.e.*, they are considered as a whole as one potential cause of injury, even if the dumped imports, when considered separately, do not inflict any (material) injury. Cumulation enhances the probability of finding injurious dumping since it boils down to the adding up of separate instances of immaterial injury which may eventually result in material injury. Second, a coincidence in time of the dumping and the deterioration in the situation of the Community industry is sufficient proof of there being a causal relationship, even if the deterioration in the situation of the Community industry coincides also with other factors which may also have a negative bearing on the performance of the Community industry.

4.2. DISTINCTION BETWEEN DUMPING AND OTHER CAUSES OF INJURY

4.2.1. Cumulation

Cumulation pertains to the question whether the dumped imports of another exporter located in the same country, as well as those from another country must be regarded as «other factors» in the sense of Article 3.5. GATT Anti-dumping Code, Article 3(7) basic EC Regulation and Article 4(1) basic ECSC Decision. If dumped imports of different exporters or from different countries are no «other factors», they will constitute one and the same potential cause of injury and should be cumulated. There are two types of cumulation : exporter cumulation, *i.e.*, the cumulation of dumped imports of different exporters established in the same country, and country cumulation, *i.e.*, the cumulation of dumped imports from different countries.

The following sections examine whether cumulation is mandatory (section 4.2.1.1.) and whether it is not applied in an arbitrary way (section 4.2.1.2.).

4.2.1.1. Cumulation : mandatory or possible ?

With regard to country cumulation, GATT anti-dumping law stipulates that the anti-dumping authorities may cumulatively assess the effects of imports of a product from more than one country and simultaneously subject to anti-dumping investigations, only if they determine that (a) the margin of dumping established in relation to the imports from each country is more than *de minimis* and the volume of imports from each country is negligible and (b) a cumulative assessment of the effects of the imports is appropriate in the light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like Community product (Article 3.3. GATT Anti-dumping Code).

EC anti-dumping law has transformed this possibility of country cumulation into a legal obligation (Article 3(4) basic EC Regulation : «the effects of such imports *shall* be cumulatively assessed»).

ECSC anti-dumping legislation, however, does not (explicitly) regulate country cumulation. According to the Court of Justice, country cumulation is «in principle necessary» under ECSC anti-dumping¹²⁴⁹. Hence, country cumulation will not be always necessary. The Court justified country cumulation by referring to the objectives of European anti-dumping law¹²⁵⁰.

In European anti-dumping law, no objective can be found that is connected with cumulation, unless the finding of as much as possible injurious dumping is an objective of ECSC anti-dumping law. Indeed, when dumped imports are cumulated, the probability of finding material injury caused by the dumping increases, since the cumulation of many instances of immaterial injury eventually constitutes material injury. This objective may very well have been envisaged by the Court since Advocate-General Sir Gordon SLYNN has held that the object of European anti-dumping law, *i.e.*, the protection against dumping, can only be reached by the cumulation of

1249 C.J.E.C., joined cases 294/86 and 77/87, 5 October 1988, *Technintorg v Commission and Council*, E.C.R., 1988, (6077), 6116 ; C.J.E.C., joined cases C-320/86 and C-188/87, 11 July 1990, *Stanko France v Commission and Council*, E.C.R., 1990, I, (3019), 3015 ; C.J.E.C., case C-157/87, 11 July 1990, *Electroimpex a.o. v Council*, E.C.R., 1990, I, (3021), 3023. See also : Commission Regulation (EEC) No 550/93 of 5 March 1993 imposing a provisional anti-dumping duty on imports of bicycles originating in the People's Republic of China, O.J., 11 March 1993, No L 58/12 ; Council Regulation (EEC) No 2861/93 of 18 October 1993 imposing a definitive anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, and collecting definitively the provisional duty imposed, O.J., 21 October 1993, No L 262/4.

1250 In respect of country cumulation the Court stated that :

«It should also be borne in mind that where (...) the dumped imports come from different countries, it is in principle necessary to assess the combined effects of such imports. It is consistent with the objectives of (basic EC legislation) that Community authorities should be able to examine the effect on Community industry of all such imports and consequently take appropriate action against all exporters, even if the volume of each individual exporter's exports is relatively small»

(C.J.E.C., joined cases 294/86 and 77/87, 5 October 1988, *Technintorg v Commission and Council*, E.C.R., 1988, (6077), 6116).

exports coming from different countries¹²⁵¹. Also, the European anti-dumping authorities characterize individual injury determination as rendering European anti-dumping law unworkable¹²⁵². However, in view of it being rooted in GATT, the finding of as much as possible injurious dumping should not be an objective of European anti-dumping law. Indeed, the more injurious dumping is found, the more anti-dumping relief will be granted and, consequently, the more restricted free trade will be, which is exactly the opposite of the objectives of GATT¹²⁵³.

If the finding of a maximum of injurious dumping would be an objective of European anti-dumping law, the question would crop up why European anti-dumping law requires the injury caused by the dumping to be material. Without that requirement, the objective of finding a maximum of injurious dumping would be met more readily, since small volumes of dumped exports will practically always cause some injury. Moreover, unlike cumulation (*i.e.*, exporter cumulation¹²⁵⁴ as well as country cumulation), it would not have a discriminatory effect, since the result of the injury examination would not depend on there being dumped imports of other exporters or from other countries. Under the prevailing legal provisions, however, dumping exporters who do not cause material injury by themselves because of their small volume of exports to the Community, will suffer disfortune, when dumping from other sources is found and when all dumped imports are cumulated. Then, indeed, the probability that their imports will be held liable for causing or, at least, contributing to the material injury increases. If, however, there is no dumping from other sources and cumulation, therefore, is impossible, the dumping exporters exporting a small volume to the Community will not be found to cause material injury.

¹²⁵¹ C.J.E.C., joined cases 294/86 and 77/87, 5 October 1988, *Technintorg v Commission and Council*, E.C.R., 1988, (6077), 6104.

¹²⁵² Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 24 November 1988, No L 317/33; Council Regulation (EEC) No 1768/89 of 19 June 1989 imposing a definitive anti-dumping duty on imports of video cassettes originating in the Republic of Korea and Hong Kong, collecting definitively the provisional duty and terminating the anti-dumping proceeding with regard to the imports of video tape reels originating in the Republic of Korea, *O.J.*, 22 June 1989, No L 174/1; Commission Regulation (EEC) No 313/92 of 4 February 1992 imposing a provisional anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in South Korea, *O.J.*, 11 February 1992, No L 34/8.

¹²⁵³ *Supra*, 68-75.

¹²⁵⁴ European anti-dumping case law admits, that merely through exporter cumulation, dumped imports may be found to cause material injury. See : *propan-1-ol from the United States of America*, where it was argued that it is appropriate to cumulate the factors of injury caused by several exporters from one particular exporting country, since the possible non-application of an anti-dumping measure to one exporter would grant the other exporters of the same country a competitive disadvantage for the future, which is not the object of an anti-dumping proceeding (Commission Decision 84/229/EEC of 13 April 1984 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of propan-1-ol (propyl alcohol) originating in the United States of America, and terminating that proceeding, *O.J.*, 19 April 1984, No L 106/55).

See also : *ferrochromium from Sweden*, where it was noted that «the exports of the (Swedish) producer in question, even if they had no major impact by themselves, when taken into conjunction with other exports by South African and Swedish exporters have contributed to material injury» (Commission Regulation (EEC) No 1682/78 of 17 July 1978 extending the provisional anti-dumping duty on ferrochromium originating in Sweden, *O.J.*, 18 July 1978, No L 193/14. See also : Council Regulation (EEC) No 2357/87 of 31 July 1987 amending Regulation (EEC) No 1282/81 imposing a definitive anti-dumping duty on imports of vinyl acetate monomer originating in the United States of America, *O.J.*, 4 August 1987, No L 213/32).

The discrimination between dumping exporters is all the worse, because, in some exceptional cases¹²⁵⁵, dumped imports have been excluded from the cumulation in particular and the injury finding in general, as by themselves they did not cause injury to the Community industry¹²⁵⁶. In most cases, however, the fact that dumped imports themselves did not cause material injury was no reason for not cumulating them with other dumped imports¹²⁵⁷. The

¹²⁵⁵ *Contra* : magnetic disks (3,5" microdisks) from Japan, Taiwan and the People's Republic of China, where the European anti-dumping authorities recalled that «it has been the consistent practice of the Community institutions, upheld by the European Court of Justice, to examine the effect of the dumped imports as a whole, except where the level of dumped imports from a given country is negligible or otherwise does not contribute to the injury (Council Regulation (EEC) No 2861/93 of 18 October 1993 imposing a definitive anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, and collecting definitively the provisional duty imposed, O.J., 21 October 1993, No L 262/4).

¹²⁵⁶ Commission Regulation (EEC) No 171/82 of 25 January 1982 imposing a provisional anti-dumping duty on imports of oxalic acid originating in China and Czechoslovakia, O.J., 27 January 1982, No L 19/26 (corrigendum, O.J., 9 February 1982, No L 34/11); Commission Decision 82/335/EEC of 18 May 1982 accepting an undertaking offered by the Czechoslovakian producer and terminating the anti-dumping procedure concerning oxalic acid originating in Czechoslovakia, Hungary and the German Democratic Republic, O.J., 27 May 1982, No L 148/51; Commission Regulation (EEC) No 1633/82 of 23 June 1982 imposing a provisional anti-dumping duty on imports of fibre building board (hardboard) originating in Romania, repealing Commission Decision No 80/564/EEC of 4 June 1980 and accepting undertakings in connection with the proceeding in respect of imports of fibre building board from Czechoslovakia, Finland, Hungary, Norway, Poland, Spain, Sweden and the Soviet Union and terminating the proceeding with regard to those countries and Bulgaria, O.J., 25 June 1982, No L 181/19; Council Regulation (EC) No 3359/93 of 2 December 1993 imposing amended anti-dumping measures on imports of ferro-silicon originating in Russia, Kazakhstan, Ukraine, Iceland, Norway, Sweden, Venezuela and Brazil, O.J., 9 December 1993, No L 302/1; Commission Regulation (EC) No 3119/94 of 19 December 1994 imposing a provisional anti-dumping duty on imports of ferro-silico-manganese originating in Russia, Ukraine, Brazil and South Africa, O.J., 21 December 1994, No L 330/15.

See also : synthetic polyester fibres from Romania, Taiwan, Turkey, the Republics of Serbia and of Montenegro, the former Yugoslav Republic of Macedonia, Mexico and the United States of America, where it was investigated whether each dumping country's exports were causing or threatening to cause injury. If they did not, they were not cumulated with the other dumped exports and the anti-dumping proceeding was terminated in their respect (Council Regulation (EEC) No 3017/92 of 19 October 1992 modifying the anti-dumping duties following the review of the anti-dumping measures applicable to imports of synthetic polyester fibres originating in Romania, Taiwan, Turkey and the Republics of Serbia and of Montenegro and the former Yugoslav Republic of Macedonia and terminating the said review in respect of imports of synthetic polyester fibres originating in Mexico and the United States of America, O.J., 22 October 1992, No L 306/1 (corrigendum, O.J., 6 February 1993, No L 30/68)).

¹²⁵⁷ Several anti-dumping cases recognize that a contribution to the material injury caused by other dumped imports is sufficient to find dumping exporters causing injury, even if their mere imports do not cause material injury :

- in *ferrochromium from Sweden* it was noted that «the exports of the (Swedish) producer in question, even if they had no major impact by themselves, when taken into conjunction with other exports by South African and Swedish exporters have contributed to material injury» (Commission Regulation (EEC) No 1682/78 of 17 July 1978 extending the provisional anti-dumping duty on ferrochromium originating in Sweden, O.J., 18 July 1978, No L 193/14);
- in *ball bearings and tapered roller bearings from Poland, Romania and the Soviet Union* it was stated that «(a)s a rule, significant injury which has already been established would be aggravated if compounded by additional specific, even if less significant, injury from dumped goods from another exporting country» (Commission Decision 86/100/EEC of 15 April 1986 terminating the anti-dumping proceeding concerning imports of ball bearings and tapered roller bearings originating in Poland, Romania and the Soviet Union, O.J., 18 April 1986, No L 102/31);
- in *serial-impact dot-matrix printers from Japan* it was accepted that «dumped exports, which, looked at in isolation, did not cause material injury, would fall outside any anti-dumping proceeding, while their cumulative effect might well have considerable injurious effects» (Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, O.J., 24 November 1988, No L 317/33);
- in *standardized multi-phase electric motors from Romania* it was even sufficient that the Romanian imports threatened to increase the existing material injury caused by dumped imports originating in other third countries (Commission Decision 87/215/EEC of 23 March 1987 accepting a price undertaking in connection with the anti-dumping proceeding concerning imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Romania, O.J., 27 March 1987, No L 83/53).

See also : Commission Regulation (EEC) No 2800/86 of 9 September 1986 imposing a provisional anti-dumping duty on imports of certain deep freezers originating in the USSR, accepting the undertakings in connection with the investigation of imports of certain deep freezers originating in Yugoslavia or in the German Democratic Republic and terminating the investigation, and terminating the proceeding concerning imports of certain deep freezers, O.J., 11 September 1986, No L 259/14; Commission Decision 86/497/EEC of 7 October 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of silicon carbide originating in the People's Republic of China, Norway, Poland and the USSR, and terminating the investigation

latter is all the more striking because sometimes the cumulation of dumped imports has been

regarding imports of that product originating in the People's Republic of China, Norway, Poland, Czechoslovakia, the USSR and Yugoslavia, *O.J.*, 10 October 1986, No L 287/25 ; Council Regulation (EEC) No 864/87 of 23 March 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union, and definitively collecting the amounts secured as provisional duties, *O.J.*, 27 March 1987, No L 83/1 ; Commission Regulation (EEC) No 1043/87 of 10 April 1987 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Yugoslavia, *O.J.*, 14 April 1987, No L 102/5 ; Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1 ; Commission Regulation (EEC) No 1695/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of polyester yarn originating in Mexico, South Korea, Taiwan and Turkey, *O.J.*, 17 June 1988, No L 151/39 (corrigendum, *O.J.*, 18 June 1988, No L 152/58) ; Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27 ; Council Regulation (EEC) No 1115/91 of 29 April 1991 imposing definitive anti-dumping duties in connection with the review of anti-dumping measures concerning imports of ferro-silicon originating in Brazil, *O.J.*, 3 May 1991, No L 111/1 ; Commission Decision 91/240/EEC of 29 April 1991 accepting undertakings offered by certain exporters in connection with the review of anti-dumping measures concerning imports of ferro-silicon originating in Brazil and terminating the investigation as regards those exporters, *O.J.*, 3 May 1991, No L 111/47 ; Council Regulation (EEC) No 729/92 of 16 March 1992 imposing a definitive anti-dumping duty on imports of certain thermal paper originating in Japan and definitively collecting the provisional anti-dumping duty, *O.J.*, 26 March 1992, No L 81/1 (corrigendum, *O.J.*, 21 May 1992, No L 138/40)).

The following anti-dumping cases are even worse :

- *aluminium foil from Austria, the German Democratic Republic, Hungary and Israel*, where, after that it had been established that the imports from each country taken in isolation did not cause material injury, it was added that even if cumulated they did not cause material injury ; thus, cumulation was taken into consideration though the imports taken in isolation did not cause, much less contribute to the injury suffered by the Community industry (Commission Decision 82/808/EEC of 25 November 1982 terminating the anti-dumping procedure concerning imports of aluminium foil for household and catering use originating in Austria, the German Democratic Republic, Hungary and Israel, *O.J.*, 1 December 1982, No L 339/58) ;
- *binder and baler twine from Brazil and Mexico*, where the Brazilian and Mexican exports were cumulated, though afterwards the Mexican exports were not held to cause material injury in view of their decreased market share ; thus, the injury attributed to the Brazilian exports was determined on the basis of a cumulation with exports which did not cause injury (Council Decision 87/66/EEC of 19 January 1987 accepting undertakings given in connection with imports of binder and baler twine originating in Brazil and Mexico, and terminating the investigations, *O.J.*, 5 February 1987, No L 34/55).

Moreover, one may gain the impression that cumulation is precisely used in order to be able to attribute injury to dumped imports which do not cause injury by themselves :

- in the decision concerning *saccharin and its salts from China and the United States of America*, the dumped imports from China and the United States of America were not cumulated with the dumped imports from the Republic of Korea, though in a decision taken the same day concerning *saccharin and its salts from the Republic of Korea*, all these imports were cumulated. The dichotomy in the saccharin-case is undoubtedly due to the fact that the Korean imports represented only 1.1 % of the British market, whereas the Chinese and American imports had respectively a market share of 22.1 and 5.2 % on the British market (Commission Regulation (EEC) No 3171/80 of 4 December 1980 repealing a national anti-dumping duty on saccharin and its salts originating in the Republic of Korea imposed under the transitional provisions of the Act of Accession, *O.J.*, 9 December 1980, No L 331/25 ; Commission Decision 80/1116/EEC of 4 December 1980 accepting undertakings offered by the exporters of saccharin and its salts originating in China and the United States of America and terminating the proceedings concerning imports of saccharin and its salts from China, Japan and the United States of America, *O.J.*, 9 December 1980, No L 331/41) ;
- in the decision concerning *standardized multi-phase electric motors from Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union*, the dumped imports from Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union were not cumulated with the dumped imports from Romania, though in a decision taken the same day concerning *standardized multi-phase electric motors from Romania*, all these imports were cumulated (Council Regulation (EEC) No 864/87 of 23 March 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union, and definitively collecting the amounts secured as provisional duties, *O.J.*, 27 March 1987, No L 83/1 ; Commission Decision 87/215/EEC of 23 March 1987 accepting a price undertaking in connection with the anti-dumping proceeding concerning imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Romania, *O.J.*, 27 March 1987, No L 83/53).

motivated by the fact that they all caused by themselves material injury¹²⁵⁸.

Notwithstanding the discriminatory effects of cumulation in European anti-dumping case law, it has been argued that the principle of non-discrimination contained in Article 9.2. GATT Anti-dumping Code, Article 9(5) basic EC Regulation and in Article 13(5) basic ECSC Decision makes cumulation (*i.e.*, country cumulation as well as exporter cumulation) mandatory¹²⁵⁹. According to those Articles, anti-dumping duties must be imposed on all dumped imports on a non-discriminatory basis, even if they originate in more than one country. Those articles, however, relate only to the imposition of anti-dumping duties. They have no impact on the injury examination in general and on the question of cumulation in particular. They only confine the non-discriminatory imposition of anti-dumping duties to dumped imports insofar as they are found to cause injury. Moreover, both articles only pertain to imports from different countries and, therefore, do not provide a basis for exporter cumulation.

Even the general principle of non-discrimination is no ground for cumulation. Indeed, cumulation implies that all dumped imports, even if they are not identical (*e.g.*, by volume), are treated equally, whereas the principle of non-discrimination implies that equals are treated equally and

1258 Council Regulation (EEC) No 96/85 of 14 January 1985 imposing a definitive anti-dumping duty on imports of pentaerythritol originating in Canada, *O.J.*, 16 January 1985, No L 13/1 (corrigendum, *O.J.*, 24 January 1985, No L 20/46); Commission Regulation (EEC) No 2317/85 of 12 August 1985 imposing a provisional anti-dumping duty on imports of roller chains for cycles originating in the USSR and the People's Republic of China, *O.J.*, 14 August 1985, No L 217/7.

1259 BESELER, J.-F., *Die Abwehr von Dumping und Subventionen durch die Europäische Gemeinschaften*, Baden-Baden, Nomos, 1980, 95. See however: BESELER, J.-F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 162-163. See also: Commission Regulation (EEC) No 595/85 of 7 March 1985 imposing a provisional anti-dumping duty on imports of certain hydraulic excavators originating in Japan, *O.J.*, 8 March 1985, No L 68/13; Commission Regulation (EEC) No 2800/86 of 9 September 1986 imposing a provisional anti-dumping duty on imports of certain deep freezers originating in the USSR, accepting the undertakings in connection with the investigation of imports of certain deep freezers originating in Yugoslavia or in the German Democratic Republic and terminating the investigation, and terminating the proceeding concerning imports of certain deep freezers, *O.J.*, 11 September 1986, No L 259/14; Commission Decision 86/464/EEC of 17 September 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of artificial corundum originating in Hungary, Poland and the USSR, and terminating the investigation, *O.J.*, 23 September 1986, No L 271/26; Council Decision 86/468/EEC of 22 September 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain acrylic fibres originating in Israel, Mexico, Romania and Turkey and terminating the investigation, *O.J.*, 24 September 1986, No L 272/29; Commission Regulation (EEC) No 3019/86 of 30 September 1986 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania and the USSR, *O.J.*, 1 October 1986, No L 280/68; Commission Decision 86/497/EEC of 7 October 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of silicon carbide originating in the People's Republic of China, Norway, Poland and the USSR, and terminating the investigation regarding imports of that product originating in the People's Republic of China, Norway, Poland, Czechoslovakia, the USSR and Yugoslavia, *O.J.*, 10 October 1986, No L 287/25; Council Regulation (EEC) No 864/87 of 23 March 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union, and definitively collecting the amounts secured as provisional duties, *O.J.*, 27 March 1987, No L 83/1; Council Regulation (EEC) No 2357/87 of 31 July 1987 amending Regulation (EEC) No 1282/81 imposing a definitive anti-dumping duty on imports of vinyl acetate monomer originating in the United States of America, *O.J.*, 4 August 1987, No L 213/32; Commission Decision 90/241/EEC of 22 May 1990 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of photo albums originating in South Korea and Hong Kong, and terminating the investigation, *O.J.*, 31 May 1990, No L 138/48; Commission Decision 91/512/EEC of 25 July 1991 accepting undertakings given in connection with the review of anti-dumping measures concerning imports of artificial corundum originating in the Soviet Union, Hungary, Poland, Czechoslovakia and the People's Republic of China and in connection with the anti-dumping proceeding concerning imports of artificial corundum originating in Brazil and Yugoslavia, and terminating the investigation, *O.J.*, 2 October 1991, No L 275/27.

unequals unequally¹²⁶⁰. Nevertheless, the general principle of non-discrimination does not exclude cumulation.

GATT and EC anti-dumping law, at first sight, seem to preclude those discriminatory effects. They allow, respectively impose country cumulation if the dumping margin is more than *de minimis* and if the volume of imports is not negligible (Article 3.3. GATT Anti-dumping Code ; Article 3(4) basic EC Regulation). As *de minimis* dumping margins and negligible volume of imports are assumed not to cause injury, GATT and EC anti-dumping law aim at preventing imports which are assumed not to cause injury, from being cumulated with other imports and, thus, from being held to cause injury. This is a step into the right direction, but it does not preclude that imports made in not negligible quantities or with a more than *de minimis* dumping margin, are found to cause injury when cumulated with other imports, though individually they do no cause any (material) injury. Moreover, whereas *de minimis* dumping margins are defined for each country separately (*i.e.*, less than 2 % (Article 5.8. 1994 GATT Anti-dumping Code ; Article 9(3) basic EC Regulation)), negligible imports are not. Under GATT anti-dumping law, negligible imports are defined as imports accounting for less than 3 % of imports of the like product in the Community, unless countries which individually account for less than 3 % of the imports of the like product in the Community collectively account for more than 7 % of imports of the like product in the Community (Article 5.8. GATT Anti-dumping Code). Similarly, under EC anti-dumping law, imports of a particular country are considered to be negligible if they represent a market share of below 1 %, unless such countries collectively account for 3 %, or more, of Community consumption (Article 5(7) basic EC Regulation). Both GATT and EC anti-dumping law are trapped in a *petitio principii* : negligible imports are not cumulated, but, through cumulation, they may become not negligible. Thus, they allow cumulation of negligible import volumes if their cumulation results in an import volume which is considered not to be negligible. It is, however, difficult to grasp why negligible import volumes are not assumed to cause injury if there are no other imports or if the other imports represent a more than negligible volume, whereas the same import volumes are assumed to cause injury if there is a sufficient number of negligible imports coming from other countries and resulting in a non-negligible cumulated import volume.

With regard to exporter cumulation, GATT and EC anti-dumping law may give rise to divergent interpretations. As they regulate country cumulation, but do not deal with exporter cumulation, it may be argued that they do not allow exporter cumulation. However, it may also be argued that, if, as under GATT anti-dumping law, country cumulation is allowed, exporter cumulation is *a fortiori* permitted ; and, similarly, that if, as under EC anti-dumping, country cumulation is

¹²⁶⁰ VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 652-653.

mandatory, exporter cumulation is equally obligatory. The latter interpretation will probably be upheld.

Indeed, with regard to ECSC anti-dumping law, which is also silent as to exporter cumulation, the Court of Justice held that «(i)t is clear from Article 4 (former basic EC Regulation and present basic ECSC Decision)» that exporter cumulation is mandatory¹²⁶¹. No further explanation is provided by the Court. It is hard to see why the Court refers to Article 4 basic ECSC Decision. First, the provision of Article 4(1) basic ECSC Decision, holding that the injury caused by other factors, such as the volume and prices of non-dumped imports, must not be attributed to the dumped imports, can only mean that non-dumped imports must not be cumulated with dumped imports¹²⁶². It would require a far-fetched interpretation for it to be also the basis for

¹²⁶¹ In respect of «exporter cumulation» the Court stated that :

«(i)t is clear from Article 4 (former basic EC Regulation (and present basic ECSC Decision)) that the injury caused to an established Community industry by dumped imports must be assessed as a whole, and it is not necessary (or, indeed, possible) to define separately the share in such injury which is attributable to each of the companies responsible»

(C.J.E.C., case 255/84, 77 May 1987, *Nachi Fujikoshi Company v Council*, E.C.R., 1987, (1861), 1895).

The European anti-dumping authorities have also held that «(i)njury must be assessed on an overall basis. It is, accordingly, neither necessary nor possible to identify the proportion of injury attributable to each exporter involved» (Commission Regulation (EEC) No 313/92 of 4 February 1992 imposing a provisional anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in South Korea, *O.J.*, 11 February 1992, No L 34/8. See also : Council Regulation (EEC) No 729/92 of 16 March 1992 imposing a definitive anti-dumping duty on imports of certain thermal paper originating in Japan and definitively collecting the provisional anti-dumping duty, *O.J.*, 26 March 1992, No L 81/1 (corrigendum, *O.J.*, 21 May 1992, No L 138/40); Commission Regulation (EEC) No 2686/92 of 16 September 1992 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea, *O.J.*, 17 September 1992, No L 272/13; Commission Regulation (EEC) No 550/93 of 5 March 1993 imposing a provisional anti-dumping duty on imports of bicycles originating in the People's Republic of China, *O.J.*, 11 March 1993, No L 58/12).

¹²⁶² See : *pentaerythritol from Canada*, where cumulation with imports from third countries was refused because no Community producer had lodged an anti-dumping complaint and because the Commission had not opened anti-dumping proceedings against these other countries on its own initiative (Council Regulation (EEC) No 96/85 of 14 January 1985 imposing a definitive anti-dumping duty on imports of pentaerythritol originating in Canada, *O.J.*, 16 January 1985, No L 13/1 (corrigendum, *O.J.*, 24 January 1985, No L 20/46)).

However, in several anti-dumping cases non-dumped imports have been cumulated with dumped imports :

- in the Commission's decision of 7 March 1978 concerning *kraft liner paper and board from the United States of America*, the American imports were cumulated with the imports of the Soviet Union (Commission Regulation (EEC) No 511/78 of 7 March 1978 imposing a provisional anti-dumping duty on kraft liner paper and board originating in the United States of America, *O.J.*, 11 March 1978, No L 69/9), though the notice of initiation of the anti-dumping proceeding against Soviet imports dated from 3 May 1978 (*O.J.*, 3 May 1978, No C 105/5);
- dumped imports have been cumulated with non-dumped imports from third countries subject to defensive measures in the Community or covered by steel arrangements concluded with the ECSC (Commission Recommendation No 790/78/ECSC of 19 April 1978 imposing a definitive anti-dumping duty on iron or steel coils for re-rolling originating in South Korea, *O.J.*, 20 April 1978, No L 106/21; Commission Recommendation No 811/78/ECSC of 21 April 1978 imposing a definitive anti-dumping duty on certain sheets and plates, of iron or steel, originating in Bulgaria, the German Democratic Republic and Romania, *O.J.*, 22 April 1978, No L 108/26; Commission Recommendation No 931/78/ECSC of 28 April 1978 providing for suspension of provisional anti-dumping duties established in relation to imports of steel products originating in Spain, *O.J.*, 4 May 1978, No L 120/21; Commission Recommendation No 1006/78/ECSC of 18 May 1978 imposing a definitive anti-dumping duty on certain galvanized sheets and plates originating in the German Democratic Republic, *O.J.*, 19 May 1978, No L 131/8; Commission Recommendation No 1704/78/ECSC of 19 July 1978 imposing a definitive anti-dumping duty on certain sheets and plates, of iron or steel, originating in Czechoslovakia, Japan, Poland and Spain, *O.J.*, 20 July 1978, No L 195/17; Commission Recommendation No 1715/78/ECSC of 20 July 1978 imposing a definitive anti-dumping duty on certain galvanized sheets and plates originating in Japan, *O.J.*, 22 July 1978, No L 198/1; Commission Recommendation No 1758/78/ECSC of 26 July 1978 imposing a definitive anti-dumping duty on certain angles, shapes and sections of iron or steel, originating in Spain, *O.J.*, 27 July 1978, No L 203/28; Commission Recommendation No 496/79/ECSC of 13 March 1979 imposing a provisional anti-dumping duty on iron or steel coils for re-rolling originating in Greece, *O.J.*, 15 March 1979, No L 65/16);

mandatory exporter cumulation, namely that it is not specified in Article 4(1) basic ECSC Decision that the concept «dumped imports» must be interpreted as imports coming from the same exporter (or country¹²⁶³); by means of that interpretation, the wording «dumped imports», however, is divorced from its context which opposes the dumped imports to the other factors possibly causing injury to the Community industry. Second, the Court might have wanted to refer to the wording «the Community producers as a whole» in Article 4(5) basic ECSC Decision; for the Court found that «(i)t (was) clear from Article 4 (former basic EC Regulation and present basic ECSC Decision) that the injury caused to an established Community industry by dumped imports must be assessed as a whole». However, Article 4(5) basic ECSC Decision has nothing to do with the causality test, nor with the definition of the cause of the injury. It only provides a definition of the injured party. The only thing which can rightfully be said about exporter cumulation (as well as about country cumulation) under ECSC anti-dumping law is that ECSC anti-dumping law does not deal with the question of cumulation. Consequently, it does not impose it nor does it prohibit it¹²⁶⁴. Therefore, cumulation is only a possibility under ECSC anti-dumping law¹²⁶⁵. Of course, no arbitrary use should be made of that possibility, nor should its application result in unlawful discrimination.

4.2.1.2. Cumulation : arbitrary or discriminatory ?

In order to assess the degree of arbitrariness in European anti-dumping case law on cumulation, it must be investigated whether the European anti-dumping authorities consistently apply the simple

- dumped imports have been cumulated with non-dumped imports from third countries of which it was not made clear whether they were subject to trade policy measures (Commission Recommendation No 496/79/ECSC of 13 March 1979 imposing a provisional anti-dumping duty on iron or steel coils for re-rolling originating in Greece, *O.J.*, 15 March 1979, No L 65/16); strikingly, in the same anti-dumping proceeding no cumulation was made with imports from another country against which anti-dumping relief had been granted (*O.J.*, 11 May 1978, No C 110/8).

¹²⁶³ In European anti-dumping case law, Article 4(1) former basic EC Regulation (and present basic ECSC Decision) has, indeed, been invoked as a basis for country cumulation. See : *standardized multi-phase electric motors from Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union*, where the European anti-dumping authorities cumulated the dumped imports from all the countries under investigation because Article 4(1) former basic EC Regulation (and present basic EC Decision) «expressly provides that 'dumped imports' must be considered for the determination of injury» (Council Regulation (EEC) No 864/87 of 23 March 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union, and definitively collecting the amounts secured as provisional duties, *O.J.*, 27 March 1987, No L 83/1). In this instance, the words «dumped imports» are divorced from their context. In fact, they are used as against the words «imports which are not dumped» in order to make clear that the injury caused by non-dumped imports must not be attributed to the dumping (see : *supra*, 518-519).

¹²⁶⁴ It may be agreed with European anti-dumping authorities that Article 4(1) basic ECSC Decision cannot be interpreted in such a narrow sense that it imposes to assess the injurious effects of the sales of each exporter, taken in isolation (Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 24 November 1988, No L 317/33).

¹²⁶⁵ VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 577-578. See also : Commission Decision 84/229/EEC of 13 April 1984 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of propan-1-ol (propyl alcohol) originating in the United States of America, and terminating that proceeding, *O.J.*, 19 April 1984, No L 106/55.

rules on cumulation. As the Court of Justice has held that exporter cumulation is mandatory¹²⁶⁶, exporter cumulation must simply be carried out without any explanation why. Derogations are apparently excluded. Nevertheless, exporter cumulation has not been applied either because of differences in the physical characteristics of the dumped product of the various exporters and because of there not being any competition between the product of some of those exporters and the product of the Community producers and the other dumping exporters¹²⁶⁷. Here, the non-application of exporter cumulation seems warranted since the products do not belong to the same product market and, thus, there is no opportunity for anti-competitive cooperation between the dumping exporters. However, in other cases, no exporter cumulation is applied for the mere reason that the different exporters established in the same country are subject to different anti-dumping proceedings¹²⁶⁸. That argument fails to convince because exporter cumulation¹²⁶⁹, as well as country cumulation¹²⁷⁰ are made in respect of imports subject to different proceedings.

¹²⁶⁶ According to the Council in *compact disc players from Japan and the Republic of Korea*, the case law of the Court of Justice does not jeopardize European anti-dumping case law. For it considered that :

«Several Korean exporters continued to claim that the effects of Korean exports should not be considered cumulatively with the effects of the Japanese exports. Since the Korean and Japanese CDPs compete with each other and with the Community production and since the volume and market shares of Korean exports are not negligible (...), the Council confirms the Commission's conclusions on this issue.

Several exporters continued to claim that the Commission failed to show the specific injurious effect of dumped imports of the individual exporters. However, the Council cannot accept these arguments. In accordance with its position in previous cases and with the jurisprudence of the Court of Justice, the Council considers that the injurious effects of the dumped imports of individual exporters concerned have to be assessed together»

(Council Regulation (EEC) No 112/90 of 16 January 1990 imposing a definitive anti-dumping duty on imports of certain compact disc players originating in Japan and the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 17 January 1990, No L 13/21).

¹²⁶⁷ Commission Regulation (EEC) No 1696/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 June 1988, No L 151/47.

¹²⁶⁸ The anti-dumping proceeding against *chemical fertilizer from the United States of America* was split in two : one proceeding against five American exporters of chemical fertilizer (Commission Regulation (EEC) No 290/83 of 2 February 1983 imposing a provisional anti-dumping duty on imports of urea ammonium nitrate solution fertilizer originating in the United States of America, *O.J.*, 4 February 1983, No L 33/9) and one against the other American exporters (Council Regulation (EEC) No 101/83 of 17 January 1983 imposing a definitive anti-dumping duty on certain chemical fertilizer originating in the United States of America, *O.J.*, 19 January 1983, No L 15/1). Though they go back to the same period, in none of these two proceedings the imports of all the American exporters have been cumulated (with the exception of a cumulated market share which was recorded, as well as the individual market share of each of the five exporters subjected to the first proceeding). Only in the second proceeding explicit reference was made to the first proceeding and, consequently, it was underscored that the impact of the dumped imports of the companies concerned has been isolated from that of the (...) exports subject to the above review investigation, because the anti-dumping proceeding was divided in two.

¹²⁶⁹ See : *electronic typewriters from Japan*, where a review proceeding was initiated against only one Japanese exporter, but the injury determination completely copied the injury findings made with regard to all the dumped imports from Japan, allowance being made for the increase in the Japanese exports to the Community caused by a change in the circumstances of the Japanese producer concerned (Commission Decision 86/490/EEC of 30 September 1986 accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of electronic typewriters originating in Japan manufactured by Tokyo Juki Industrial Co Ltd/JDK Corporation, and terminating the investigation, *O.J.*, 4 October 1986, No L 283/25).

¹²⁷⁰ *Infra*, 521-524.

Since, under ECSC anti-dumping law, country cumulation is in principle necessary, its renouncement must be explained, as is the case for its application when there are objections raised against it¹²⁷¹. Apparently, ECSC anti-dumping seems to apply the same approach as EC anti-dumping law, which imposes country cumulation provided that a number of conditions are fulfilled¹²⁷².

A first condition of GATT and EC anti-dumping law is that the imports coming from more than one country are simultaneously subject to anti-dumping investigations (Article 3.3. GATT Anti-dumping Code ; Article 3(4) basic EC Regulation). Therefore, it might be argued that they do not allow country cumulation of imports subject to different anti-dumping proceedings¹²⁷³. However, it might also be argued that they do not prevent cumulation of imports coming from countries subject to different anti-dumping proceedings, provided that the anti-dumping investigations are carried out simultaneously. Thus, it seems that GATT and EC anti-dumping law will not provide more clarity than European anti-dumping case law. Indeed, in several cases, country-cumulation has been made in respect of imports subject to different proceedings¹²⁷⁴,

¹²⁷¹ C.J.E.C., joined cases 294/86 and 77/87, 5 October 1988, *Technointerg v Commission and Council*, E.C.R., 1988, (6077), 6116.

¹²⁷² VAN BAEL, I., and BELLIS, J.-F., *Anti-Dumping and other Trade Protection Laws of the EEC*, Bicester, CCH Editions Ltd., 1990, 138 ; VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 654.

Only since 1983, dumped imports originating in different countries are not cumulated automatically. Originally, the European anti-dumping authorities simply cumulated dumped imports without providing any explanation for it. This may create the impression that dumped imports were automatically cumulated, except sometimes for the application of a *de minimis* rule with regard to a very small volume of dumped imports which were considered not to cause any injury (see : VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 654). The fact that the judgement of the Court of Justice about country cumulation dates from 1987 does not alter the conclusion that original case law is illegal since this judgement is based on the objectives of European anti-dumping law, in particular its workability (*supra*, 512-513), which have not changed since the enactment of European anti-dumping law in 1968.

¹²⁷³ WAER, P., and VERMULST, E., «EC Anti-Dumping Law and Practice after the Uruguay Round. A New Lease of Life ?», *Journal of World Trade*, 1994/2, (5), 15.

¹²⁷⁴ Commission Recommendation No 160/78/ECSC of 27 January 1978 imposing a provisional anti-dumping duty on certain sheets and plates, of iron or steel, originating in the German Democratic Republic, Romania and Spain, *O.J.*, 28 January 1978, No L 23/33 ; Commission Recommendation No 161/78/ECSC of 27 January 1978 imposing a provisional anti-dumping duty on certain sheets and plates, of iron or steel, originating in Japan, *O.J.*, 28 January 1978, No L 23/35 ; Commission Recommendation No 245/78/ECSC of 2 February 1978 imposing a provisional anti-dumping duty on imports of iron or steel coils for re-rolling originating in Japan and Bulgaria, *O.J.*, 7 February 1978, No L 37/13 ; Commission Recommendation No 262/78/ECSC of 7 February 1978 imposing a provisional anti-dumping duty on certain sheets and plates, of iron or steel, originating in Poland, *O.J.*, 9 February 1978, No L 39/13 ; Commission Recommendation No 263/78/ECSC of 7 February 1978 imposing a provisional anti-dumping duty on certain angles, shapes and sections, of iron or steel, not further worked than hot-rolled or extruded, originating in Japan, *O.J.*, 9 February 1978, No L 39/15 ; Commission Recommendation No 307/78/ECSC of 14 February 1978 imposing a provisional anti-dumping duty on imports of iron or steel coils for re-rolling originating in Australia, *O.J.*, 16 February 1978, No L 45/17 ; Commission Recommendation No 359/78/ECSC of 20 February 1978 imposing a provisional anti-dumping duty on certain galvanized sheets and plates originating in the German Democratic Republic and Japan, *O.J.*, 22 February 1978, No L 50/13 ; Commission Regulation (EEC) No 511/78 of 7 March 1978 imposing a provisional anti-dumping duty on kraft liner paper and board originating in the United States of America, *O.J.*, 11 March 1978, No L 69/9 ; Commission Recommendation No 790/78/ECSC of 19 April 1978 imposing a definitive anti-dumping duty on iron or steel coils for re-rolling originating in South Korea, *O.J.*, 20 April 1978, No L 106/21 ; Commission Recommendation No 811/78/ECSC of 21 April 1978 imposing a definitive anti-dumping duty on certain sheets and plates, of iron or steel, originating in Bulgaria, the German Democratic Republic and Romania, *O.J.*, 22 April 1978, No L 108/26 ; Commission Recommendation No 931/78/ECSC of 28 April 1978 providing for suspension of provisional anti-dumping duties established in relation to imports of steel products originating in Spain, *O.J.*, 4 May 1978, No L 120/21 ;

Commission Recommendation No 1006/78/ECSC of 18 May 1978 imposing a definitive anti-dumping duty on certain galvanized sheets and plates originating in the German Democratic Republic, *O.J.*, 19 May 1978, No L 131/8 ; Commission Recommendation No 1704/78/ECSC of 19 July 1978 imposing a definitive anti-dumping duty on certain sheets and plates, of iron or steel, originating in Czechoslovakia, Japan, Poland and Spain, *O.J.*, 20 July 1978, No L 195/17 ; Commission Recommendation No 1715/78/ECSC of 20 July 1978 imposing a definitive anti-dumping duty on certain galvanized sheets and plates originating in Japan, *O.J.*, 22 July 1978, No L 198/1 ; Commission Recommendation No 1758/78/ECSC of 26 July 1978 imposing a definitive anti-dumping duty on certain angles, shapes and sections of iron or steel, originating in Spain, *O.J.*, 27 July 1978, No L 203/28 ; Council Regulation (EEC) No 2133/78 of 8 September 1978 imposing a definitive anti-dumping duty on kraft liner paper and board originating in the United States of America, *O.J.*, 9 September 1978, No L 247/22 ; Commission Recommendation No 496/79/ECSC of 13 March 1979 imposing a provisional anti-dumping duty on iron or steel coils for re-rolling originating in Greece, *O.J.*, 15 March 1979, No L 65/16 ; Commission Regulation (EEC) No 3171/80 of 4 December 1980 repealing a national anti-dumping duty on saccharin and its salts originating in the Republic of Korea imposed under the transitional provisions of the Act of Accession, *O.J.*, 9 December 1980, No L 331/25 ; Commission Decision 83/75/EEC of 15 February 1983 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain fibre building board originating in Brazil, *O.J.*, 19 February 1983, No L 47/30 ; Commission Regulation (EEC) No 1479/83 of 7 June 1983 imposing a provisional anti-dumping duty on imports of copper sulphate originating in Czechoslovakia and the USSR, *O.J.*, 9 June 1983, No L 151/24 ; Commission Decision 84/407/EEC of 10 August 1984 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain kraft liner paper and board originating in Spain and terminating that proceeding, *O.J.*, 21 August 1984, No L 224/30 ; Commission Regulation (EEC) No 2681/84 of 18 September 1984 imposing a provisional anti-dumping duty on imports of pentaerythritol originating in Canada and accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of pentaerythritol originating in Sweden and terminating that proceeding, *O.J.*, 22 September 1984, No L 254/5 ; Commission Decision 86/464/EEC of 17 September 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of artificial corundum originating in Hungary, Poland and the USSR, and terminating the investigation, *O.J.*, 23 September 1986, No L 271/26 ; Commission Decision 86/497/EEC of 7 October 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of silicon carbide originating in the People's Republic of China, Norway, Poland and the USSR, and terminating the investigation regarding imports of that product originating in the People's Republic of China, Norway, Poland, Czechoslovakia, the USSR and Yugoslavia, *O.J.*, 10 October 1986, No L 287/25 ; Commission Regulation (EEC) No 1043/87 of 10 April 1987 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Yugoslavia, *O.J.*, 14 April 1987, No L 102/5 ; Commission Regulation (EEC) No 2409/87 of 6 August 1987 imposing a provisional anti-dumping duty on imports of ferro-silicon originating in Brazil and accepting undertakings offered by Italmagnesio SA of Brazil and from Promesrio-Import of the USSR, *O.J.*, 8 August 1987, No L 219/24 ; Commission Regulation (EEC) No 2623/88 of 24 August 1988 imposing a provisional anti-dumping duty on imports of urea originating in Austria, Hungary, Malaysia, Romania, the USA and Venezuela, *O.J.*, 25 August 1988, No L 235/5 ; Council Regulation (EEC) No 450/89 of 20 February 1989 imposing a definitive anti-dumping duty on imports of urea originating in the United States of America or Venezuela and adjusting the definitive anti-dumping duty for Saudi Arabia laid down by Regulation (EEC) No 3339/87, *O.J.*, 24 February 1989, No L 52/1 ; Council Regulation (EEC) No 1786/89 of 19 June 1989 terminating the proceeding in connection with a review of anti-dumping measures concerning imports of fibre building board (hardboard) originating in Czechoslovakia, Poland and the USSR, confirming the expiry of the definitive anti-dumping duties imposed on imports from Czechoslovakia and Poland, and repealing the definitive anti-dumping duty imposed on imports from the USSR, *O.J.*, 23 June 1989, No L 176/1 ; Commission Decision 89/377/EEC of 19 June 1989 terminating the proceeding in connection with a review of anti-dumping measures concerning imports of fibre building board (hardboard) originating in Romania, Brazil and Sweden, confirming the expiry of the undertakings given by Romanian, Brazilian and certain Swedish exporters, and repealing the undertaking given by another Swedish exporter, *O.J.*, 23 June 1989, No L 176/51 ; Commission Regulation (EEC) No 1537/90 of 28 May 1990 imposing a provisional anti-dumping duty on imports of potassium permanganate originating in the USSR, *O.J.*, 8 June 1990, No L 145/9 ; Council Regulation (EEC) No 1115/91 of 29 April 1991 imposing definitive anti-dumping duties in connection with the review of anti-dumping measures concerning imports of ferro-silicon originating in Brazil, *O.J.*, 3 May 1991, No L 111/1 ; Commission Decision 91/240/EEC of 29 April 1991 accepting undertakings offered by certain exporters in connection with the review of anti-dumping measures concerning imports of ferro-silicon originating in Brazil and terminating the investigation as regards those exporters, *O.J.*, 3 May 1991, No L 111/47.

However, country cumulation between different proceedings is not always applied, see : Commission Decision 80/875/EEC of 17 September 1980 accepting undertakings given by Romanian exporters in connection with the anti-dumping proceeding concerning imports of certain tubes of iron or steel originating in that country, and terminating that proceeding, *O.J.*, 20 September 1980, No L 249/24 (corrigendum, *O.J.*, 7 October 1980, No L 263/8) ; Commission Decision 80/1116/EEC of 4 December 1980 accepting undertakings offered by the exporters of saccharin and its salts originating in China and the United States of America and terminating the proceedings concerning imports of saccharin and its salts from China, Japan and the United States of America, *O.J.*, 9 December 1980, No L 331/41 ; Council Regulation (EEC) No 2978/83 of 24 October 1983 amending Regulation (EEC) No 191/80 imposing a definitive anti-dumping duty on lithium hydroxide originating in the United States of America and the Soviet Union, *O.J.*, 26 October 1983, No L 294/3 ; Commission Decision 83/522/EEC of 24 October 1983 accepting the undertaking given in connection with the anti-dumping proceeding in respect of imports of lithium hydroxide originating in the People's Republic of China and terminating that proceeding, *O.J.*, 26 October 1983, No L 294/29 ; Commission Regulation (EEC) No 512/84 of 27 February 1984 imposing a provisional anti-dumping duty on imports of vinyl acetate monomer originating in Canada, *O.J.*, 29 February 1984, No L 58/17 ; Commission Decision 84/404/EEC of 25 July 1984 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of copper sulphate originating in Yugoslavia and terminating the proceeding, *O.J.*, 11 August 1984, No L 215/16 ; Commission Regulation (EEC) No 2553/84 of 4 September 1984 imposing a provisional anti-dumping duty on imports of oxalic acid originating in Brazil, accepting an undertaking offered by the exporter in the German Democratic Republic of oxalic acid and terminating the proceeding regarding imports of oxalic acid from the German Democratic Republic and

whereas, in other cases, no explanation is provided why dumped imports coming from different

Spain, *O.J.*, 7 September 1984, No L 239/8 ; Commission Regulation (EEC) No 2908/84 of 15 October 1984 imposing a provisional anti-dumping duty on imports of copper sulphate originating in Poland, accepting undertakings given by the Bulgarian and Hungarian exporters of copper sulphate, terminating the investigation regarding exports of copper sulphate from Bulgaria and Hungary and terminating the proceeding regarding those from Spain, *O.J.*, 18 October 1984, No L 275/12 ; Council Regulation (EEC) No 1244/86 of 28 April 1986 imposing a definitive anti-dumping duty on imports of copper sulphate originating in Yugoslavia, *O.J.*, 30 April 1986, No L 113/4 ; Commission Decision 86/232/EEC of 9 June 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of hardboard originating in Argentina, Switzerland and Yugoslavia and terminating the investigation, *O.J.*, 12 June 1986, No 157/61 ; Council Decision 86/468/EEC of 22 September 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain acrylic fibres originating in Israel, Mexico, Romania and Turkey and terminating the investigation, *O.J.*, 24 September 1986, No L 272/29 ; Council Regulation (EEC) No 864/87 of 23 March 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union, and definitively collecting the amounts secured as provisional duties, *O.J.*, 27 March 1987, No L 83/1 ; Commission Regulation (EEC) No 1043/87 of 10 April 1987 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Yugoslavia, *O.J.*, 14 April 1987, No L 102/5 ; Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1 ; Commission Regulation (EEC) No 699/88 of 15 March 1988 imposing a provisional anti-dumping duty on imports of oxalic acid originating in Taiwan and South Korea, *O.J.*, 18 March 1988, No L 72/12 ; Commission Regulation (EEC) No 1613/90 of 13 June 1990 imposing a provisional anti-dumping duty on imports of ball bearings with a greatest external diameter not exceeding 30 mm originating in Thailand, *O.J.*, 16 June 1990, No L 152/24 ; Commission Regulation (EEC) No 1956/92 of 7 July 1992 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in India and the Republic of Korea, *O.J.*, 16 July 1992, No L 197/25 ; Council Regulation (EEC) No 54/93 of 8 January 1993 imposing a definitive duty on imports of synthetic fibres of polyesters originating in India and the Republic of Korea, *O.J.*, 15 January 1993, No L 9/2 ; Council Regulation (EEC) No 993/93 of 26 April 1993 imposing a definitive anti-dumping duty on imports of certain electronic weighing scales originating in Japan, *O.J.*, 29 April 1993, No L 104/4 ; Commission Regulation (EEC) No 1103/93 of 30 April 1993 imposing a provisional anti-dumping duty on imports into the Community of certain electronic weighing scales originating in Singapore and the Republic of Korea, *O.J.*, 6 May 1993, No L 112/20 ; Commission Regulation (EEC) No 2581/93 of 20 September 1993 imposing provisional anti-dumping duties on imports of ferro-silicon originating in South Africa and the People's Republic of China, *O.J.*, 22 September 1993, No L 237/2 ; Council Regulation (EC) No 3359/93 of 2 December 1993 imposing amended anti-dumping measures on imports of ferro-silicon originating in Russia, Kazakhstan, Ukraine, Iceland, Norway, Sweden, Venezuela and Brazil, *O.J.*, 9 December 1993, No L 302/1 ; Commission Regulation (EC) No 371/94 of 17 February 1994 imposing a provisional anti-dumping duty on imports into the Community of large aluminium electrolytic capacitors originating in the Republic of Korea and Taiwan, *O.J.*, 19 February 1994, No L 48/10 ; Commission Regulation (EC) No 534/94 of 9 March 1994 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, *O.J.*, 11 March 1994, No L 68/5.

See also : *small-screen colour television receivers from Hong Kong and the People's Republic of China*, where no straightforward cumulation was made with imports of small-screen colour television receivers from the Republic of Korea (at the time of the anti-dumping proceeding against Hong Kong and the People's Republic of China, definitive anti-dumping duties were applicable to imports from the Republic of Korea (Council Regulation (EEC) No 1048/90 of 25 April 1990 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 27 April 1990, No L 107/56 (corrigendum, *O.J.*, 24 May 1990, No L 133/92)). Instead, mention was made from time to time of data concerning the Korean imports. Thus, information was provided about cumulated data for Hong Kong and the People's Republic of China, separate data for the Republic of Korea and cumulated data for Hong Kong, the People's Republic of China and the Republic of Korea (Commission Regulation (EEC) No 129/91 of 11 January 1991 imposing a provisional anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China, *O.J.*, 19 January 1991, No L 14/31).

countries subject to an anti-dumping proceeding, are not cumulated¹²⁷⁵.

The other two conditions under GATT and EC anti-dumping law are : (a) the margin of dumping established in relation to the imports from each country is more than *de minimis* and the volume of imports from each country is negligible and (b) a cumulative assessment of the effects of the imports is appropriate in the light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like Community product (Article 3.3. GATT Anti-dumping Code ; Article 3(4) basic EC Regulation). Whereas condition (a) is a first, but moderate step into the right direction¹²⁷⁶, condition (b) could be a codification of European anti-dumping case law applying ECSC anti-dumping law. Indeed, in European anti-dumping case law, country cumulation has only been applied if dumped imports from different countries were in some respect comparable. In order to determine their comparability, several factors have been taken into account : the comparability of the dumped products¹²⁷⁷, the extent to which each of the dumped products competes in the Community

¹²⁷⁵ Commission Decision 80/1116/EEC of 4 December 1980 accepting undertakings offered by the exporters of saccharin and its salts originating in China and the United States of America and terminating the proceedings concerning imports of saccharin and its salts from China, Japan and the United States of America, *O.J.*, 9 December 1980, No L 331/41 ; Commission Decision 81/493/EEC of 6 July 1981 terminating the anti-dumping procedure concerning imports of furfural originating in the Dominican Republic, Spain and the People's Republic of China, *O.J.*, 11 July 1981, No L 189/57 ; Commission Decision 82/808/EEC of 25 November 1982 terminating the anti-dumping procedure concerning imports of aluminium foil for household and catering use originating in Austria, the German Democratic Republic, Hungary and Israel, *O.J.*, 1 December 1982, No L 339/58 ; Council Decision 83/9/EEC of 17 January 1983 terminating the anti-dumping proceeding concerning imports of codeine and its salts originating in Czechoslovakia, Hungary, Poland and Yugoslavia, *O.J.*, 20 January 1983, No L 16/30 ; Commission Regulation (EEC) No 985/83 of 26 April 1983 imposing a provisional anti-dumping duty on imports of barium chloride originating in the People's Republic of China and the German Democratic Republic, *O.J.*, 27 April 1983, No L 110/11 ; Council Regulation (EEC) No 2370/83 of 19 August 1983 imposing a definitive anti-dumping duty on imports of barium chloride originating in the People's Republic of China and in the German Democratic Republic, *O.J.*, 20 August 1983, No L 228/28 ; Commission Decision 86/35/EEC of 21 February 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of fibre building board from Finland and Sweden and terminating the investigation, *O.J.*, 25 February 1986, No L 46/23 ; Commission Regulation (EEC) No 707/89 of 17 March 1989 imposing a provisional anti-dumping duty on imports of calcium metal originating in the People's Republic of China or the Soviet Union, *O.J.*, 21 March 1989, No L 78/10.

¹²⁷⁶ *Supra*, 517-518.

¹²⁷⁷ Usually a short reference to the comparability of the dumped products is made without any further explanation being provided (see e.g., Commission Decision No 67/94/ECSC of 12 January 1994 imposing a provisional anti-dumping duty on imports into the Community of hematite pig iron, originating in Brazil, Poland, Russia and Ukraine, *O.J.*, 15 January 1994, No L 12/5).

Sometimes, the comparability of the dumped products is determined on the basis of :

- their physical characteristics (see e.g., Commission Regulation (EC) No 1506/94 of 27 June 1994 imposing provisional duties on imports of urea ammonium nitrate solution originating in Bulgaria and Poland, *O.J.*, 30 June 1994, No L 162/16) ;
- their technical characteristics (see e.g., Commission Regulation (EEC) No 2623/88 of 24 August 1988 imposing a provisional anti-dumping duty on imports of urea originating in Austria, Hungary, Malaysia, Romania, the USA and Venezuela, *O.J.*, 25 August 1988, No L 235/5) ;
- their end uses (Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7 ; Commission Regulation (EEC) No 3296/92 of 12 November 1992 imposing a provisional anti-dumping duty on imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in Czechoslovakia, Hungary, Poland and the Republic of Croatia and terminating the anti-dumping proceeding with regard to the Republics of Serbia and of Montenegro, the former Yugoslav Republic of Macedonia, the Republic of Bosnia-Herzegovina and the Republic of Slovenia, *O.J.*, 14 November 1992, No L 328/15 ; Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5 ; Commission Regulation (EC) No 1506/94 of 27 June 1994 imposing provisional duties on imports of urea ammonium nitrate solution originating in

- Bulgaria and Poland, *O.J.*, 30 June 1994, No L 162/16);
- the limited difference in the user's perception of the product (Council Regulation (EEC) No 830/92 of 30 March 1992 imposing a definitive anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and collecting definitively the provisional duty, *O.J.*, 3 April 1992, No L 88/1 (corrigendum, *O.J.*, 5 June 1992, No L 153/16));
 - the fact that they compete with each other (Commission Decision 90/196/EEC of 10 April 1990 terminating the anti-dumping proceeding concerning imports of methenamine (hexamethylenetetramine) originating in Hungary and Yugoslavia and accepting undertakings offered in connection with the proceeding concerning imports of methenamine (hexamethylenetetramine) originating in Bulgaria, Czechoslovakia, Poland and Romania, *O.J.*, 24 April 1990, No L 104/14; Commission Regulation (EEC) No 3262/90 of 5 November 1990 imposing a provisional anti-dumping duty on imports of audio tapes in cassettes originating in Japan, the Republic of Korea and Hong Kong, *O.J.*, 13 November 1990, No L 313/5 (corrigendum, *O.J.*, 12 January 1991, No L 9/36); Commission Regulation (EEC) No 3617/90 of 11 December 1990 imposing a provisional anti-dumping duty on imports of certain welded tubes of iron or non-alloy steel, originating in Turkey or in Venezuela and accepting undertakings offered in connection with such imports, *O.J.*, 15 December 1990, No L 351/17; Council Regulation (EEC) No 830/92 of 30 March 1992 imposing a definitive anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and collecting definitively the provisional duty, *O.J.*, 3 April 1992, No L 88/1 (corrigendum, *O.J.*, 5 June 1992, No L 153/16); Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5; Commission Regulation (EEC) No 1103/93 of 30 April 1993 imposing a provisional anti-dumping duty on imports into the Community of certain electronic weighing scales originating in Singapore and the Republic of Korea, *O.J.*, 6 May 1993, No L 112/20; Commission Regulation (EEC) No 2581/93 of 20 September 1993 imposing provisional anti-dumping duties on imports of ferro-silicon originating in South Africa and the People's Republic of China, *O.J.*, 22 September 1993, No L 237/2; Council Regulation (EC) No 3359/93 of 2 December 1993 imposing amended anti-dumping measures on imports of ferro-silicon originating in Russia, Kazakhstan, Ukraine, Iceland, Norway, Sweden, Venezuela and Brazil, *O.J.*, 9 December 1993, No L 302/1; Commission Regulation (EC) No 371/94 of 17 February 1994 imposing a provisional anti-dumping duty on imports into the Community of large aluminium electrolytic capacitors originating in the Republic of Korea and Taiwan, *O.J.*, 19 February 1994, No L 48/10; Commission Regulation (EC) No 534/94 of 9 March 1994 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, *O.J.*, 11 March 1994, No L 68/5; Council Regulation (EC) No 621/94 of 17 March 1994 imposing a definitive anti-dumping duty on imports of ferro-silicon originating in South Africa and in the People's Republic of China, *O.J.*, 19 March 1994, No L 77/48; Council Regulation (EC) No 643/94 of 21 March 1994 amending Regulation (EEC) No 3068/92 in respect of definitive anti-dumping duties on imports of potassium chloride originating in Belarus, Russia and Ukraine, *O.J.*, 24 March 1994, No L 80/1; Commission Regulation (EC) No 1076/94 of 6 May 1994 imposing a provisional anti-dumping duty on imports of certain watch movements originating in Malaysia and Thailand, *O.J.*, 11 May 1994, No L 120/3; Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24; Commission Regulation (EC) No 3119/94 of 19 December 1994 imposing a provisional anti-dumping duty on imports of ferro-silico-manganese originating in Russia, Ukraine, Brazil and South Africa, *O.J.*, 21 December 1994, No L 330/15);
 - the fact that the dumped products are destined for the same customers (Commission Decision 90/399/EEC of 26 July 1990 terminating an anti-dumping proceeding concerning imports of certain single phase, two-speed electric motors originating in Bulgaria, Romania and Czechoslovakia, *O.J.*, 31 July 1990, No L 202/47);
 - the mutual interchangeability of the dumped products (see e.g., Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7; Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5; Commission Regulation (EEC) No 1103/93 of 30 April 1993 imposing a provisional anti-dumping duty on imports into the Community of certain electronic weighing scales originating in Singapore and the Republic of Korea, *O.J.*, 6 May 1993, No L 112/20; Commission Regulation (EC) No 371/94 of 17 February 1994 imposing a provisional anti-dumping duty on imports into the Community of large aluminium electrolytic capacitors originating in the Republic of Korea and Taiwan, *O.J.*, 19 February 1994, No L 48/10; Commission Regulation (EC) No 534/94 of 9 March 1994 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, *O.J.*, 11 March 1994, No L 68/5; Council Regulation (EC) No 643/94 of 21 March 1994 amending Regulation (EEC) No 3068/92 in respect of definitive anti-dumping duties on imports of potassium chloride originating in Belarus, Russia and Ukraine, *O.J.*, 24 March 1994, No L 80/1; Council Regulation (EC) No 821/94 of 12 April 1994 imposing a definitive anti-dumping duty on imports of silicon carbide, originating in the People's Republic of China, Poland, the Russian Federation and Ukraine, *O.J.*, 13 April 1994, No L 94/21; Commission Regulation (EC) No 1076/94 of 6 May 1994 imposing a provisional anti-dumping duty on imports of certain watch movements originating in Malaysia and Thailand, *O.J.*, 11 May 1994, No L 120/3; Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50);
 - the fact that importers easily and frequently swap sources of supply between the different dumping countries (Commission Regulation (EEC) No 1386/91 of 23 May 1991 imposing a provisional anti-dumping duty on imports of gas-fuelled, non-

with the Community industry's product¹²⁷⁸, the degree of competition between the dumped imports and other products imported into the Community¹²⁷⁹, the fact that the dumped products and the Community industry's product are sold to the same customers¹²⁸⁰, the fact that the dumped products are sold or offered for sale in the same geographical markets¹²⁸¹,

refillable pocket flint lighters originating in Japan, the People's Republic of China, the Republic of Korea and Thailand, *O.J.*, 28 May 1991, No L 133/20 ; Council Regulation (EEC) No 830/92 of 30 March 1992 imposing a definitive anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and collecting definitively the provisional duty, *O.J.*, 3 April 1992, No L 88/1 (corrigendum, *O.J.*, 5 June 1992, No L 153/16) ; Commission Regulation (EEC) No 3296/92 of 12 November 1992 imposing a provisional anti-dumping duty on imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in Czechoslovakia, Hungary, Poland and the Republic of Croatia and terminating the anti-dumping proceeding with regard to the Republics of Serbia and of Montenegro, the former Yugoslav Republic of Macedonia, the Republic of Bosnia-Herzegovina and the Republic of Slovenia, *O.J.*, 14 November 1992, No L 328/15).

Quality differences by themselves are not sufficient to prevent cumulation (Commission Decision No 163/88/ECSC of 20 January 1988 imposing a provisional anti-dumping duty on imports of certain iron or steel coils, originating in Algeria, Mexico and Yugoslavia, *O.J.*, 22 January 1988, No L 18/31).

1278 Usually a short reference to the extent to which each of the dumped products competes in the Community with the Community industry's product is made without any further explanation being provided (see e.g., Commission Regulation (EC) No 3119/94 of 19 December 1994 imposing a provisional anti-dumping duty on imports of ferro-silico-manganese originating in Russia, Ukraine, Brazil and South Africa, *O.J.*, 21 December 1994, No L 330/15).

Sometimes, the extent to which each of the dumped products competes with the Community industry's product on the Community market is determined on the basis of :

- the interchangeability of the imported products and the Community products, notwithstanding some differences in physical characteristics (Commission Regulation (EEC) No 1043/87 of 10 April 1987 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Yugoslavia, *O.J.*, 14 April 1987, No L 102/5 ; Council Regulation (EEC) No 2382/87 of 5 August 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Yugoslavia, *O.J.*, 7 August 1987, No L 218/2) ;
- the similarity between the dumped products and the Community products (Commission Decision 90/196/EEC of 10 April 1990 terminating the anti-dumping proceeding concerning imports of methenamine (hexamethylenetetramine) originating in Hungary and Yugoslavia and accepting undertakings offered in connection with the proceeding concerning imports of methenamine (hexamethylenetetramine) originating in Bulgaria, Czechoslovakia, Poland and Romania, *O.J.*, 24 April 1990, No L 104/14 ; Commission Regulation (EEC) No 129/91 of 11 January 1991 imposing a provisional anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China, *O.J.*, 19 January 1991, No L 14/31 ; Commission Regulation (EC) No 1506/94 of 27 June 1994 imposing provisional duties on imports of urea ammonium nitrate solution originating in Bulgaria and Poland, *O.J.*, 30 June 1994, No L 162/16).

1279 Commission Regulation (EEC) No 4062/88 of 23 December 1988 imposing a provisional anti-dumping duty on imports of video cassettes and video tape reels originating in the Republic of Korea and Hong Kong, *O.J.*, 24 December 1988, No L 356/47 ; Council Regulation (EEC) No 1251/91 of 13 May 1991 imposing a definitive anti-dumping duty on imports of audio tapes in cassettes originating in Japan and the Republic of Korea, collecting definitively the provisional duty and terminating the procedure concerning Hong Kong, *O.J.*, 14 May 1991, No L 119/35.

1280 Commission Regulation (EC) No 892/94 of 21 April 1994 imposing a provisional anti-dumping duty on imports of calcium metal originating in the People's Republic of China and Russia, *O.J.*, 23 April 1994, No L 104/5.

1281 Council Regulation (EEC) No 1251/91 of 13 May 1991 imposing a definitive anti-dumping duty on imports of audio tapes in cassettes originating in Japan and the Republic of Korea, collecting definitively the provisional duty and terminating the procedure concerning Hong Kong, *O.J.*, 14 May 1991, No L 119/35 ; Commission Regulation (EEC) No 1956/92 of 7 July 1992 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in India and the Republic of Korea, *O.J.*, 16 July 1992, No L 197/25 ; Council Regulation (EC) No 821/94 of 12 April 1994 imposing a definitive anti-dumping duty on imports of silicon carbide, originating in the People's Republic of China, Poland, the Russian Federation and Ukraine, *O.J.*, 13 April 1994, No L 94/21 ; Commission Regulation (EC) No 892/94 of 21 April 1994 imposing a provisional anti-dumping duty on imports of calcium metal originating in the People's Republic of China and Russia, *O.J.*, 23 April 1994, No L 104/5 ; Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50.

the fact that they are simultaneously present in the market¹²⁸², the absolute volume of the dumped imports¹²⁸³, the increase in the volume of the dumped imports¹²⁸⁴, the market

¹²⁸² Council Regulation (EEC) No 1251/91 of 13 May 1991 imposing a definitive anti-dumping duty on imports of audio tapes in cassettes originating in Japan and the Republic of Korea, collecting definitively the provisional duty and terminating the procedure concerning Hong Kong, *O.J.*, 14 May 1991, No L 119/35; Commission Regulation (EEC) No 1956/92 of 7 July 1992 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in India and the Republic of Korea, *O.J.*, 16 July 1992, No L 197/25; Council Regulation (EEC) No 54/93 of 8 January 1993 imposing a definitive duty on imports of synthetic fibres of polyesters originating in India and the Republic of Korea, *O.J.*, 15 January 1993, No L 9/2; Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5; Commission Regulation (EEC) No 1103/93 of 30 April 1993 imposing a provisional anti-dumping duty on imports into the Community of certain electronic weighing scales originating in Singapore and the Republic of Korea, *O.J.*, 6 May 1993, No L 112/20; Commission Regulation (EC) No 371/94 of 17 February 1994 imposing a provisional anti-dumping duty on imports into the Community of large aluminium electrolytic capacitors originating in the Republic of Korea and Taiwan, *O.J.*, 19 February 1994, No L 48/10; Commission Regulation (EC) No 534/94 of 9 March 1994 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, *O.J.*, 11 March 1994, No L 68/5; Council Regulation (EC) No 821/94 of 12 April 1994 imposing a definitive anti-dumping duty on imports of silicon carbide, originating in the People's Republic of China, Poland, the Russian Federation and Ukraine, *O.J.*, 13 April 1994, No L 94/21; Commission Regulation (EC) No 1076/94 of 6 May 1994 imposing a provisional anti-dumping duty on imports of certain watch movements originating in Malaysia and Thailand, *O.J.*, 11 May 1994, No L 120/3; Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50.

¹²⁸³ Usually a short reference to the absolute volume of dumped imports is made without any further explanation being provided (see e.g., Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7).

Sometimes, more information is given as to the absolute volume of the dumped imports, such as :

- the fact that all dumped imports attained a substantially similar level in volume (Council Regulation (EEC) No 450/89 of 20 February 1989 imposing a definitive anti-dumping duty on imports of urea originating in the United States of America or Venezuela and adjusting the definitive anti-dumping duty for Saudi Arabia laid down by Regulation (EEC) No 3339/87, *O.J.*, 24 February 1989, No L 52/1; Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24);
- the fact that the volume of the dumped imports from each of the exporting countries, taken in isolation, was not negligible (Commission Regulation (EEC) No 129/91 of 11 January 1991 imposing a provisional anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China, *O.J.*, 19 January 1991, No L 14/31; Council Regulation (EEC) No 830/92 of 30 March 1992 imposing a definitive anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and collecting definitively the provisional duty, *O.J.*, 3 April 1992, No L 88/1 (corrigendum, *O.J.*, 5 June 1992, No L 153/16); Commission Regulation (EEC) No 1808/92 of 30 June 1992 imposing a provisional anti-dumping duty on imports of ferro-silicon originating in Poland and Egypt, *O.J.*, 3 July 1992, No L 183/8; Commission Regulation (EEC) No 1956/92 of 7 July 1992 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in India and the Republic of Korea, *O.J.*, 16 July 1992, No L 197/25; Commission Regulation (EEC) No 3296/92 of 12 November 1992 imposing a provisional anti-dumping duty on imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in Czechoslovakia, Hungary, Poland and the Republic of Croatia and terminating the anti-dumping proceeding with regard to the Republics of Serbia and of Montenegro, the former Yugoslav Republic of Macedonia, the Republic of Bosnia-Herzegovina and the Republic of Slovenia, *O.J.*, 14 November 1992, No L 328/15; Council Regulation (EEC) No 54/93 of 8 January 1993 imposing a definitive duty on imports of synthetic fibres of polyesters originating in India and the Republic of Korea, *O.J.*, 15 January 1993, No L 9/2; Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5; Commission Regulation (EEC) No 2581/93 of 20 September 1993 imposing provisional anti-dumping duties on imports of ferro-silicon originating in South Africa and the People's Republic of China, *O.J.*, 22 September 1993, No L 237/2; Council Regulation (EC) No 3359/93 of 2 December 1993 imposing amended anti-dumping measures on imports of ferro-silicon originating in Russia, Kazakhstan, Ukraine, Iceland, Norway, Sweden, Venezuela and Brazil, *O.J.*, 9 December 1993, No L 302/1; Commission Decision No 67/94/ECSC of 12 January 1994 imposing a provisional anti-dumping duty on imports into the Community of hematite pig iron, originating in Brazil, Poland, Russia and Ukraine, *O.J.*, 15 January 1994, No L 12/5; Commission Regulation (EC) No 371/94 of 17 February 1994 imposing a provisional anti-dumping duty on imports into the Community of large aluminium electrolytic capacitors originating in the Republic of Korea and Taiwan, *O.J.*, 19 February 1994, No L 48/10; Commission Regulation (EC) No

share of the dumped imports¹²⁸⁵, the price level of the dumped imports¹²⁸⁶, the different

534/94 of 9 March 1994 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, *O.J.*, 11 March 1994, No L 68/5 ; Council Regulation (EC) No 621/94 of 17 March 1994 imposing a definitive anti-dumping duty on imports of ferro-silicon originating in South Africa and in the People's Republic of China, *O.J.*, 19 March 1994, No L 77/48 ; Council Regulation (EC) No 643/94 of 21 March 1994 amending Regulation (EEC) No 3068/92 in respect of definitive anti-dumping duties on imports of potassium chloride originating in Belarus, Russia and Ukraine, *O.J.*, 24 March 1994, No L 80/1 ; Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50 ; Commission Regulation (EC) No 3119/94 of 19 December 1994 imposing a provisional anti-dumping duty on imports of ferro-silico-manganese originating in Russia, Ukraine, Brazil and South Africa, *O.J.*, 21 December 1994, No L 330/15 ; Council Regulation (EC) No 3319/94 of 22 December 1994 imposing a definitive anti-dumping duty on imports of urea ammonium nitrate solution originating in Bulgaria and Poland, exported by companies not exempted from the duty, and collecting definitively the provisional duty imposed, *O.J.*, 31 December 1994, No L 350/20).

If the imports are negligible as such, they will not be cumulated with other dumped imports (Council Regulation (EEC) No 1251/91 of 13 May 1991 imposing a definitive anti-dumping duty on imports of audio tapes in cassettes originating in Japan and the Republic of Korea, collecting definitively the provisional duty and terminating the procedure concerning Hong Kong, *O.J.*, 14 May 1991, No L 119/35).

1284 Frequently a short reference to the increase in the volume of the dumped imports is made without any further explanation being provided (see e.g., Commission Regulation (EEC) No 1386/91 of 23 May 1991 imposing a provisional anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in Japan, the People's Republic of China, the Republic of Korea and Thailand, *O.J.*, 28 May 1991, No L 133/20).

Sometimes, more information is given, but one will get none the wiser from it. In *iron or steel coils from Algeria, Mexico and Yugoslavia*, the dumped imports were cumulated because their volume increase was of the same order of magnitude, namely going from 47.8 % for Algerian imports over 59.2 % for Yugoslav imports up to 87.4 % for Mexican imports on a one-year basis (Commission Decision No 163/88/ECSC of 20 January 1988 imposing a provisional anti-dumping duty on imports of certain iron or steel coils, originating in Algeria, Mexico and Yugoslavia, *O.J.*, 22 January 1988, No L 18/31. See also : *small-screen colour television receivers from Hong Kong and the People's Republic of China*, where reference was made to a «similar» rate of increase (Commission Regulation (EEC) No 129/91 of 11 January 1991 imposing a provisional anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China, *O.J.*, 19 January 1991, No L 14/31), and *urea ammonium nitrate solution from Bulgaria and Poland*, where reference was made to «a parallel trend in volumes» (Council Regulation (EC) No 3319/94 of 22 December 1994 imposing a definitive anti-dumping duty on imports of urea ammonium nitrate solution originating in Bulgaria and Poland, exported by companies not exempted from the duty, and collecting definitively the provisional duty imposed, *O.J.*, 31 December 1994, No L 350/20). However, a quite flexible interpretation is given to what are increases of the same order of magnitude. For example, in *urea from Libya, Saudi Arabia, Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia*, the Libyan imports increased by 12 893 % whereas the Czechoslovakian imports increased by only 24 % within the same two-year period ; together with the imports from the other countries, the growth rate of it varied between these two figures, they were cumulated (Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1).

1285 Cumulation has been based on the fact that :

- the market share of the dumped imports of each country separately is significant enough to cause material injury (see e.g., Council Regulation (EEC) No 112/90 of 16 January 1990 imposing a definitive anti-dumping duty on imports of certain compact disc players originating in Japan and the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 17 January 1990, No L 13/21) ;
- the market share of the dumping exporters was not negligible (Commission Regulation (EEC) No 1472/91 of 29 May 1991 imposing a provisional anti-dumping duty on imports of oxalic acid originating in India or China and terminating the anti-dumping proceeding in respect of imports of oxalic acid originating in Czechoslovakia, *O.J.*, 1 June 1991, No L 138/62 ; Council Regulation (EEC) No 738/92 of 23 March 1992 imposing a definitive anti-dumping duty on imports of cotton yarn originating in Brazil and Turkey, *O.J.*, 27 March 1992, No L 82/1), whereby it was said that the relatively low market share held by one of the dumping exporters had to be seen in the light of the anti-dumping measures already in force (Commission Decision 91/512/EEC of 25 July 1991 accepting undertakings given in connection with the review of anti-dumping measures concerning imports of artificial corundum originating in the Soviet Union, Hungary, Poland, Czechoslovakia and the People's Republic of China and in connection with the anti-dumping proceeding concerning imports of artificial corundum originating in Brazil and Yugoslavia, and terminating the investigation, *O.J.*, 2 October 1991, No L 275/27 ; Commission Decision No 891/92/ECSC of 30 March 1992 imposing a provisional anti-dumping duty on imports of certain semi-finished products of alloy steel, originating in Turkey and Brazil, *O.J.*, 9 April 1992, No L 95/26 ; Commission Regulation (EEC) No 1103/93 of 30 April 1993 imposing a provisional anti-dumping duty on imports into the Community of certain electronic weighing scales originating in Singapore and the Republic of Korea, *O.J.*, 6 May 1993, No L 112/20 ; Council Regulation (EEC) No 1189/93 of 14 May 1993 imposing definitive anti-dumping duties on imports of certain seamless pipes and tubes, of iron or non-alloy

steel, originating in Hungary, Poland and the Republic of Croatia and definitively collecting provisional anti-dumping duties, *O.J.*, 15 May 1993, No L 120/34 ; Council Regulation (EEC) No 2861/93 of 18 October 1993 imposing a definitive anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, and collecting definitively the provisional duty imposed, *O.J.*, 21 October 1993, No L 262/4 ; Commission Decision No 67/94/ECSC of 12 January 1994 imposing a provisional anti-dumping duty on imports into the Community of hematite pig iron, originating in Brazil, Poland, Russia and Ukraine, *O.J.*, 15 January 1994, No L 12/5 ; Commission Regulation (EC) No 534/94 of 9 March 1994 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, *O.J.*, 11 March 1994, No L 68/5 ; Commission Regulation (EC) No 892/94 of 21 April 1994 imposing a provisional anti-dumping duty on imports of calcium metal originating in the People's Republic of China and Russia, *O.J.*, 23 April 1994, No L 104/5).

Conversely, dumped imports representing only a small market share (between 0.1 and 0.7 %) have not been cumulated with other dumped imports (Commission Regulation (EEC) No 2818/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports of cotton yarn originating in Brazil, Egypt and Turkey and terminating the anti-dumping proceeding in respect of cotton yarn originating in India and Thailand, *O.J.*, 27 September 1991, No L 271/17), especially if their market share is distinctly lower compared to the other dumped imports (Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7). Moreover, dumped imports have not been cumulated because one of the dumping countries lost major shares of the Community market to the other dumping country (Commission Regulation (EEC) No 2054/91 of 11 July 1991 imposing a provisional anti-dumping duty on imports of dihydrostreptomycin originating in the People's Republic of China, *O.J.*, 13 July 1991, No L 187/23).

1286 Usually a short reference to the price level of the dumped products is made without any further explanation being provided (see e.g., Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries ; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24).

Sometimes, more information is provided. Thus, dumped imports have been cumulated because :

- there was no clear distinction in the price behaviour of the dumping exporters in the Community (Commission Regulation (EC) No 534/94 of 9 March 1994 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, *O.J.*, 11 March 1994, No L 68/5 ; Council Regulation (EC) No 643/94 of 21 March 1994 amending Regulation (EEC) No 3068/92 in respect of definitive anti-dumping duties on imports of potassium chloride originating in Belarus, Russia and Ukraine, *O.J.*, 24 March 1994, No L 80/1) ;
- the price trends of the dumping exporters were similar (Commission Regulation (EC) No 3119/94 of 19 December 1994 imposing a provisional anti-dumping duty on imports of ferro-silico-manganese originating in Russia, Ukraine, Brazil and South Africa, *O.J.*, 21 December 1994, No L 330/15 ; Council Regulation (EC) No 3319/94 of 22 December 1994 imposing a definitive anti-dumping duty on imports of urea ammonium nitrate solution originating in Bulgaria and Poland, exported by companies not exempted from the duty, and collecting definitively the provisional duty imposed, *O.J.*, 31 December 1994, No L 350/20) ;
- the dumping exporters aligned their prices to those of low-priced dumped imports originating in other countries (Commission Decision 83/75/EEC of 15 February 1983 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain fibre building board originating in Brazil, *O.J.*, 19 February 1983, No L 47/30) ;
- the dumped products originating in different countries are marketed in the Community at relatively similar prices (see e.g., Commission Regulation (EC) No 1076/94 of 6 May 1994 imposing a provisional anti-dumping duty on imports of certain watch movements originating in Malaysia and Thailand, *O.J.*, 11 May 1994, No L 120/3) ;
- the price level of the dumped products of one country hardly exceeded that of the other countries (Commission Regulation (EEC) No 129/91 of 11 January 1991 imposing a provisional anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China, *O.J.*, 19 January 1991, No L 14/31) ;
- the prices of the different dumped imports all significantly undercut the Community producers' prices (Commission Regulation (EEC) No 2623/88 of 24 August 1988 imposing a provisional anti-dumping duty on imports of urea originating in Austria, Hungary, Malaysia, Romania, the USA and Venezuela, *O.J.*, 25 August 1988, No L 235/5 ; Commission Regulation (EEC) No 1386/91 of 23 May 1991 imposing a provisional anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in Japan, the People's Republic of China, the Republic of Korea and Thailand, *O.J.*, 28 May 1991, No L 133/20 ; Commission Decision 91/512/EEC of 25 July 1991 accepting undertakings given in connection with the review of anti-dumping measures concerning imports of artificial corundum originating in the Soviet Union, Hungary, Poland, Czechoslovakia and the People's Republic of China and in connection with the anti-dumping proceeding concerning imports of artificial corundum originating in Brazil and Yugoslavia, and terminating the investigation, *O.J.*, 2 October 1991, No L 275/27 ; Council Regulation (EEC) No 1189/93 of 14 May 1993 imposing definitive anti-dumping duties on imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in Hungary, Poland and the Republic of Croatia and definitively collecting provisional anti-dumping duties, *O.J.*, 15 May 1993, No L 120/34).

Conversely, dumped imports have not been cumulated because the prices of the dumped imports coming from one country did not undercut the Community producers' prices, whereas the prices of the dumped imports coming from another country did (Commission Regulation (EEC) No 2054/91 of 11 July 1991 imposing a provisional anti-dumping duty on imports of

interests of new and established exporters¹²⁸⁷, the sales strategy of the dumping exporters¹²⁸⁸ and the existence of a relationship or an association between the dumping

dihydrostreptomycin originating in the People's Republic of China, *O.J.*, 13 July 1991, No L 187/23).

1287 The different interests of new and established exporters have not yet been able to prevent cumulation because :

- the only thing that matters in anti-dumping proceedings is the effect of the dumped imports on the Community market and not the different interests of producers (Council Regulation (EEC) No 96/85 of 14 January 1985 imposing a definitive anti-dumping duty on imports of pentaerythritol originating in Canada, *O.J.*, 16 January 1985, No L 13/1 (corrigendum, *O.J.*, 24 January 1985, No L 20/46)) ;
- the fact that no complaint was lodged before the entering on the market of the new exporter, cannot be considered as a sufficient ground to prevent Community producers from lodging a complaint at a later stage against the new and established exporters (Council Regulation (EEC) No 96/85 of 14 January 1985 imposing a definitive anti-dumping duty on imports of pentaerythritol originating in Canada, *O.J.*, 16 January 1985, No L 13/1 (corrigendum, *O.J.*, 24 January 1985, No L 20/46)) ;
- it is unimportant to know which exporter started causing injury ; it is only important to establish that all exporters contributed to the injury (Council Regulation (EEC) No 96/85 of 14 January 1985 imposing a definitive anti-dumping duty on imports of pentaerythritol originating in Canada, *O.J.*, 16 January 1985, No L 13/1 (corrigendum, *O.J.*, 24 January 1985, No L 20/46)) ;
- the exports of the new exporter reached a level substantially similar to that of the other exporters covered by the proceeding (Council Regulation (EEC) No 450/89 of 20 February 1989 imposing a definitive anti-dumping duty on imports of urea originating in the United States of America or Venezuela and adjusting the definitive anti-dumping duty for Saudi Arabia laid down by Regulation (EEC) No 3339/87, *O.J.*, 24 February 1989, No L 52/1 ; Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1).

1288 Cumulation has been based on :

- the fact that the dumped products originating in different countries were marketed with a similar sales strategy (Commission Regulation (EEC) No 4062/88 of 23 December 1988 imposing a provisional anti-dumping duty on imports of video cassettes and video tape reels originating in the Republic of Korea and Hong Kong, *O.J.*, 24 December 1988, No L 356/47 ; Commission Regulation (EEC) No 1537/90 of 28 May 1990 imposing a provisional anti-dumping duty on imports of potassium permanganate originating in the USSR, *O.J.*, 8 June 1990, No L 145/9 ; Commission Regulation (EEC) No 1386/91 of 23 May 1991 imposing a provisional anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in Japan, the People's Republic of China, the Republic of Korea and Thailand, *O.J.*, 28 May 1991, No L 133/20 (in particular their pricing policy) ; Commission Regulation (EEC) No 2818/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports of cotton yarn originating in Brazil, Egypt and Turkey and terminating the anti-dumping proceeding in respect of cotton yarn originating in India and Thailand, *O.J.*, 27 September 1991, No L 271/17 ; Commission Regulation (EC) No 371/94 of 17 February 1994 imposing a provisional anti-dumping duty on imports into the Community of large aluminium electrolytic capacitors originating in the Republic of Korea and Taiwan, *O.J.*, 19 February 1994, No L 48/10 ; Commission Regulation (EC) No 534/94 of 9 March 1994 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, *O.J.*, 11 March 1994, No L 68/5) ;
- the fact that the behaviour on the Community market of all exporters was similar (Commission Decision No 891/92/ECSC of 30 March 1992 imposing a provisional anti-dumping duty on imports of certain semi-finished products of alloy steel, originating in Turkey and Brazil, *O.J.*, 9 April 1992, No L 95/26 ; Commission Regulation (EEC) No 2581/93 of 20 September 1993 imposing provisional anti-dumping duties on imports of ferro-silicon originating in South Africa and the People's Republic of China, *O.J.*, 22 September 1993, No L 237/2 ; Council Regulation (EC) No 3359/93 of 2 December 1993 imposing amended anti-dumping measures on imports of ferro-silicon originating in Russia, Kazakhstan, Ukraine, Iceland, Norway, Sweden, Venezuela and Brazil, *O.J.*, 9 December 1993, No L 302/1 ; Commission Decision No 67/94/ECSC of 12 January 1994 imposing a provisional anti-dumping duty on imports into the Community of hematite pig iron, originating in Brazil, Poland, Russia and Ukraine, *O.J.*, 15 January 1994, No L 12/5 ; Council Regulation (EC) No 621/94 of 17 March 1994 imposing a definitive anti-dumping duty on imports of ferro-silicon originating in South Africa and in the People's Republic of China, *O.J.*, 19 March 1994, No L 77/48) ;
- the use of comparable sales channels for selling the dumped products on the Community market (Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1 ; Commission Decision 90/196/EEC of 10 April 1990 terminating the anti-dumping proceeding concerning imports of methenamine (hexamethylenetetramine) originating in Hungary and Yugoslavia and accepting undertakings offered in connection with the proceeding concerning imports of methenamine (hexamethylenetetramine) originating in Bulgaria, Czechoslovakia, Poland and Romania, *O.J.*, 24 April 1990, No L 104/14 ; Commission Regulation (EEC) No 3617/90 of 11 December 1990 imposing a provisional anti-dumping duty on imports of certain welded tubes of iron or non-alloy steel, originating in Turkey or in Venezuela and accepting undertakings offered in connection with such imports, *O.J.*, 15 December 1990, No L 351/17 ; Commission Regulation (EEC) No 129/91 of 11 January 1991 imposing a provisional anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China, *O.J.*, 19 January 1991, No L 14/31 ; Council Regulation (EEC) No 1251/91 of 13 May 1991 imposing a definitive anti-dumping duty on imports of audio tapes in cassettes originating in Japan and the Republic of Korea, collecting definitively the provisional duty and terminating the procedure concerning Hong Kong, *O.J.*, 14 May 1991, No L 119/35 ; Commission Regulation (EEC) No 1472/91 of 29 May

exporters¹²⁸⁹. Factors concerning the economic structures, tax systems, raw material subsidies and manufacturing procedures of the countries coming under the anti-dumping proceeding are not strictly relevant to the question of cumulation¹²⁹⁰. All those factors on the basis of which the European anti-dumping authorities have applied country cumulation, may be advanced for examining the «conditions of competition» referred to by condition (b) of GATT and EC anti-dumping law. For instance, the comparability of the dumped product, their simultaneous presence on the market, their presence in the same geographical market and their identical price levels will all show that there is competition between the dumped products. Thus, European anti-dumping case law will probably remain unchanged.

It should, however, be regretted that GATT and EC anti-dumping law have but codified European anti-dumping case law. Indeed, there are two problems with European anti-dumping case law. First, only exceptionally, the factors which are usually considered relevant to cumulation, prevent

1991 imposing a provisional anti-dumping duty on imports of oxalic acid originating in India or China and terminating the anti-dumping proceeding in respect of imports of oxalic acid originating in Czechoslovakia, *O.J.*, 1 June 1991, No L 138/62 ; Commission Regulation (EEC) No 1956/92 of 7 July 1992 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in India and the Republic of Korea, *O.J.*, 16 July 1992, No L 197/25 ; Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5 ; Council Regulation (EC) No 821/94 of 12 April 1994 imposing a definitive anti-dumping duty on imports of silicon carbide, originating in the People's Republic of China, Poland, the Russian Federation and Ukraine, *O.J.*, 13 April 1994, No L 94/21 ; Commission Regulation (EC) No 892/94 of 21 April 1994 imposing a provisional anti-dumping duty on imports of calcium metal originating in the People's Republic of China and Russia, *O.J.*, 23 April 1994, No L 104/5 ; Commission Regulation (EC) No 1076/94 of 6 May 1994 imposing a provisional anti-dumping duty on imports of certain watch movements originating in Malaysia and Thailand, *O.J.*, 11 May 1994, No L 120/3 ; Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries ; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24 ; Commission Regulation (EC) No 1506/94 of 27 June 1994 imposing provisional duties on imports of urea ammonium nitrate solution originating in Bulgaria and Poland, *O.J.*, 30 June 1994, No L 162/16 ; Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50 ;

- the fact that the majority of the imports coming from the dumping countries under investigation are made through the same company which is jointly owned by the dumping exporters (Commission Regulation (EEC) No 3421/90 of 26 November 1990 imposing a provisional anti-dumping duty on imports of aspartame originating in Japan and the United States of America, *O.J.*, 29 November 1990, No L 330/16 ; Council Regulation (EEC) No 1391/91 of 27 May 1991 imposing a definitive anti-dumping duty on imports of of aspartame originating in Japan and the United States of America, *O.J.*, 29 May 1991, No L 134/1) ;

- the fact that the products are sold under the same brand name and identical conditions (Commission Regulation (EEC) No 3421/90 of 26 November 1990 imposing a provisional anti-dumping duty on imports of aspartame originating in Japan and the United States of America, *O.J.*, 29 November 1990, No L 330/16).

¹²⁸⁹ The dumped imports of exporters located in different countries have been cumulated because :

- these exporters belonged to the same holding company (Commission Decision 90/138/EEC of 16 March 1990 accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of certain diesel engines originating in Finland and Sweden, and terminating the investigation, *O.J.*, 22 March 1990, No L 76/28) ;

- of the close relationship between the dumping exporters (Commission Regulation (EEC) No 3421/90 of 26 November 1990 imposing a provisional anti-dumping duty on imports of aspartame originating in Japan and the United States of America, *O.J.*, 29 November 1990, No L 330/16 ; Council Regulation (EEC) No 1391/91 of 27 May 1991 imposing a definitive anti-dumping duty on imports of of aspartame originating in Japan and the United States of America, *O.J.*, 29 May 1991, No L 134/1).

¹²⁹⁰ Council Regulation (EEC) No 3434/91 of 25 November 1991 imposing a definitive anti-dumping duty on imports of oxalic acid originating in India or the People's Republic of China, *O.J.*, 28 November 1991, No L 326/6.

country cumulation¹²⁹¹. Those exceptions are, however, unpredictable : either the factors taken into account result in contradictory conclusions regarding cumulation and the European anti-

1291 No country cumulation has been made because :

- in respect of the factor «comparability of the dumped products» :
 - the dumped products were showing different physical and quality characteristics (Commission Regulation (EEC) No 1696/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 June 1988, No L 151/47) ;
 - direct competition with one another was lacking, because, on the basis of quality differences, they were aimed at different purchaser groups on the Community market (Commission Decision 86/100/EEC of 15 April 1986 terminating the anti-dumping proceeding concerning imports of ball bearings and tapered roller bearings originating in Poland, Romania and the Soviet Union, *O.J.*, 18 April 1986, No L 102/31) ;
- in respect of the factor «increase in the volume of the dumped imports» :
 - the comparable level of volume of the imports of the two dumping countries was the result of diametrically opposed progressions ; in particular, the imports from one country had increased while the imports from the other country had declined in volume (Commission Regulation (EEC) No 763/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten carbide and fused tungsten carbide originating in the People's Republic of China and terminating the anti-dumping proceeding concerning imports of those products from the Republic of Korea, *O.J.*, 30 March 1990, No L 83/36) ;
 - the volume of the dumped imports of one country, contrary to the other dumped imports, has declined (it has to be noted that the decline in the volume of the dumped imports was only convincing for not cumulating within the framework of the threat of injury examination but not within the framework of the actual injury examination) (Commission Decision 87/236/EEC of 10 April 1987 terminating the anti-dumping proceeding on imports of synthetic fibres of polyesters originating in the German Democratic Republic, Romania, Turkey and Yugoslavia, *O.J.*, 15 April 1987, No L 103/38) ;
- in respect of the factor «market share of the dumped imports» :
 - the market shares are considered to be minimal and, therefore, not to cause injury, so that the dumped imports in question are excluded from the injury finding and, consequently, cannot be cumulated with the other dumped imports (Commission Regulation (EEC) No 171/82 of 25 January 1982 imposing a provisional anti-dumping duty on imports of oxalic acid originating in China and Czechoslovakia, *O.J.*, 27 January 1982, No L 19/26 (corrigendum, *O.J.*, 9 February 1982, No L 34/11) ; Commission Decision 82/335/EEC of 18 May 1982 accepting an undertaking offered by the Czechoslovakian producer and terminating the anti-dumping procedure concerning oxalic acid originating in Czechoslovakia, Hungary and the German Democratic Republic, *O.J.*, 27 May 1982, No L 148/51 ; Commission Regulation (EEC) No 1633/82 of 23 June 1982 imposing a provisional anti-dumping duty on imports of fibre building board (hardboard) originating in Romania, repealing Commission Decision No 80/564/EEC of 4 June 1980 and accepting undertakings in connection with the proceeding in respect of imports of fibre building board from Czechoslovakia, Finland, Hungary, Norway, Poland, Spain, Sweden and the Soviet Union and terminating the proceeding with regard to those countries and Bulgaria, *O.J.*, 25 June 1982, No L 181/19 ; Commission Decision 90/383/EEC of 13 July 1990 terminating the anti-dumping proceeding concerning imports of NPK fertilizers originating in Hungary, Poland, Romania and Yugoslavia, *O.J.*, 20 July 1990, No L 188/63 ; Council Regulation (EEC) No 1251/91 of 13 May 1991 imposing a definitive anti-dumping duty on imports of audio tapes in cassettes originating in Japan and the Republic of Korea, collecting definitively the provisional duty and terminating the procedure concerning Hong Kong, *O.J.*, 14 May 1991, No L 119/35 ; Commission Regulation (EEC) No 2818/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports of cotton yarn originating in Brazil, Egypt and Turkey and terminating the anti-dumping proceeding in respect of cotton yarn originating in India and Thailand, *O.J.*, 27 September 1991, No L 271/17) ;
 - the same level of market share held by the different dumping countries - a market share which is considered significant enough to cause material injury - is obtained by diametrically opposed progressions (Commission Regulation (EEC) No 763/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten carbide and fused tungsten carbide originating in the People's Republic of China and terminating the anti-dumping proceeding concerning imports of those products from the Republic of Korea, *O.J.*, 30 March 1990, No L 83/36) ;
- in respect of the fact «price level of the dumped imports» :
 - some dumped products were imported at higher prices than those of the other dumped products (Commission Regulation (EEC) No 1696/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 June 1988, No L 151/47) ;
 - the margin by which the dumped imports undercut the Community producers' prices is significantly different depending on the origin of the dumped imports (Commission Regulation (EEC) No 763/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten carbide and fused tungsten carbide originating in the People's Republic of China and terminating the anti-dumping proceeding concerning imports of those products from the Republic of Korea, *O.J.*, 30 March 1990, No L 83/36) ;
 - the prices of certain dumped imports declined, while the prices of other dumped imports increased or remained stable (Commission Regulation (EEC) No 763/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten carbide and fused tungsten carbide originating in the People's Republic of China and terminating the anti-dumping proceeding concerning imports of those products from the Republic of Korea, *O.J.*, 30 March 1990, No L 83/36).

dumping authorities may freely choose which of them will be decisive¹²⁹², or there is an explanation why, despite of factors pointing in the direction of no-cumulation, cumulation was necessary¹²⁹³, at least if the European anti-dumping authorities take the trouble to provide an explanation¹²⁹⁴.

The second and major problem with country cumulation, though, is not the unpredictability. It is the illegal discrimination between dumping exporters who are lucky not to have dumping competitors on the Community market, and those who are not so lucky. The discrimination is illegal because practically all factors taken into account, are irrelevant to the question of country cumulation. Indeed, they do not prevent dumping exporters from being held liable for injury which they did not cause. Exporters should be held liable only for the injury they have caused themselves. If they only contribute to the injury caused by other exporters, they should be held liable only for their contribution to the injury and not for the entire injury, unless it is proven that

1292 Dumped imports have been cumulated notwithstanding the fact :

- that one dumping country was offering but a limited range of the product concentrated in the lower segment of the market ; the cumulation was based on the fact that the dumped products of that country competed with the products from the Community and other dumping and non-dumping countries (Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27) ;
- that the dumped imports of certain countries had stabilized or declined ; the cumulation was based on the comparability of the dumped products (Council Regulation (EEC) No 864/87 of 23 March 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union, and definitively collecting the amounts secured as provisional duties, *O.J.*, 27 March 1987, No L 83/1) ;
- that there was a fall in the volume of the dumped imports ; the cumulation was based on the fact that the absolute volume of the dumped imports lay notably higher than that achieved by other exporters (Commission Regulation (EEC) No 1696/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 June 1988, No L 151/47 ; Commission Regulation (EEC) No 2623/88 of 24 August 1988 imposing a provisional anti-dumping duty on imports of urea originating in Austria, Hungary, Malaysia, Romania, the USA and Venezuela, *O.J.*, 25 August 1988, No L 235/5).

1293 With regard to the factor «increase in the volume of the dumped imports» :

- the decline in the volume of the dumped imports did not prevent cumulation because the decline was not continuous over the entire period taken into consideration ; instead the fact that the volume of the dumped imports fluctuated was decisive (Council Regulation (EEC) No 96/85 of 14 January 1985 imposing a definitive anti-dumping duty on imports of pentaerythritol originating in Canada, *O.J.*, 16 January 1985, No L 13/1 (corrigendum, *O.J.*, 24 January 1985, No L 20/46)) ;
- dumped imports have been cumulated because during the last part of the reported period their volume had stabilized after a period of decline (Commission Regulation (EEC) No 2317/85 of 12 August 1985 imposing a provisional anti-dumping duty on imports of roller chains for cycles originating in the USSR and the People's Republic of China, *O.J.*, 14 August 1985, No L 217/7) ;
- dumped imports have not been cumulated though their volumes were at a comparable level ; they were not cumulated because their comparable level of volume was the result of diametrically opposed progressions, namely the imports from one country had increased while the imports from the other country had declined in volume (Commission Regulation (EEC) No 763/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten carbide and fused tungsten carbide originating in the People's Republic of China and terminating the anti-dumping proceeding concerning imports of those products from the Republic of Korea, *O.J.*, 30 March 1990, No L 83/36).

1294 Sometimes no explanation is provided. In this respect, *synthetic fibres of polyesters from the German Democratic Republic, Romania, Turkey and Yugoslavia* may be referred to, a case in which, within the framework of the actual injury examination, the imports from all the four dumping countries were cumulated. However, within the framework of the threat of injury examination, the imports from the German Democratic Republic were disregarded because, contrary to the other dumped imports, the volume of the East-German imports had declined (Commission Decision 87/236/EEC of 10 April 1987 terminating the anti-dumping proceeding on imports of synthetic fibres of polyesters originating in the German Democratic Republic, Romania, Turkey and Yugoslavia, *O.J.*, 15 April 1987, No L 103/38). No explanation was offered to account for the fact that the East German imports, despite the decline in their volume, were cumulated with the other dumped imports within the framework of the actual injury examination.

they have cooperated with each other against the Community industry. Indeed, imports should be cumulated only if they have a collective injurious effect on the Community industry, i.e. whether the cooperation between the exporters results in injury additional to the injury each exporter caused individually. Only the factors «sales strategy of the dumping exporters» and «associated exporters» - which are but two of the factors the European anti-dumping authorities take into account as to cumulation and which the European anti-dumping authorities only rarely rely on - may be upheld as conclusive proof of cooperation between the dumping exporters. All other factors, however, do not provide any information as to the question of whether the exporters cooperated with each other. Since, on their basis, it cannot be assessed whether the dumped imports have a collective injurious effect, they are irrelevant and result in illegal discrimination : dumping exporters who face competition from other dumping exporters on the Community market, but who themselves do not injure the Community industry, will probably be found to cause injury when the other dumping exporters are causing injury ; the same dumping exporters will not be found to cause injury if they do not face such competition. The presence of other dumping exporters, however, is no lawful reason for the unequal treatment.

Though it may be expected that GATT and EC anti-dumping law will not result in a modification of European anti-dumping case law, they do not prevent it from being altered. Indeed, the concept «conditions of competition» may be interpreted as referring to the degree of collusion between the dumping exporters against the Community producers. On the other hand not much hope should be vested in condition (a) on *de minimis* dumping margins and negligible imports. Though this condition partly prevents imports which are assumed not to cause injury, from being cumulated with other imports and, thus, from being held to cause injury, it does not guarantee that imports will be cumulated only if the dumping exporters cooperate against the Community producers. Indeed, the fact that imports are being dumped at a more than *de minimis* dumping margin and that their volume is more than negligible, does not prove that the dumping exporters collude against the Community industry.

4.2.2. *Other factors causing injury*

Injury caused by «other factors» must not be attributed to the dumping (Article 3.5. GATT Anti-dumping Code ; Article 3(7) basic EC Regulation ; Article 4(1) basic ECSC Decision). GATT and European anti-dumping law enumerate several «other factors» (the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the pattern of consumption, trade restrictive practices of and competition between foreign and Community producers, developments in technology and the export performance and productivity of the Community industry). Since that enumeration is not exhaustive (Article 3.5. GATT Anti-dumping Code («*inter alia*») ; Article 3(7) basic EC Regulation («*inter alia*») ; Article 4(1) basic ECSC Decision («such as»)), European anti-dumping case law takes into account also not enumerated

factors (the volume and prices of imports sold at dumping prices, intra-community trade, the fierce competition of other products, the relocation of Community-owned production facilities to third countries, the purchasing policy of the economic group to which the Community producers belong, over-capacity, lack of interest on the part of the Community industry, the coincidence of trade policy measures, the price policy of Member States, internal problems of the Community producers, the recovery in economic activity or economic recession, and the depreciation of the currency in which the sales of the like product are made). In general, «other factors» may be defined as each factor, except for the dumped imports subjected to the anti-dumping proceeding and the dumped imports cumulated with the dumped imports subjected to the anti-dumping proceeding.

The majority of these factors (the prices of imports not sold at dumping prices¹²⁹⁵, the volume

¹²⁹⁵ With regard to the prices of non-dumped imports, the only constant element in European anti-dumping case law is that there is always a reason why they are not a ground for not finding injurious dumping :

- the volume of the non-dumped imports overrules the negative effect of their low prices (Commission Regulation (EEC) No 2999/80 of 20 November 1980 imposing a provisional anti-dumping duty on vinyl acetate monomer originating in the United States of America, *O.J.*, 21 November 1980, No L 311/13 ; Commission Decision 82/881/EEC of 23 December 1982 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of perchlorethylene originating in Czechoslovakia, Romania, Spain and the United States of America and terminating that proceeding, *O.J.*, 30 December 1982, No L 371/47 ; Commission Regulation (EEC) No 3019/86 of 30 September 1986 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania and the USSR, *O.J.*, 1 October 1986, No L 280/68 ; Council Regulation (EEC) No 864/87 of 23 March 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union, and definitively collecting the amounts secured as provisional duties, *O.J.*, 27 March 1987, No L 83/1) ;
- the prices of the non-dumped imports are considered not to be too low because :
 - they are higher than those of the dumped imports (see e.g., Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries ; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24) ;
 - they respect the minimum price levels set by the Commission within the framework of its structural adjustment policy for the European steel sector (see e.g., Commission Decision No 708/89/ECSC of 17 March 1989 imposing a provisional anti-dumping duty on imports of certain flat-rolled products of iron or non-alloy steel, cold-rolled, originating in Yugoslavia, *O.J.*, 21 March 1989, No L 78/14) ;
 - they are similar to (see e.g., Council Regulation (EEC) No 90/82 of 18 January 1982 imposing a definitive anti-dumping duty on phenol originating in the United States of America, *O.J.*, 18 January 1982, No L 12/1 ; Commission Regulation (EEC) No 797/93 of 30 March 1993 imposing a provisional anti-dumping duty on imports of ferro-chrome with a carbon content by weight of max. 0,5 % (low carbon ferro-chrome) originating in Kazakhstan, Russia and Ukraine, *O.J.*, 2 April 1993, No L 80/8 ; Council Regulation (EC) No 821/94 of 12 April 1994 imposing a definitive anti-dumping duty on imports of silicon carbide, originating in the People's Republic of China, Poland, the Russian Federation and Ukraine, *O.J.*, 13 April 1994, No L 94/21) or do not significantly undercut (Commission Regulation (EEC) No 763/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten carbide and fused tungsten carbide originating in the People's Republic of China and terminating the anti-dumping proceeding concerning imports of those products from the Republic of Korea, *O.J.*, 30 March 1990, No L 83/36 ; Council Regulation (EEC) No 2737/90 of 24 September 1990 imposing a definitive anti-dumping duty on imports of tungsten carbide and fused tungsten carbide originating in the People's Republic of China and definitively collecting the provisional duty, *O.J.*, 27 September 1990, No L 264/7 (corrigendum, *O.J.*, 24 October 1990, No L292/30) ; Commission Regulation (EEC) No 2805/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports into the Community of certain thermal paper originating in Japan, *O.J.*, 26 September 1991, No L 270/15 ; Council Regulation (EEC) No 3836/91 of 19 December 1991 imposing a definitive anti-dumping duty on imports of dihydrostreptomycin originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty, *O.J.*, 31 December 1991, No 362/1 ; Commission Regulation (EEC) No 1451/92 of 2 June 1992 imposing a provisional anti-dumping duty on imports into the Community of certain large electrolytic aluminium capacitors originating in Japan, *O.J.*, 4 June 1992, No L 152/22 (corrigendum, *O.J.*, 17 June 1992, No L 163/27) ; Council Regulation (EEC) No 3068/92 of 23 October 1992 imposing a definitive anti-dumping duty on imports of potassium chloride originating in Belarus, Russia or Ukraine, *O.J.*, 24 October 1992, No L 308/41 ;

and prices of imports sold at dumping prices¹²⁹⁶, intra-community trade¹²⁹⁷, the fierce

Commission Regulation (EEC) No 550/93 of 5 March 1993 imposing a provisional anti-dumping duty on imports of bicycles originating in the People's Republic of China, *O.J.*, 11 March 1993, No L 58/12 ; Commission Regulation (EEC) No 797/93 of 30 March 1993 imposing a provisional anti-dumping duty on imports of ferro-chrome with a carbon content by weight of max. 0,5 % (low carbon ferro-chrome) originating in Kazakhstan, Russia and Ukraine, *O.J.*, 2 April 1993, No L 80/8 ; Council Regulation (EEC) No 2717/93 of 28 September 1993 imposing a definitive anti-dumping duty on imports of ferro-chrome with a carbon content by weight of maximum 0,5 % (low carbon ferro-chrome), originating in Kazakhstan, Russia and Ukraine, *O.J.*, 2 October 1993, No L 246/1) the prices obtained by the Community industry (and are consequently undercut by the prices of the dumped imports) ;

there is no indication that they are dumping prices (Council Regulation (EEC) No 1048/90 of 25 April 1990 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 27 April 1990, No L 107/56 (corrigendum, *O.J.*, 24 May 1990, No L 133/92) ; Commission Regulation (EEC) No 3617/90 of 11 December 1990 imposing a provisional anti-dumping duty on imports of certain welded tubes of iron or non-alloy steel, originating in Turkey or in Venezuela and accepting undertakings offered in connection with such imports, *O.J.*, 15 December 1990, No L 351/17 ; Commission Decision 91/392/EEC of 21 June 1991 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain asbestos cement pipes originating in Turkey, and terminating the investigation, *O.J.*, 31 July 1991, No L 209/37 ; Commission Regulation (EEC) No 2818/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports of cotton yarn originating in Brazil, Egypt and Turkey and terminating the anti-dumping proceeding in respect of cotton yarn originating in India and Thailand, *O.J.*, 27 September 1991, No L 271/17 ; Commission Decision 91/512/EEC of 25 July 1991 accepting undertakings given in connection with the review of anti-dumping measures concerning imports of artificial corundum originating in the Soviet Union, Hungary, Poland, Czechoslovakia and the People's Republic of China and in connection with the anti-dumping proceeding concerning imports of artificial corundum originating in Brazil and Yugoslavia, and terminating the investigation, *O.J.*, 2 October 1991, No L 275/27 ; Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7 ; Commission Regulation (EEC) No 313/92 of 4 February 1992 imposing a provisional anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in South Korea, *O.J.*, 11 February 1992, No L 34/8 ; Commission Decision No 891/92/ECSC of 30 March 1992 imposing a provisional anti-dumping duty on imports of certain semi-finished products of alloy steel, originating in Turkey and Brazil, *O.J.*, 9 April 1992, No L 95/26 ; Council Regulation (EC) No 821/94 of 12 April 1994 imposing a definitive anti-dumping duty on imports of silicon carbide, originating in the People's Republic of China, Poland, the Russian Federation and Ukraine, *O.J.*, 13 April 1994, No L 94/21) ;

they are distinctly higher than the dumped prices (Commission Regulation (EEC) No 3296/92 of 12 November 1992 imposing a provisional anti-dumping duty on imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in Czechoslovakia, Hungary, Poland and the Republic of Croatia and terminating the anti-dumping proceeding with regard to the Republics of Serbia and of Montenegro, the former Yugoslav Republic of Macedonia, the Republic of Bosnia-Herzegovina and the Republic of Slovenia, *O.J.*, 14 November 1992, No L 328/15) ;

they have increased considerably (Commission Regulation (EEC) No 512/84 of 27 February 1984 imposing a provisional anti-dumping duty on imports of vinyl acetate monomer originating in Canada, *O.J.*, 29 February 1984, No L 58/17) ;

they remained relatively stable while the dumped prices dropped considerably (Commission Decision 91/142/EEC of 15 March 1991 terminating the anti-dumping proceeding concerning imports of Atlantic salmon originating in Norway, *O.J.*, 16 March 1991, No L 69/32 (corrigendum, *O.J.*, 21 March 1991, No L 75/64)) ;

they have increased while the dumped prices have decreased (Commission Regulation (EEC) No 1472/91 of 29 May 1991 imposing a provisional anti-dumping duty on imports of oxalic acid originating in India or China and terminating the anti-dumping proceeding in respect of imports of oxalic acid originating in Czechoslovakia, *O.J.*, 1 June 1991, No L 138/62) ;

the wide variation in the level of prices, as they appear in the statistics, do not allow to draw any conclusion (Commission Regulation (EC) No 1076/94 of 6 May 1994 imposing a provisional anti-dumping duty on imports of certain watch movements originating in Malaysia and Thailand, *O.J.*, 11 May 1994, No L 120/3).

The fact that the non-dumping prices were similar to the prices charged by the Community producers precluded even a finding of no injury, notwithstanding a substantial increase in the volume of the non-dumped imports (Commission Regulation (EEC) No 2017/81 of 15 July 1981 imposing a provisional anti-dumping duty on phenol originating in the United States of America, *O.J.*, 18 July 1981, No L 195/22 ; Council Regulation (EEC) No 90/82 of 18 January 1982 imposing a definitive anti-dumping duty on phenol originating in the United States of America, *O.J.*, 18 January 1982, No L 12/1).

Even the fact that, according to the European anti-dumping authorities, it is «virtually inconceivable» that Community producers would jeopardize their sales of products manufactured in the Community by selling competing products manufactured in their production facilities located in third countries and imported by them at low prices, was sufficient to show that the injury was not caused by the prices of these imports from third countries (Commission Regulation (EEC) No 313/92 of 4 February 1992 imposing a provisional anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in South Korea, *O.J.*, 11 February 1992, No L 34/8). Such imports are a legitimate and justified reaction of self-defence against dumped imports in order to try to maintain their competitiveness on the Community market (Council Regulation (EEC) No 2306/92 of 4 August 1992 imposing a definitive anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in the Republic of Korea, *O.J.*, 7 August 1992, No L 222/8 (corrigendum, *O.J.*, 21 January 1993, No L 13/20)).

1296 If no cumulation is made, the dumped imports originating in other countries are taken into consideration as «other factor». Sometimes, the dumped imports from other countries are not explicitly taken into account as «other factor», see e.g., : *saccharin and its salts from China and the United States of America*, where no explicit reference is made to the dumped imports from the Republic of Korea (which are the object of another anti-dumping proceeding, see : Commission Regulation (EEC) No 3171/80 of 4 December 1980 repealing a national anti-dumping duty on saccharin and its salts originating in the Republic of Korea imposed under the transitional provisions of the Act of Accession, *O.J.*, 9 December 1980, No L 331/25) (Commission Decision 80/1116/EEC of 4 December 1980 accepting undertakings offered by the exporters of saccharin and its salts originating in China and the United States of America and terminating the proceedings concerning imports of saccharin and its salts from China, Japan and the United States of America, *O.J.*, 9 December 1980, No L 331/41). It is, however, not excluded that the dumped imports from the Republic of Korea were subsumed under the factor «the volume and prices of other imports».

Cumulation usually increases the probability of a finding of injury. However, even if no cumulation is made, the fact that other imports are also dumped on the Community market does usually not prevent a finding of injurious dumping (Commission Decision 80/875/EEC of 17 September 1980 accepting undertakings given by Romanian exporters in connection with the anti-dumping proceeding concerning imports of certain tubes of iron or steel originating in that country, and terminating that proceeding, *O.J.*, 20 September 1980, No L 249/24 (corrigendum, *O.J.*, 7 October 1980, No L 263/8); *O.J.*, 9 December 1980, No L 331/25; *O.J.*, 9 December 1980, No L 331/41; Council Regulation (EEC) No 2978/83 of 24 October 1983 amending Regulation (EEC) No 191/80 imposing a definitive anti-dumping duty on lithium hydroxide originating in the United States of America and the Soviet Union, *O.J.*, 26 October 1983, No L 294/3; Commission Decision 83/522/EEC of 24 October 1983 accepting the undertaking given in connection with the anti-dumping proceeding in respect of imports of lithium hydroxide originating in the People's Republic of China and terminating that proceeding, *O.J.*, 26 October 1983, No L 294/29; *O.J.*, 29 February 1984, No L 58/17; Commission Decision 84/404/EEC of 25 July 1984 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of copper sulphate originating in Yugoslavia and terminating the proceeding, *O.J.*, 11 August 1984, No L 215/16; *O.J.*, 7 September 1984, No L 239/8; *O.J.*, 18 October 1984, No L 275/12; Council Regulation (EEC) No 1244/86 of 28 April 1986 imposing a definitive anti-dumping duty on imports of copper sulphate originating in Yugoslavia, *O.J.*, 30 April 1986, No L 113/4; Commission Decision 86/232/EEC of 9 June 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of hardboard originating in Argentina, Switzerland and Yugoslavia and terminating the investigation, *O.J.*, 12 June 1986, No L 157/61; *O.J.*, 24 September 1986, No L 272/29; *O.J.*, 14 April 1987, No L 102/5; *O.J.*, 7.11.1987, L 317/1; *O.J.*, 18.3.1988, L 72/12; Commission Regulation (EEC) No 1613/90 of 13 June 1990 imposing a provisional anti-dumping duty on imports of ball bearings with a greatest external diameter not exceeding 30 mm originating in Thailand, *O.J.*, 16 June 1990, No L 152/24; Commission Regulation (EEC) No 1808/92 of 30 June 1992 imposing a provisional anti-dumping duty on imports of ferro-silicon originating in Poland and Egypt, *O.J.*, 3 July 1992, No L 183/8). It is sufficient that the dumped imports under investigation themselves cause injury (see : Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7; Council Regulation (EEC) No 2305/92 of 4 August 1992 imposing a definitive anti-dumping duty on imports of silicon metal originating in Brazil and definitively collecting the amounts secured by way of the provisional anti-dumping duty, *O.J.*, 7 August 1992, No L 222/1; Council Regulation (EEC) No 993/93 of 26 April 1993 imposing a definitive anti-dumping duty on imports of certain electronic weighing scales originating in Japan, *O.J.*, 29 April 1993, No L 104/4; Commission Regulation (EEC) No 1103/93 of 30 April 1993 imposing a provisional anti-dumping duty on imports into the Community of certain electronic weighing scales originating in Singapore and the Republic of Korea, *O.J.*, 6 May 1993, No L 112/20; Commission Regulation (EEC) No 2477/93 of 6 September 1993 imposing a provisional anti-dumping duty on imports of certain photo albums originating in the People's Republic of China, *O.J.*, 9 September 1993, No L 228/16; Commission Regulation (EEC) No 2581/93 of 20 September 1993 imposing provisional anti-dumping duties on imports of ferro-silicon originating in South Africa and the People's Republic of China, *O.J.*, 22 September 1993, No L 237/2; Council Regulation (EC) No 3359/93 of 2 December 1993 imposing amended anti-dumping measures on imports of ferro-silicon originating in Russia, Kazakhstan, Ukraine, Iceland, Norway, Sweden, Venezuela and Brazil, *O.J.*, 9 December 1993, No L 302/1; Commission Regulation (EC) No 371/94 of 17 February 1994 imposing a provisional anti-dumping duty on imports into the Community of large aluminium electrolytic capacitors originating in the Republic of Korea and Taiwan, *O.J.*, 19 February 1994, No L 48/10; Commission Regulation (EC) No 534/94 of 9 March 1994 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, *O.J.*, 11 March 1994, No L 68/5).

See also : *DRAMs from Japan*, where injurious dumping was found. Nevertheless, there were grounds for believing that imports from third countries were also dumped. However, no anti-dumping proceeding was initiated against these other dumped imports (Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79; corrigendum, *O.J.*, 10 February 1990, No L 38/44)). One year later, though, an anti-dumping proceeding was initiated against one of those third countries (Notice of initiation of an anti-dumping proceeding concerning imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea, *O.J.*, 6 March 1991, No C 57/9).

Only in one anti-dumping case the dumped imports originating in other countries, as «other factor», prevented the dumping from being found to cause material injury. Indeed, in *furfural from the Dominican Republic, Spain and the People's Republic of China*, the Spanish dumped imports were not held to cause injury because their volume was negligible compared to the quantity of the Chinese dumped imports and the Dominican non-dumped imports (Commission Decision 81/493/EEC of 6 July 1981 terminating the anti-dumping procedure concerning imports of furfural originating in the Dominican Republic, Spain and the People's Republic of

China, *O.J.*, 11 July 1981, No L 189/57).

When the Community producers, in view of the low prices of the dumped products subject to the anti-dumping proceeding, are forced to purchase them, but do not resell them, the Community producers are not considered to cause «self-inflicted» injury to themselves and, consequently, these dumped imports do not constitute «other factors» (Commission Regulation (EEC) No 2686/92 of 16 September 1992 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea, *O.J.*, 17 September 1992, No L 272/13).

1297 If, pursuant to Article 5(1)(ii) basic EC Regulation and Article 4(5) basic ECSC Decision, the Community market is split into several regional markets, the imports from the rest of the Community into a regional market may be considered to be an «other factor». In view of the definition of a regional market, i.e., a market the demand of which is not to any substantial degree supplied by producers of the product located elsewhere in the Community, it is rather impossible to consider these intra-Community imports as cause of the injury. As a consequence, intra-community trade has not yet been a convincing «other factor» on the basis of which it may be concluded that the dumping did not cause the injury (Commission Decision 86/36/EEC of 26 February 1986 accepting undertakings entered into in connection with the anti-dumping proceeding concerning imports into Greece of certain categories of glass originating in Turkey, Yugoslavia, Romania, Bulgaria, Hungary and Czechoslovakia and terminating the investigation, *O.J.*, 28 February 1986, No L 51/73).

However, in *asbestos cement pipes from Turkey*, the market share on the regional market held by the producers located elsewhere in the Community amounted to 5.5 % and increased sharply by 98.2 %. These figures are high enough to find dumped imports to cause injury (*supra*, 447). Nevertheless, the imports on the regional market by the producers located elsewhere in the Community were not found to cause injury. In order to reach that conclusion, it was underscored that the imports of the producers located elsewhere in the Community were made at higher prices than those charged by the Community producers located on the regional market, and were concentrated in certain segments of that market (Commission Decision 91/392/EEC) of 21 June 1991 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain asbestos cement pipes originating in Turkey, and terminating the investigation, *O.J.*, 31 July 1991, No L 209/37).

Intra-community trade is also taken into account in cases in which the Community market is not divided into regional markets. This was the case when the Community industry did not comprise all the Community producers. In such a case, it is investigated :
- whether the Community industry suffers injury from the other Community producers not included in the Community industry.

The competition from these other Community producers has not yet prevented the finding of injurious dumping because :

- their sales were declining and their prices were higher than the prices charged by the Community industry (Commission Regulation (EEC) No 1472/91 of 29 May 1991 imposing a provisional anti-dumping duty on imports of oxalic acid originating in India or China and terminating the anti-dumping proceeding in respect of imports of oxalic acid originating in Czechoslovakia, *O.J.*, 1 June 1991, No L 138/62) ;
- there was no evidence suggesting that the trend of their sales and prices charged on the Community market was different from that of the complainant Community producers (Commission Regulation (EC) No 371/94 of 17 February 1994 imposing a provisional anti-dumping duty on imports into the Community of large aluminium electrolytic capacitors originating in the Republic of Korea and Taiwan, *O.J.*, 19 February 1994, No L 48/10) ;
- the loss of market share of the complainant Community producers to the other Community producers was significantly lower than that to the dumping exporters and cannot, therefore, have a comparable effect on the complainant Community producers (Commission Decision No 891/92/ECSC of 30 March 1992 imposing a provisional anti-dumping duty on imports of certain semi-finished products of alloy steel, originating in Turkey and Brazil, *O.J.*, 9 April 1992, No L 95/26) ;
- the negative impact which the sales of products manufactured by companies related to the dumping exporters and established in the Community, might have had (a market share of 10.7 % which had increased by 5.4. % on a one-year basis) on the situation of the Community industry, was limited and could not account for the material injury suffered by the Community industry (Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5) ;
- the production of the like product by the other Community producers was only a marginal activity for them, one of them sells most of his output to the other and the prices they charge are significantly higher than those of the complainant Community producers (Council Regulation (EEC) No 3434/91 of 25 November 1991 imposing a definitive anti-dumping duty on imports of oxalic acid originating in India or the People's Republic of China, *O.J.*, 28 November 1991, No L 326/6).

- whether the remaining Community producers were able to gain from the closures of other Community producers. Here, injury was found because the sales of the remaining Community producers still decreased despite these closures (Commission Regulation (EEC) No 797/93 of 30 March 1993 imposing a provisional anti-dumping duty on imports of ferro-chrome with a carbon content by weight of max. 0,5 % (low carbon ferro-chrome) originating in Kazakhstan, Russia and Ukraine, *O.J.*, 2 April 1993, No L 80/8).

In other cases, in which the Community market was not divided into regional markets, intra-community trade has been used as either an economic factor measuring the impact of the dumping on the Community industry in the sense of Article 3(5) basic EC Regulation and Article 4(2)(c) basic ECSC Decision (see : *supra*, p. ...), or as an «other factor», more specifically the factor

competition of other products¹²⁹⁸, developments in technology¹²⁹⁹, the export

«competition between foreign and domestic producers» (see : *infra*, 551-552).

1298 The fierce competition from other products did not result in a finding of no injury because it already existed before the Community producer entered the market and, even if it has caused a downward adjustment of the prices, the price drop observed at the time the Community producer decided to enter the market, was much more substantial. Moreover, such competition, admittedly to a lesser degree, existed also in one of the dumping countries where prices remained relatively stable at a very high level (Council Regulation (EEC) No 1391/91 of 27 May 1991 imposing a definitive anti-dumping duty on imports of of aspartame originating in Japan and the United States of America, *O.J.*, 29 May 1991, No L 134/1).

1299 In but one anti-dumping case, the dumping was not found to have caused material injury because of the factor «developments in technology». In that case, no injurious dumping was found because the costs involved in important investments carried out by producers in some of the Member States linked to the conversion from oil to coal energy and new technology had a negative effect on the state of the Community industry (Commission Decision 86/344/EEC of 17 July 1986 terminating the anti-dumping proceeding concerning imports of Portland cement originating in the German Democratic Republic, Poland and Yugoslavia, *O.J.*, 25 July 1986, No L 202/43).

In all other cases, the factor «developments in technology» has not prevented dumping from being found to cause material injury :

- the absence of an «appreciable technology gap» between production in the exporting country and the Community underbuilt a finding of injurious dumping (Council Regulation (EEC) No 117/91 of 16 January 1991 imposing a definitive anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 19 January 1991, No L 14/1) ;
- the argument according to which the Community producers caused themselves injury because they were too late in committing sufficient resources to develop and incorporate the new technology in their products or to develop the know-how of marketing the product, was not accepted either because they started as soon as possible the production of the product incorporating the new technology, or because they were the first to develop the new technology (C.J.E.C., joined cases 277 and 300/85, 5 October 1988, *Canon Inc. a.o. v Council, E.C.R.*, 1988, (5731), 5807 ; C.J.E.C., joined cases 273/85 and 107/86, 5 October 1988, *Silver Seiko Limited a.o. v Council, E.C.R.*, 1988, (5927), 5981 ; C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council, E.C.R.*, 1992, I, (1335), 1403 ; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council, E.C.R.*, 1992, I, (1409), 1486 ; C.J.E.C., case C-176/87, 10 March 1992, *Konishiroku Photo Industry Co. Ltd v Council, E.C.R.*, 1992, I, (1493), 1530 ; C.J.E.C., case C-177/87, 10 March 1992, *Sanyo Electric Co. Ltd v Council, E.C.R.*, 1992, I, (1535), 1571 ; C.J.E.C., case C-179/87, 10 March 1992, *Sharp Corporation v Council, E.C.R.*, 1992, I, (1635), 1683-1684 ; Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5 ; Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12) ;
- the argument that the absence of marketing support in the commercialization of the product by the Community has forced the latter to concentrate on the low-priced, unbranded segment, thus explaining the alleged precarious financial situation of the Community industry, was not accepted. Instead, the sales of the Community industry were said to be evenly distributed between the branded and unbranded segments, and the pressure on prices and the resulting lack of profitability were found to oblige the Community industry to limit marketing expenditure (Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5) ;
- injurious dumping was found as the dumped and the Community products were of a high standard and the allegations about the poor marketing performance of the Community industry and about its insufficient after-sales service were unsubstantiated (Commission Regulation (EEC) No 3029/93 of 29 October 1993 imposing provisional antidumping duties on imports of television camera systems originating in Japan, *O.J.*, 30 October 1993, No L 271/1) ;
- injurious dumping was found because the Community industry was able to compete in terms of technology, provided the competition is fair and not distorted by dumping (Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5) ;
- though the late market entry of the Community producers was recognized, injurious dumping was found because the Community producers had well established sales relationships with a significant number of major consumers of the like product which suggests that performance, strategy and management and product quality met the expectations of these consumers (Council Regulation (EEC) No 577/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as EPROMs (erasable programmable read only memories) originating in Japan, *O.J.*, 12 March 1991, No L 65/1) ;
- notwithstanding the Community producer's outdated technology, injurious dumping was found because the Community producer considered building a new plant, but decided not to do so, because of the depressed market prices of the product (Commission Regulation (EEC) No 2681/84 of 18 September 1984 imposing a provisional anti-dumping duty on imports of pentaerythritol originating in Canada and accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of pentaerythritol originating in Sweden and terminating that proceeding, *O.J.*, 22 September 1984, No L 254/5) ;
- notwithstanding the late-market entry of the Community producers, the dumping was considered to cause the injury because there were no indications suggesting that the difficulties subsequently encountered by the Community producers should be attributed to their late-market entry rather than to the effect of the rapid increase in low-priced dumped imports (Commission

performance¹³⁰⁰ and productivity¹³⁰¹ of the Community industry, over-capacity¹³⁰²,

Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79; corrigendum, *O.J.*, 10 February 1990, No L 38/44);

the argument that the Community producers made wrong commercial decisions in investing heavily in advanced technology to produce high-quality products, was not accepted because investments carried out to reduce production costs and to defend a high-quality brand image were not regarded by the European anti-dumping authorities as wrong business decisions (Council Regulation (EEC) No 1768/89 of 19 June 1989 imposing a definitive anti-dumping duty on imports of video cassettes originating in the Republic of Korea and Hong Kong, collecting definitively the provisional duty and terminating the anti-dumping proceeding with regard to the imports of video tape reels originating in the Republic of Korea, *O.J.*, 22 June 1989, No L 174/1);

the investments of the Community producers in advanced technology were necessary to maintain a high level of competitiveness and the Community producers did not over-invest in advanced technology as compared to the higher rate of such investments in the United States of America (Council Regulation (EEC) No 738/92 of 23 March 1992 imposing a definitive anti-dumping duty on imports of cotton yarn originating in Brazil and Turkey, *O.J.*, 27 March 1992, No L 82/1);

the Community producers were considered to have reacted rationally by concentrating their activity on the niche-market of a certain type of the like product where they enjoyed reasonable profits, even if the bulk of Community demand was for another type of the like product (Commission Regulation (EEC) No 3262/90 of 5 November 1990 imposing a provisional anti-dumping duty on imports of audio tapes in cassettes originating in Japan, the Republic of Korea and Hong Kong, *O.J.*, 13 November 1990, No L 313/5 (corrigendum, *O.J.*, 12 January 1991, No L 9/36));

the dumping has been considered to cause the injury because the losses incurred by the Community producers because of their unsuccessful development of a new technology, had already occurred before the dumping exporters materially entered the Community market (Commission Regulation (EEC) No 2684/88 of 26 August 1988 imposing a provisional anti-dumping duty on certain imports of video cassette recorders originating in Japan and the Republic of Korea, *O.J.*, 31 August 1988, No L 240/5);

a finding of injurious dumping has been made because the dumped imports thwarted the efforts of the Community producers to make investments in research and development (Council Regulation (EEC) No 1877/85 of 4 July 1985 imposing a definitive anti-dumping duty on imports of certain hydraulic excavators originating in Japan, *O.J.*, 6 July 1985, No L 176/1);

the technology of the Community industry resulted in temporary cost advantages which, however, could not overshadow the overall injurious effects of the dumping (Commission Decision No 891/92/ECSC of 30 March 1992 imposing a provisional anti-dumping duty on imports of certain semi-finished products of alloy steel, originating in Turkey and Brazil, *O.J.*, 9 April 1992, No L 95/26).

1300 In only three anti-dumping cases, the export performance supported a finding of no injurious dumping :

in *stainless steel household cooking ware from South Korea*, an increase in the Community producers' exports was established (Commission Decision 86/86/EEC of 18 March 1986 terminating the anti-dumping proceeding concerning imports of stainless steel household cooking ware originating in South Korea, *O.J.*, 19 March 1986, No L 74/33);

in *propan-1-ol from the United States of America*, the decrease in the Community producers' production and capacity utilization was found to be due mainly to the fall in their sales to third countries (Commission Decision 90/540/EEC of 29 October 1990 terminating the anti-dumping review proceeding concerning imports of propan-1-ol originating in the United States of America, *O.J.*, 6 November 1990, No L 306/23);

in *acrylic fibres from Mexico*, the Community industry will be faced with excess capacity, combined with falling prices and profits, because of the drastic reduction of the import requirements of a third country to which the Community industry exported 16 % of its total output (Council Regulation (EC) No 1318/94 of 6 June 1994 terminating the review of anti-dumping measures concerning imports of certain acrylic fibres originating in Mexico and repealing the measures applying to such imports, *O.J.*, 8 June 1994, No L 143/1).

In all other cases, the development in the export performance of the Community industry has not prevented dumping from being found to cause material injury :

the decline in the export performance of the Community industry has not been accepted as the sole explanation for the decline in Community production, if the Community producers' sales on the Community market had declined as well (Council Regulation (EEC) No 1877/85 of 4 July 1985 imposing a definitive anti-dumping duty on imports of certain hydraulic excavators originating in Japan, *O.J.*, 6 July 1985, No L 176/1; Commission Regulation (EEC) No 1613/90 of 13 June 1990 imposing a provisional anti-dumping duty on imports of ball bearings with a greatest external diameter not exceeding 30 mm originating in Thailand, *O.J.*, 16 June 1990, No L 152/24);

by increasing its exports the Community industry was considered to have reacted in an efficient manner to the effect of dumping by developing new markets which were not affected by unfair competition; moreover, the increase in its exports did not fully compensate for the loss in the Community industry's sales on the Community market (Council Regulation (EEC) No 1251/91 of 13 May 1991 imposing a definitive anti-dumping duty on imports of audio tapes in cassettes originating in Japan and the Republic of Korea, collecting definitively the provisional duty and terminating the procedure concerning Hong Kong, *O.J.*, 14 May 1991, No L 119/35);

the fact that the exports, which were increased in order to substitute the lost domestic sales, were made at less attractive prices than those realized on the Community market contributed to the finding of injurious dumping because they affected

the profitability of the Community producers (Commission Regulation (EEC) No 2221/85 of 29 July 1985 imposing a provisional anti-dumping duty on imports of basic chromium sulphate originating in Yugoslavia, *O.J.*, 3 August 1985, No L 205/12);

- the injury suffered by the Community producers on the Community market (in particular, the decline in their sales) could not have been caused by their decision to export their products at higher prices because their export sales did not increase, nor did the prices and the profitability of these sales (Council Regulation (EEC) No 2736/90 of 24 September 1990 imposing a definitive anti-dumping duty on imports of tungstic oxide and tungstic acid originating in the People's Republic of China and definitively collecting the provisional duty, *O.J.*, 27 September 1990, No L 264/4 (corrigendum, *O.J.*, 24 October 1990, No L 292/30));
- the increased export performance made at low prices did not prove that the Community producers had decided to export their production at low prices and refused to face competition on the Community market; for their exports concerned so-called «conversion» contracts; under such contracts the Community producers process the raw material belonging to a customer to produce the like product; the like product is then exported to the customer at a low price in view of the considerable share taken by the raw material in the production costs of the like product (Council Regulation (EEC) No 2737/90 of 24 September 1990 imposing a definitive anti-dumping duty on imports of tungsten carbide and fused tungsten carbide originating in the People's Republic of China and definitively collecting the provisional duty, *O.J.*, 27 September 1990, No L 264/7 (corrigendum, *O.J.*, 24 October 1990, No L 292/30));
- because of the decline in export performance, the impact of the dumped imports has been even more strongly felt by the Community industry (Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1);
- the export performance of the Community industry did not show any significant changes (Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7);
- the negative effect of a decrease in the Community exports has been duly allowed for (Commission Regulation (EEC) No 2757/76 of 12 November 1976 imposing a provisional anti-dumping duty on cycle chains originating in Taiwan, *O.J.*, 13 November 1976, No L 312/41; Commission Regulation (EEC) No 261/77 of 4 February 1977 imposing a provisional anti-dumping duty on ball bearings, tapered roller bearings and parts thereof originating in Japan, *O.J.*, 5 February 1977, No L 34/60; Commission Regulation (EEC) No 322/79 of 16 February 1979 imposing a provisional anti-dumping duty on a certain herbicide originating in Romania, *O.J.*, 21 February 1979, No L 44/8; Council Regulation (EEC) No 955/79 of 15 May 1979 imposing a definitive anti-dumping duty on a certain herbicide originating in Romania, *O.J.*, 17 May 1979, No L 121/5; Council Regulation (EEC) No 191/80 of 29 January 1980 imposing a definitive anti-dumping duty on lithium hydroxide originating in the United States of America and the Soviet Union, *O.J.*, 30 January 1980, No L 23/19 (corrigendum, *O.J.*, 8 February 1980, No L 31/23); Council Regulation (EEC) No 2294/80 of 28 August 1980 amending Regulation (EEC) No 191/80 imposing a definitive anti-dumping duty on lithium hydroxide originating in the United States of America and the Soviet Union, *O.J.*, 30 August 1980, No L 228/59). Moreover, the decline in the Community producers' exports is found not to influence the injury investigation if these exports represent only a small proportion of the total sales of the Community industry (Commission Regulation (EEC) No 2908/84 of 15 October 1984 imposing a provisional anti-dumping duty on imports of copper sulphate originating in Poland, accepting undertakings given by the Bulgarian and Hungarian exporters of copper sulphate, terminating the investigation regarding exports of copper sulphate from Bulgaria and Hungary and terminating the proceeding regarding those from Spain, *O.J.*, 18 October 1984, No L 275/12) or if their decline did not affect the production costs which were used as the basis for the calculation of the anti-dumping duty (Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia, *O.J.*, 9 May 1987, No L 121/11);
- the effects of the Community industry's sales performances outside the Community market do not form part of the findings of injury (Council Regulation (EEC) No 2455/93 of 2 September 1993 amending Regulation (EEC) No 1798/90 in respect of the definitive anti-dumping duty on imports of monosodium glutamate originating in Indonesia, the Republic of Korea, Taiwan and Thailand, *O.J.*, 4 September 1993, No L 225/1);
- the increase of the Community producers' exports could not have contributed to the injury suffered by the Community industry (Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50);
- «the pattern of the Community producers' exports has not contributed to the injury» (Commission Regulation (EEC) No 2054/91 of 11 July 1991 imposing a provisional anti-dumping duty on imports of dihydrostreptomycin originating in the People's Republic of China, *O.J.*, 13 July 1991, No L 187/23).

See also : *serial impact fully formed character printers from Japan*, where the Community producer whose financial performance had been appreciably affected by circumstances outside the Community, was left out of the examination of the causal link between the dumping and the injury suffered by the Community industry (Commission Regulation (EEC) No 2005/88 of 5 July 1988 imposing a provisional anti-dumping duty on imports of serial impact fully formed character printers originating in Japan, *O.J.*, 8 July 1988, No L 177/1).

- 1301 The allegedly low productivity of the Community industry has not resulted in a finding of no injurious dumping because :
- there was no evidence to cast doubt on the efficiency of the Community industry (Council Regulation (EEC) No 117/91 of 16 January 1991 imposing a definitive anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 19 January 1991, No L 14/1) ;
 - there was no evidence that the Community producers failed to respond to new developments (Commission Regulation (EEC) No 2686/92 of 16 September 1992 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea, *O.J.*, 17 September 1992, No L 272/13) ;
 - the Community producers' plants were comparable with those of the dumping exporters (Commission Regulation (EEC) No 595/85 of 7 March 1985 imposing a provisional anti-dumping duty on imports of certain hydraulic excavators originating in Japan, *O.J.*, 8 March 1985, No L 68/13) ;
 - the cost of production of the Community producer with the highest capacity utilization were lower than that of the dumping exporters (Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5) ;
 - the production costs of the Community industry did not rise, but remained stable (Council Regulation (EC) No 3386/93 of 6 December 1993 imposing a definitive anti-dumping duty on imports of dead-burned (sintered) magnesia originating in the People's Republic of China, *O.J.*, 11 December 1993, No L 306/16) ;
 - the Community producers are notably efficient as a result of the rationalization and modernization of the industry (Commission Regulation (EEC) No 2799/92 of 25 September 1992 imposing a provisional anti-dumping duty on imports of deadburned (sintered) magnesia originating in the People's Republic of China, *O.J.*, 26 September 1992, No L 282/15) ;
 - the Community industry incurred losses despite substantial reductions in costs achieved through the continued rationalization measures taken by the Community industry well before the dumping started (Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50) ;
 - the differences in production methods between the Community producers and the dumping producers were not considered of liable to affect the conclusion that the injury had been caused by the dumping (Commission Regulation (EEC) No 171/82 of 25 January 1982 imposing a provisional anti-dumping duty on imports of oxalic acid originating in China and Czechoslovakia, *O.J.*, 27 January 1982, No L 19/26 (corrigendum, *O.J.*, 9 February 1982, No L 34/11) ; Council Regulation (EEC) No 1283/82 of 17 May 1982 imposing a definitive anti-dumping duty on oxalic acid originating in China and definitively collecting the amounts secured by way of provisional duty on oxalic acid originating in China and Czechoslovakia, *O.J.*, 27 May 1982, No L 148/37 ; Commission Decision 82/335/EEC of 18 May 1982 accepting an undertaking offered by the Czechoslovakian producer and terminating the anti-dumping procedure concerning oxalic acid originating in Czechoslovakia, Hungary and the German Democratic Republic, *O.J.*, 27 May 1982, No L 148/51) ;
 - the Community producers did not have old-fashioned production processes and the possible advantages of the dumping exporters as far as the costs of labour are concerned were reduced by the high standard of automation of the Community industry (Commission Regulation (EEC) No 2684/88 of 26 August 1988 imposing a provisional anti-dumping duty on certain imports of video cassette recorders originating in Japan and the Republic of Korea, *O.J.*, 31 August 1988, No L 240/5) ;
 - the possible cost advantage on the part of the dumping exporters, especially in labour costs, was limited since the labour content of the production of the like product is small in modern plants such as those operated by the complainant Community producers (Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1) ;
 - the cost advantages of the dumping exporters were not reflected without any discrimination in export and domestic prices, and because they could obtain economies of scale only by dumping large quantities on the Community market (Commission Regulation (EEC) No 2064/90 of 17 July 1990 imposing a provisional anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 20 July 1990, No L 188/10 (corrigendum, *O.J.*, 21 November 1990, No L 321/19) ; Council Regulation (EEC) No 117/91 of 16 January 1991 imposing a definitive anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 19 January 1991, No L 14/1 ; Commission Regulation (EEC) No 1386/91 of 23 May 1991 imposing a provisional anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in Japan, the People's Republic of China, the Republic of Korea and Thailand, *O.J.*, 28 May 1991, No L 133/20 ; Commission Regulation (EEC) No 2805/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports into the Community of certain thermal paper originating in Japan, *O.J.*, 26 September 1991, No L 270/15) ;
 - the cost advantages resulted from economies of scale caused by the increased volume of the dumped exports a significant part of which was sold in the Community market at prices below their costs of production (Commission Regulation (EEC) No 3262/90 of 5 November 1990 imposing a provisional anti-dumping duty on imports of audio tapes in cassettes originating in Japan, the Republic of Korea and Hong Kong, *O.J.*, 13 November 1990, No L 313/5 (corrigendum, *O.J.*, 12 January 1991, No L 9/36) ;
 - the dumped imports prevented the Community producers from attaining the full rate of capacity utilization and, consequently, prevented them from benefiting from economies of scale (Council Regulation (EEC) No 577/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as EPROMs (erasable programmable read only memories) originating in Japan, *O.J.*, 12 March 1991, No L 65/1 ; Council Regulation (EEC) No 1391/91 of 27 May 1991 imposing a definitive anti-dumping duty on imports of of aspartame originating in Japan and the United States of America, *O.J.*, 29 May 1991, No L 134/1 ; Commission Regulation (EEC) No 1451/92 of 2 June 1992 imposing a provisional anti-dumping duty on imports into the Community of certain large electrolytic aluminium capacitors originating in Japan, *O.J.*, 4 June 1992, No L 152/22 (corrigendum, *O.J.*, 17 June 1992, No L 163/27) ; Council Regulation

(EEC) No 2306/92 of 4 August 1992 imposing a definitive anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in the Republic of Korea, *O.J.*, 7 August 1992, No L 222/8 (corrigendum, *O.J.*, 21 January 1993, No L 13/20);

- the Community industry has reduced costs and has increased productivity before the dumping started (Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24);

- the question of cost advantages is irrelevant as the dumping exporters sold their exports to the Community below their cost of production (Council Regulation (EEC) No 3482/92 of 30 November 1992 imposing a definitive anti-dumping duty on imports of certain large electrolytic aluminium capacitors originating in Japan and collecting definitively the provisional anti-dumping duty, *O.J.*, 3 December 1992, No L 353/1 (corrigendum, *O.J.*, 28 January 1993, No L 19/34));

- a comparison between the Community producers' plants and the plants of NME countries was rejected for it makes no sense to consider comparative advantages with regard to NME countries (Council Regulation (EEC) No 864/87 of 23 March 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union, and definitively collecting the amounts secured as provisional duties, *O.J.*, 27 March 1987, No L 83/1);

- the dumping prices were so low that the difference between these prices and the Community producers' cost of production could not be made up by means of any rationalization measures (Council Regulation (EEC) No 725/89 of 20 March 1989 imposing a definitive anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty on such imports, *O.J.*, 22 March 1989, No L 79/24).

See also : *linear tungsten halogen lamps from Japan*, where the steady downward pressure exerted by the Japanese export prices on LTH lamp prices in the Community was said to oblige the Community producers to sell at a loss and to prevent them from making the investment needed to improve productivity (Council Regulation (EEC) No 117/91 of 16 January 1991 imposing a definitive anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 19 January 1991, No L 14/1).

1302 In several anti-dumping cases, it has been recognized that over-capacity of the Community industry may have a negative effect (e.g., a price-depressive effect, or an increasing effect on unit production costs because of the low rate of capacity utilization). Nevertheless, in these cases the dumping was found to cause material injury (Commission Decision 80/783/EEC of 27 August 1980 accepting undertakings in connection with the anti-dumping proceedings concerning imports of studded welded-link chain, originating in Spain and Sweden and terminating those proceedings, *O.J.*, 2 September 1980, No L 231/10; Commission Regulation (EEC) No 2568/82 of 17 September 1982 imposing a provisional anti-dumping duty on imports of polyvinyl chloride resins and compounds originating in Czechoslovakia, and accepting undertakings and terminating the proceeding in respect of imports of such products originating in Romania, the German Democratic Republic and Hungary, *O.J.*, 24 September 1982, No L 274/15; Commission Decision 82/881/EEC of 23 December 1982 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of perchlorethylene originating in Czechoslovakia, Romania, Spain and the United States of America and terminating that proceeding, *O.J.*, 30 December 1982, No L 371/47; Commission Decision 83/248/EEC of 24 May 1983 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of polyethylene originating in the Soviet Union, the German Democratic Republic, Czechoslovakia and Poland and terminating that proceeding, *O.J.*, 27 May 1983, No L 138/65; Commission Regulation (EEC) No 1631/83 of 15 June 1983 imposing a provisional anti-dumping duty on imports of certain glass textile fibres (rovings) originating in Czechoslovakia, the German Democratic Republic and Japan, accepting a price undertaking from one Japanese exporter and terminating the proceeding in respect of imports of certain glass textile fibres (mats), originating in Czechoslovakia and the German Democratic Republic, *O.J.*, 18 June 1983, No L 160/18; Council Regulation (EEC) No 55/93 of 8 January 1993 imposing a definitive anti-dumping duty on imports of outer rings of tapered roller bearings originating in Japan, *O.J.*, 15 January 1993, No L 9/7; Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24; Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50; Council Regulation (EC) No 3319/94 of 22 December 1994 imposing a definitive anti-dumping duty on imports of urea ammonium nitrate solution originating in Bulgaria and Poland, exported by companies not exempted from the duty, and collecting definitively the provisional duty imposed, *O.J.*, 31 December 1994, No L 350/20).

In other anti-dumping cases, in which the dumping was also found to cause injury, it was underscored that the investments of the Community industry, resulting in over-capacity, were made before the Community market was distorted by the dumping (Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27); Council Regulation (EEC) No 2808/89 of 18 September 1989 imposing a definitive anti-dumping duty on imports of calcium metal originating in the People's Republic of China and the Soviet Union and definitively collecting the provisional anti-dumping duty imposed on such imports, *O.J.*, 20 September 1989, No L 271/1; Commission Decision 91/392/EEC of 21 June 1991

insufficient capacity¹³⁰³, the sales policy¹³⁰⁴ and distribution policy¹³⁰⁵ of the Community industry, lack of interest on the part of the Community industry¹³⁰⁶, the

accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain asbestos cement pipes originating in Turkey, and terminating the investigation, *O.J.*, 31 July 1991, No L 209/37). In other words, the over-capacity was considered to be a result of the dumping. In such cases, the European anti-dumping authorities, according to Advocate General JACOBS, are not required to examine the appropriateness of the Community producers' management decisions, unless those decisions are incontestably unreasonable (C.J.E.C., case C-358/89, 11 June 1992, *Extramet Industrie SA v Council*, *E.C.R.*, 1992, I, (3813), 3835 (Opinion of Advocate General JACOBS).

New investments will not prevent a finding of injury either when they were made at a time when Community consumption had risen substantially (Council Regulation (EEC) No 3434/91 of 25 November 1991 imposing a definitive anti-dumping duty on imports of oxalic acid originating in India or the People's Republic of China, *O.J.*, 28 November 1991, No L 326/6) or when the new production capacity is not considered in assessing injury as it did not begin production during the period of investigation (Council Regulation (EEC) No 3434/91 of 25 November 1991 imposing a definitive anti-dumping duty on imports of oxalic acid originating in India or the People's Republic of China, *O.J.*, 28 November 1991, No L 326/6; Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5).

Finally, injurious dumping has been found as the dumping exporters, each having several production lines and even constructing new ones, were considered to have contributed more to worldwide over-capacity than the Community industry the capacity of which was at the lower level of an economically feasible production with a single production line (Commission Regulation (EEC) No 2686/92 of 16 September 1992 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea, *O.J.*, 17 September 1992, No L 272/13).

1303 Injurious dumping will be found when the decline in the Community's market share is not caused by the Community's inability to supply the product in accordance with demand as the Community industry's production capacity is able to meet Community demand (Council Regulation (EEC) No 2474/93 of 8 September 1993 imposing a definitive anti-dumping duty on imports into the Community of bicycles originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 9 September 1993, No L 228/1).

1304 Though the Community producers did adapt to recent fluctuations in demand, injurious dumping was found. The European anti-dumping authorities were of the opinion that producers had to produce fairly continuously in order to maximize the use of their plant and keep unit costs down and, therefore, are less able to adjust to fluctuations in demand than importers are (Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24).

1305 Injurious dumping was found, though the Community producers dealt only with a limited number of merchants and dealers, as there was no evidence suggesting that there was a general problem of obtaining the Community product (Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24).

1306 The Community industry is assumed not to suffer injury from the dumping if all Community producers either do not consider themselves to be injured, do not cooperate or withdraw the complaint (Commission Decision 80/456/EEC of 24 April 1980 terminating the anti-dumping/anti-subsidy procedure concerning canned peaches originating in Greece, *O.J.*, 29 April 1980, No L 110/35; Commission Decision 81/1012/EEC of 17 December 1981 terminating the anti-dumping proceeding concerning imports of certain monochrome portable television sets originating in the Republic of Korea, *O.J.*, 19 December 1981, No L 364/49; Commission Recommendation No 2975/82/ECSC of 8 November 1982 imposing a definitive anti-dumping duty on certain sheets and plates, of iron or steel, originating in Brazil, *O.J.*, 9 November 1982, No L 312/10; Commission Decision 85/143/EEC of 18 February 1985 terminating the anti-dumping proceeding concerning imports of certain boots with fitted ice skates originating in Czechoslovakia, Yugoslavia, Romania and Hungary, *O.J.*, 22 February 1985, No L 52/48; Commission Regulation (EEC) No 1015/87 of 8 April 1987 repealing Council Regulation (EEC) No 2109/85 imposing a definitive anti-dumping duty on imports of certain kinds of polystyrene sheet originating in Spain, *O.J.*, 9 April 1987, No L 95/13; Commission Decision 88/622/EEC of 12 December 1988 terminating the anti-dumping proceeding on imports of microwave ovens originating in Japan, the Republic of Singapore and the Republic of Korea, *O.J.*, 13 December 1988, No L 343/33; Commission Decision 89/568/EEC of 25 October 1989 terminating the review of anti-dumping measures applying to imports of certain synthetic fibre hand-knitting yarn originating in Turkey and confirming the expiry of the said measures, *O.J.*, 26 October 1989, No L 309/42; Commission Decision 90/85/EEC of 1 March 1990 terminating the review of anti-dumping measures applying to imports of certain glass textile fibres (rovings) originating in Czechoslovakia and the German Democratic Republic and confirming the expiry of the said measures, *O.J.*, 8 March 1990, No L 59/45; Commission Decision 90/383/EEC of 13 July 1990 terminating the anti-dumping proceeding concerning imports of NPK fertilizers originating in Hungary, Poland, Romania and Yugoslavia, *O.J.*, 20 July 1990, No L 188/63; Commission Decision 91/182/EEC of 8 April 1991 terminating the anti-dumping proceeding concerning imports of high carbon ferro-chromium

coincidence of trade policy measures in regard to imports from other countries than the dumping country¹³⁰⁷, the price policy of Member States¹³⁰⁸, the internal problems of the

originating in Albania and the USSR, *O.J.*, 11 April 1991, No L 90/38).

If only a part of the Community industry cooperates and claims to be injured by the dumping, injury may be assessed if the cooperating and complainant Community producers represent a major proportion of the Community production (Commission Decision 82/398/EEC of 14 June 1982 accepting undertakings given in connection with the anti-dumping procedure concerning cylinder vacuum cleaners originating in Czechoslovakia, the German Democratic Republic and Poland and terminating the procedure, *O.J.*, 18 June 1982, No L 172/47; Commission Decision 82/543/EEC of 6 August 1982 accepting an undertaking given in connection with the anti-dumping proceeding concerning paracetamol (INN) crystals or powder originating in China and terminating the proceeding, *O.J.*, 11 August 1982, No L 236/23; Commission Decision 86/86/EEC of 18 March 1986 terminating the anti-dumping proceeding concerning imports of stainless steel household cooking ware originating in South Korea, *O.J.*, 19 March 1986, No L 74/33; Council Regulation (EEC) No 1058/86 of 8 April 1986 imposing a definitive anti-dumping duty on imports of certain electronic scales originating in Japan, *O.J.*, 12 April 1986, No L 97/1; Commission Decision 89/511/EEC of 22 August 1989 terminating the anti-dumping proceeding concerning imports of hydraulic excavators originating in Japan, *O.J.*, 25 August 1989, No L 249/71; Commission Decision 91/33/EEC of 18 January 1991 terminating the anti-dumping proceeding concerning imports of certain cotton terry-towelling articles (bathrobes, toilet and kitchen linen) originating in Turkey, *O.J.*, 23 January 1991, No L 17/22; Commission Decision 91/59/EEC of 4 February 1991 terminating the review and confirming expiry of the anti-dumping measures applying to imports into the Community of self-propelled hydraulic excavators, track-laying or wheeled, of a total operating weight exceeding six tonnes but not exceeding 35 tonnes, equipped with a single bucket mounted on a boom capable of pivoting through 360°, or intended to be so equipped, originating in Japan, *O.J.*, 8 February 1991, No L 36/25; Commission Decision 93/672/EC of 9 December 1993 terminating an anti-dumping procedure and giving notice that anti-dumping measures concerning imports into the Community of outboard motors originating in Japan shall lapse, *O.J.*, 14 December 1993, No L 310/42; Commission Decision 94/120/EC of 24 February 1994 terminating the anti-dumping proceeding concerning imports of certain synthetic hand-knitting yarn, originating in Turkey, *O.J.*, 26 February 1994, No L 55/58).

¹³⁰⁷ Injurious dumping has been found when imports from other countries subject to anti-dumping measures had declined and were replaced by the dumped imports after the imposition of the anti-dumping measures (Commission Regulation (EEC) No 1956/92 of 7 July 1992 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in India and the Republic of Korea, *O.J.*, 16 July 1992, No L 197/25; Commission Regulation (EEC) No 2477/93 of 6 September 1993 imposing a provisional anti-dumping duty on imports of certain photo albums originating in the People's Republic of China, *O.J.*, 9 September 1993, No L 228/16).

Quantitative restrictions applicable to non-dumped imports originating in other countries than the dumping countries have been invoked in findings of injurious dumping (Commission Regulation (EEC) No 3453/81 of 2 December 1981 imposing a provisional anti-dumping duty on imports of certain cotton yarns originating in Turkey, *O.J.*, 3 December 1981, No L 347/19; Council Regulation (EEC) No 789/82 of 2 April 1982 imposing a definitive anti-dumping duty on imports of certain cotton yarns originating in Turkey, *O.J.*, 3 March 1982, No L 90/1; Commission Regulation (EEC) No 2464/84 of 24 August 1984 imposing a provisional anti-dumping duty on imports of certain shovels originating in Brazil, *O.J.*, 29 August 1984, No L 231/29).

¹³⁰⁸ Injurious dumping has been found notwithstanding:

- price controls enforced by the authorities of a Member State intended to restrict price increases (Commission Regulation (EEC) No 2800/86 of 9 September 1986 imposing a provisional anti-dumping duty on imports of certain deep freezers originating in the USSR, accepting the undertakings in connection with the investigation of imports of certain deep freezers originating in Yugoslavia or in the German Democratic Republic and terminating the investigation, and terminating the proceeding concerning imports of certain deep freezers, *O.J.*, 11 September 1986, No L 259/14);
- the Community industry's written undertaking to fight inflation, which was approved by the authorities of a Member State, because it allowed to pass on the increases in the costs of the raw material entirely in the selling prices of the like product and could, therefore, not be the cause why the increases in the costs of the raw material were not passed on in full (Commission Regulation (EEC) No 909/85 of 2 April 1985 imposing a provisional anti-dumping duty on imports of certain kinds of polystyrene sheet originating in Spain, *O.J.*, 4 April 1985, No L 97/30).

However, the injury caused by the fact that the Community producers' production costs were higher than the prices they were obliged to charge within the framework of a price control system set up a Member State, was not attributed to the dumping, but it did not prevent a finding of dumping causing material injury to the Community industry (Commission Decision 86/36/EEC of 26 February 1986 accepting undertakings entered into in connection with the anti-dumping proceeding concerning imports into Greece of certain categories of glass originating in Turkey, Yugoslavia, Romania, Bulgaria, Hungary and Czechoslovakia and terminating the investigation, *O.J.*, 28 February 1986, No L 51/73).

Community producers¹³⁰⁹, the German unification¹³¹⁰, the economic recession¹³¹¹, the interest rates to be paid by the Community producers¹³¹², the depreciation of the currency in which the sales of the like product take place¹³¹³, measures as to health care¹³¹⁴ or as to

¹³⁰⁹ The internal problems within a Community company have not yet precluded that dumping was considered to cause injury because :

- they had been resolved before the Community company began to suffer material injury (C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council, E.C.R.*, 1992, I, (1335), 1403 ; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council, E.C.R.*, 1992, I, (1409), 1486 ; C.J.E.C., case C-176/87, 10 March 1992, *Konishiroku Photo Industry Co. Ltd v Council, E.C.R.*, 1992, I, (1493), 1530 ; C.J.E.C., case C-177/87, 10 March 1992, *Sanyo Electric Co. Ltd v Council, E.C.R.*, 1992, I, (1535), 1571 ; C.J.E.C., case C-179/87, 10 March 1992, *Sharp Corporation v Council, E.C.R.*, 1992, I, (1635), 1683 ; Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12 ; Council Regulation (EEC) No 2347/87 of 23 July 1987 imposing a definitive anti-dumping duty on mechanical wrist-watches originating in the USSR, *O.J.*, 4 August 1987, No L 213/5 ; Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12) ;
- there was no evidence suggesting that the injury suffered by the Community industry could be attributed to internal management problems of the Community industry (Council Regulation (EC) No 643/94 of 21 March 1994 amending Regulation (EEC) No 3068/92 in respect of definitive anti-dumping duties on imports of potassium chloride originating in Belarus, Russia and Ukraine, *O.J.*, 24 March 1994, No L 80/1).

¹³¹⁰ Injury was found despite the increase in the prices of the Community producer established in the eastern part of Germany because this Community producer had to adjust to market economy conditions and increased his prices from a much lower base than on the rest of the Community market until prices of the Community industry worker out on the same level (Council Regulation (EC) No 2819/94 of 17 November 1994 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in the People's Republic of China, *O.J.*, 19 November 1994, No L 298/32).

¹³¹¹ Injurious dumping has been found, despite of the fact that the market of the like product had been affected by the economic recession (Commission Regulation (EEC) No 2800/86 of 9 September 1986 imposing a provisional anti-dumping duty on imports of certain deep freezers originating in the USSR, accepting the undertakings in connection with the investigation of imports of certain deep freezers originating in Yugoslavia or in the German Democratic Republic and terminating the investigation, and terminating the proceeding concerning imports of certain deep freezers, *O.J.*, 11 September 1986, No L 259/14).

¹³¹² Council Regulation (EEC) No 738/92 of 23 March 1992 imposing a definitive anti-dumping duty on imports of cotton yarn originating in Brazil and Turkey, *O.J.*, 27 March 1992, No L 82/1.

¹³¹³ The effect on the Community industry of a depreciation of the currency, in which the sales of the like product are made, has been recognized and accounted for, but it has not yet been a sufficient reason to find that the dumping did not cause material injury (Commission Regulation (EEC) No 2450/87 of 12 August 1987 imposing a provisional anti-dumping duty on imports of mercury originating in the Union of Soviet Socialist Republics, *O.J.*, 14 August 1987, No L 227/8 ; Council Regulation (EEC) No 3687/87 of 8 December 1987 imposing a definitive anti-dumping duty on imports of mercury originating in the Soviet Union and definitively collecting the provisional anti-dumping duty imposed on such imports, *O.J.*, 10 December 1987, No L 346/27 ; Commission Regulation (EEC) No 2686/92 of 16 September 1992 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea, *O.J.*, 17 September 1992, No L 272/13).

See also : *upright pianos from the USSR*, where the improvement in the export performance of the British industry has been resorted to in order to explain why the rise in value of the pound sterling was not the cause of the difficulties of the British producers and, therefore, did not change the conclusion that the injury to the British industry was caused by the dumping (Commission Regulation (EEC) No 871/82 of 14 April 1982 imposing a provisional anti-dumping duty on upright pianos originating in the USSR, *O.J.*, 16 April 1982, No L 101/30 (corrigendum, *O.J.*, 29 April 1982, No L 115/22) ; Council Decision 82/220/EEC of 14 April 1982 terminating an anti-dumping proceeding in respect of imports of upright pianos originating in Czechoslovakia, the German Democratic Republic and Poland, *O.J.*, 16 April 1982, No L 101/45).

¹³¹⁴ Injurious dumping was found as the dumped product was not one of the substances whose administration to food-producing animals was prohibited in the Community (Commission Regulation (EC) No 1648/94 of 6 July 1994 imposing a provisional anti-dumping duty on imports of furazolidone originating in the People's Republic of China, *O.J.*, 8 July 1994, No L 174/4).

the protection of the environment¹³¹⁵) generally do not prevent dumping from being found to cause material injury to the Community industry. Sometimes those factors are invoked as aggravating circumstances¹³¹⁶ or as a factor explaining why the Community industry is doing

¹³¹⁵ Injurious dumping will be found when the measures for the protection of the environment do not affect the demand for the like product substantially (Commission Regulation (EEC) No 2463/93 of 1 September 1993 imposing a provisional anti-dumping duty on imports of fluorspar originating in the People's Republic of China, *O.J.*, 7 September 1993, No L 226/3).

¹³¹⁶ Aggravating circumstances are :

- the fact that the Community industry suffered severe losses despite its substantial investment needed in order to keep up with technical progress (Commission Regulation (EEC) No 2865/85 of 14 October 1985 imposing a provisional anti-dumping duty on imports of certain electronic scales originating in Japan and accepting undertakings and terminating the proceeding in respect of certain imports of such products originating in Japan, *O.J.*, 16 October 1985, No L 275/5) ;
- the fact that the Community exports of the like product to the dumping country had fallen to zero, thus, the absence of reciprocal trade balances (Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12) ;
- in the light of the deterioration of the Community's industry profitability, the fact that the Community industry has substantially cut its production costs in order to improve its productivity (Commission Regulation (EEC) No 4062/88 of 23 December 1988 imposing a provisional anti-dumping duty on imports of video cassettes and video tape reels originating in the Republic of Korea and Hong Kong, *O.J.*, 24 December 1988, No L 356/47) ;
- the fact that investments by a Community producer to modernize his plant into one of the most efficient worldwide, has not brought up results because of the increase in overheads following the continual drop in production or turnover (Council Regulation (EEC) No 1531/88 of 31 May 1988 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty imposed on those imports, *O.J.*, 3 June 1988, No L 138/1 ; Commission Regulation (EEC) No 1745/88 of 21 June 1988 imposing a provisional anti-dumping duty on imports of paracetamol originating in the People's Republic of China, *O.J.*, 22 June 1988, No L 155/29) ;
- the fact that the imports subject to anti-dumping measures have decreased, but were replaced by dumped imports from elsewhere (Commission Regulation (EEC) No 512/84 of 27 February 1984 imposing a provisional anti-dumping duty on imports of vinyl acetate monomer originating in Canada, *O.J.*, 29 February 1984, No L 58/17 ; Commission Regulation (EEC) No 2908/84 of 15 October 1984 imposing a provisional anti-dumping duty on imports of copper sulphate originating in Poland, accepting undertakings given by the Bulgarian and Hungarian exporters of copper sulphate, terminating the investigation regarding exports of copper sulphate from Bulgaria and Hungary and terminating the proceeding regarding those from Spain, *O.J.*, 18 October 1984, No L 275/12 ; Council Decision 86/468/EEC of 22 September 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain acrylic fibres originating in Israel, Mexico, Romania and Turkey and terminating the investigation, *O.J.*, 24 September 1986, No L 272/29 ; Council Regulation (EEC) No 993/93 of 26 April 1993 imposing a definitive anti-dumping duty on imports of certain electronic weighing scales originating in Japan, *O.J.*, 29 April 1993, No L 104/4 ; Commission Regulation (EEC) No 1103/93 of 30 April 1993 imposing a provisional anti-dumping duty on imports into the Community of certain electronic weighing scales originating in Singapore and the Republic of Korea, *O.J.*, 6 May 1993, No L 112/20) ;
- the fact that the Community industry has become much more vulnerable because of the economic recession (Council Regulation (EEC) No 2849/92 of 28 September 1992 modifying the definitive anti-dumping duty on imports of ball bearings with a greatest external diameter exceeding 30 mm originating in Japan imposed by Regulation (EEC) No 1739/85, *O.J.*, 1 October 1992, No L 286/2 (corrigendum, *O.J.*, 25 March 1993, No L 72/36) ; Council Regulation (EEC) No 993/93 of 26 April 1993 imposing a definitive anti-dumping duty on imports of certain electronic weighing scales originating in Japan, *O.J.*, 29 April 1993, No L 104/4)..

well, in spite of the dumping¹³¹⁷. Exceptionally, those factors, under identical circumstances,

¹³¹⁷ The following elements have been invoked to explain why, despite of the dumping, a substantial improvement in the overall situation of the Community industry has been taken place :

- a rise in Community exports (Commission Decision 84/512/EEC of 23 October 1984 accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of paraformaldehyde originating in Spain and terminating the investigation, *O.J.*, 26 October 1984, No L 282/58 ; Commission Decision 86/464/EEC of 17 September 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of artificial corundum originating in Hungary, Poland and the USSR, and terminating the investigation, *O.J.*, 23 September 1986, No L 271/26 ; Commission Decision 86/497/EEC of 7 October 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of silicon carbide originating in the People's Republic of China, Norway, Poland and the USSR, and terminating the investigation regarding imports of that product originating in the People's Republic of China, Norway, Poland, Czechoslovakia, the USSR and Yugoslavia, *O.J.*, 10 October 1986, No L 287/25 ; Commission Regulation (EEC) No 665/90 of 16 March 1990 imposing a provisional anti-dumping duty on imports of ferrobore alloy originating in Japan, *O.J.*, 20 March 1990, No L 73/6) ;
- rationalization and restructuring efforts undertaken by the Community industry (Commission Regulation (EEC) No 3669/84 of 21 December 1984 imposing a provisional anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan, *O.J.*, 28 December 1984, No L 340/37 ; Commission Regulation (EEC) No 2516/86 of 4 August 1986 imposing a provisional anti-dumping duty on imports of housed bearing units originating in Japan, *O.J.*, 7 August 1986, No L 221/16) ;
- anti-dumping action taken against dumped imports from other countries not subjected to the anti-dumping proceeding in question or not cumulated with the dumped imports subjected to the anti-dumping proceeding in question (Commission Decision 84/407/EEC of 10 August 1984 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain kraft liner paper and board originating in Spain and terminating that proceeding, *O.J.*, 21 August 1984, No L 224/30 ; Commission Regulation (EEC) No 2553/84 of 4 September 1984 imposing a provisional anti-dumping duty on imports of oxalic acid originating in Brazil, accepting an undertaking offered by the exporter in the German Democratic Republic of oxalic acid and terminating the proceeding regarding imports of oxalic acid from the German Democratic Republic and Spain, *O.J.*, 7 September 1984, No L 239/8) ;
- the recovery of the economic activity (Commission Regulation (EEC) No 2516/86 of 4 August 1986 imposing a provisional anti-dumping duty on imports of housed bearing units originating in Japan, *O.J.*, 7 August 1986, No L 221/16 ; Commission Decision No 2767/86/ECSC of 5 September 1986 imposing a provisional anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Yugoslavia, *O.J.*, 6 September 1986, No L 254/18 ; Council Regulation (EEC) No 864/87 of 23 March 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union, and definitively collecting the amounts secured as provisional duties, *O.J.*, 27 March 1987, No L 83/1 ; Commission Regulation (EEC) No 1043/87 of 10 April 1987 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Yugoslavia, *O.J.*, 14 April 1987, No L 102/5).

See also : *basic chromium sulphate from Yugoslavia*, where it was noted that, without the improvement of the export performance of the Community producers, they would have been affected even more (Commission Regulation (EEC) No 2221/85 of 29 July 1985 imposing a provisional anti-dumping duty on imports of basic chromium sulphate originating in Yugoslavia, *O.J.*, 3 August 1985, No L 205/12).

may result in findings of injurious dumping as well as in findings of no injurious dumping¹³¹⁸, without there being an apparent reason arguing for it¹³¹⁹.

¹³¹⁸ For example, in connection with the factor «productivity of the Community industry», improvements in productivity, including increased automation and rationalization measures, even if they have a negative effect on prices or employment, have not prevented the European anti-dumping authorities, in some cases, to conclude that the dumping had materially injured the Community industry (Commission Decision 80/410/EEC of 10 April 1980 accepting undertakings given in connection with the anti-dumping proceedings concerning certain filament lamps for lighting exceeding 28 volts, originating in Czechoslovakia, the German Democratic Republic, Hungary and Poland, and terminating those proceedings, *O.J.*, 15 April 1980, No L 97/59; Commission Regulation (EEC) No 1579/80 of 19 June 1980 imposing a provisional anti-dumping duty on mechanical alarm clocks (other than travel alarms) originating in the German Democratic Republic and the USSR, and repealing a national anti-dumping duty on mechanical alarm clocks originating in China imposed under the transitional provisions of the Act of Accession, *O.J.*, 25 June 1980, No L 158/5; Commission Decision 80/600/EEC of 19 June 1980 accepting undertakings offered by the Chinese and Czechoslovak exporters in connection with the anti-dumping proceeding concerning imports of mechanical alarm clocks (other than travel alarms) originating in China, Czechoslovakia, the German Democratic Republic, Hong Kong and the USSR, terminating the proceeding in respect of China, Czechoslovakia and Hong Kong, and withdrawing acceptance of undertakings previously accepted by the United Kingdom Government from the exporters in the German Democratic Republic, *O.J.*, 25 June 1980, No L 158/18; Commission Regulation (EEC) No 1337/81 of 18 May 1981 imposing a provisional anti-dumping duty on imports of certain textured polyester fabrics originating in the United States of America, *O.J.*, 20 May 1981, No L 133/17; Commission Regulation (EEC) No 2865/85 of 14 October 1985 imposing a provisional anti-dumping duty on imports of certain electronic scales originating in Japan and accepting undertakings and terminating the proceeding in respect of certain imports of such products originating in Japan, *O.J.*, 16 October 1985, No L 275/5; Council Regulation (EEC) No 864/87 of 23 March 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union, and definitively collecting the amounts secured as provisional duties, *O.J.*, 27 March 1987, No L 83/1; Commission Regulation (EEC) No 2684/88 of 26 August 1988 imposing a provisional anti-dumping duty on certain imports of video cassette recorders originating in Japan and the Republic of Korea, *O.J.*, 31 August 1988, No L 240/5), whereas they have in other cases (Commission Decision 85/501/EEC of 11 November 1985 terminating the anti-dumping proceeding concerning imports of wire rod originating in Brazil, Portugal, Trinidad and Tobago and Venezuela, *O.J.*, 13 November 1985, No L 299/18; Commission Decision 86/344/EEC of 17 July 1986 terminating the anti-dumping proceeding concerning imports of Portland cement originating in the German Democratic Republic, Poland and Yugoslavia, *O.J.*, 25 July 1986, No L 202/43; Commission Decision 88/125/EEC of 4 March 1988 terminating the anti-dumping proceeding concerning imports of kraftliner paper and board originating in Brazil and the Republic of South Africa, *O.J.*, 8 March 1988, No L 62/39).

Sometimes, an explanation is provided, pointing out why a situation does not prevent a finding of injurious dumping whereas it normally should. For example, in *small screen colour television receivers from the Republic of Korea*, the relocation of Community producers' production facilities outside the Community had a disruptive effect on employment within the Community. Nevertheless, the dumping was held to cause injury, *inter alia*, to Community employment. The relocation was seen to be a consequence and a measure of injury rather than a cause because it was part of a series of rationalization measures (i.e., the factor «productivity of the Community industry») undertaken by the Community industry for improving profitability in order to counter the effects of competition of low-priced imports (Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1).

¹³¹⁹ See: *small screen colour television receivers from the Republic of Korea*, where the relocation of Community producers' production facilities outside the Community had a disruptive effect on employment within the Community. Nevertheless, the dumping was held to cause injury, *inter alia*, to Community employment. The relocation was seen as a consequence and a measure of injury rather than as a cause, since it was part of a series of rationalization measures (i.e., the factor «productivity of the Community industry») undertaken by the Community industry for improving profitability in order to counter the effects of competition of low-priced imports (Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1).

The remaining «other factors» (the volume of imports not sold at dumping prices¹³²⁰,

1320 With regard to the volume of imports not sold at dumping prices, the following figures can be found in European anti-dumping case law :

	Injury		No injury	
	minimum	maximum	minimum	maximum
Share of non-dumped imports on the Community market	0.7 % ^a	52.7 % ^b	5.3 % ^c	87.0 % ^d
Share of non-dumped imports in total imports	3.3 % ^e	95.1 % ^f	3.6 % ^g	93.9 % ^h
Evolution in share of non-dumped imports in total imports	-37.5 % ⁱ	+82.7 % ^j	-6.1 % ^k	+59.0 % ^l

Source : Official Journal of the European Communities ; own calculations. In particular :

- ^a Commission Regulation (EEC) No 595/85 of 7 March 1985 imposing a provisional anti-dumping duty on imports of certain hydraulic excavators originating in Japan, *O.J.*, 8 March 1985, No L 68/13 ;
- ^b Commission Regulation (EEC) No 720/90 of 22 March 1990 imposing a provisional anti-dumping duty on imports of silicon metal originating in the People's Republic of China, *O.J.*, 27 March 1990, No L 80/9 ;
- ^c Commission Decision 85/501/ECSC of 11 November 1985 terminating the anti-dumping proceeding concerning imports of wire rod originating in Brazil, Portugal, Trinidad and Tobago and Venezuela, *O.J.*, 13 November 1985, No L 299/18 ;
- ^d Commission Decision 90/155/EEC of 26 March 1990 terminating the anti-dumping proceeding concerning imports of tungsten metal powder originating in the People's Republic of China or the Republic of Korea, *O.J.*, 30 March 1990, No L 83/124 ;
- ^e Commission Decision 86/36/EEC of 26 February 1986 accepting undertakings entered into in connection with the anti-dumping proceeding concerning imports into Greece of certain categories of glass originating in Turkey, Yugoslavia, Romania, Bulgaria, Hungary and Czechoslovakia and terminating the investigation, *O.J.*, 28 February 1986, No L 51/73 ;
- ^f Commission Recommendation No 932/78/ECSC of 2 May 1978 imposing a definitive anti-dumping duty on iron or steel coils for re-rolling originating in Bulgaria, *O.J.*, 4 May 1978, No L 120/22 ;
- ^g Commission Decision 90/154/EEC of 26 March 1990 terminating the anti-dumping proceeding concerning imports of ammonium paratungstate originating in the People's Republic of China and the Republic of Korea, *O.J.*, 30 March 1990, No L 83/117 ;
- ^h Commission Decision 89/56/EEC of 20 January 1989 terminating the anti-dumping proceeding concerning imports of certain seamless tubes of iron or non-alloy steel originating in Austria, *O.J.*, 28 January 1989, No L 25/87 ;
- ⁱ Commission Regulation (EEC) No 2495/86 of 1 August 1986 imposing a provisional anti-dumping duty on imports of potassium permanganate originating in Czechoslovakia, the German Democratic Republic and the People's Republic of China, *O.J.*, 5 August 1986, No L 217/12 ;
- ^j Commission Regulation (EEC) No 2017/81 of 15 July 1981 imposing a provisional anti-dumping duty on phenol originating in the United States of America, *O.J.*, 18 July 1981, No L 195/22 ; Council Regulation (EEC) No 90/82 of 18 January 1982 imposing a definitive anti-dumping duty on phenol originating in the United States of America, *O.J.*, 18 January 1982, No L 12/1 ;
- ^k Commission Decision 89/56/EEC of 20 January 1989 terminating the anti-dumping proceeding concerning imports of certain seamless tubes of iron or non-alloy steel originating in Austria, *O.J.*, 28 January 1989, No L 25/87 ;
- ^l Commission Decision 81/1012/EEC of 17 December 1981 terminating the anti-dumping proceeding concerning imports of certain monochrome portable television sets originating in the Republic of Korea, *O.J.*, 19 December 1981, No L 364/49.

Thus, with regard to the volume of non-dumped imports no thresholds can be deduced from European anti-dumping case law.

demand¹³²¹ and pattern of consumption¹³²², trade- restrictive practices of and competition

¹³²¹ In most anti-dumping cases in which no injury was found and in which demand was invoked as other factor, there was a contraction of demand (Council Decision 83/162/EEC of 18 April 1983 terminating the anti-dumping proceeding in respect of imports of acrylonitrile originating in the United States of America, *O.J.*, 20 April 1983, No L 101/29; Commission Regulation (EEC) No 1631/83 of 15 June 1983 imposing a provisional anti-dumping duty on imports of certain glass textile fibres (rovings) originating in Czechoslovakia, the German Democratic Republic and Japan, accepting a price undertaking from one Japanese exporter and terminating the proceeding in respect of imports of certain glass textile fibres (mats), originating in Czechoslovakia and the German Democratic Republic, *O.J.*, 18 June 1983, No L 160/18; Commission Decision 85/143/EEC of 18 February 1985 terminating the anti-dumping proceeding concerning imports of certain boots with fitted ice skates originating in Czechoslovakia, Yugoslavia, Romania and Hungary, *O.J.*, 22 February 1985, No L 52/48; Commission Decision 86/344/EEC of 17 July 1986 terminating the anti-dumping proceeding concerning imports of Portland cement originating in the German Democratic Republic, Poland and Yugoslavia, *O.J.*, 25 July 1986, No L 202/43; Council Regulation (EC) No 1318/94 of 6 June 1994 terminating the review of anti-dumping measures concerning imports of certain acrylic fibres originating in Mexico and repealing the measures applying to such imports, *O.J.*, 8 June 1994, No L 143/1).

However, a contraction of demand does not prevent a finding of injurious dumping (see, e.g., in connection with a decline in demand due to a change in the pattern of consumption: Commission Regulation (EEC) No 2599/79 of 22 November 1979 imposing a provisional anti-dumping duty on certain sodium carbonate originating in the Soviet Union, *O.J.*, 24 November 1979, No L 297/12; Council Regulation (EEC) No 407/80 of 18 February 1980 imposing a definitive anti-dumping duty on certain sodium carbonate originating in the Soviet Union, *O.J.*, 22 February 1980, No L 48/1; Commission Regulation (EEC) No 84/82 of 14 January 1982 imposing a provisional anti-dumping duty on mechanical wrist-watches originating in the USSR, *O.J.*, 16 January 1982, No L 11/14; Commission Regulation (EEC) No 2667/82 of 4 October 1982 imposing a provisional anti-dumping duty on imports of certain sodium carbonate originating in Bulgaria, the German Democratic Republic, Poland, Romania and the Soviet Union, *O.J.*, 6 October 1982, No L 283/9; Commission Decision 86/36/EEC of 26 February 1986 accepting undertakings entered into in connection with the anti-dumping proceeding concerning imports into Greece of certain categories of glass originating in Turkey, Yugoslavia, Romania, Bulgaria, Hungary and Czechoslovakia and terminating the investigation, *O.J.*, 28 February 1986, No L 51/73; Commission Decision 86/232/EEC of 9 June 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of hardboard originating in Argentina, Switzerland and Yugoslavia and terminating the investigation, *O.J.*, 12 June 1986, No L 157/61; Council Decision 87/66/EEC of 19 January 1987 accepting undertakings given in connection with imports of binder and baler twine originating in Brazil and Mexico, and terminating the investigations, *O.J.*, 5 February 1987, No L 34/55; Commission Regulation (EEC) No 1361/87 of 18 May 1987 imposing a provisional anti-dumping duty on imports of ferro-silico-calcium/calcium silicide originating in Brazil, *O.J.*, 19 May 1987, No L 129/5; Council Regulation (EEC) No 2347/87 of 23 July 1987 imposing a definitive anti-dumping duty on mechanical wrist-watches originating in the USSR, *O.J.*, 4 August 1987, No L 213/5; Commission Regulation (EEC) No 2005/88 of 5 July 1988 imposing a provisional anti-dumping duty on imports of serial impact fully formed character printers originating in Japan, *O.J.*, 8 July 1988, No L 177/1; Commission Regulation (EEC) No 761/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten ores and concentrates originating in the People's Republic of China, and terminating the proceeding concerning imports originating in Hong Kong, *O.J.*, 30 March 1990, No L 83/23; Council Regulation (EEC) No 2735/90 of 24 September 1990 imposing a definitive anti-dumping duty on imports of tungsten ores and concentrates originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty, *O.J.*, 27 September 1990, No L 264/1; Commission Decision 93/521/EEC of 3 September 1993 accepting undertakings given in connection with the anti-dumping review in respect of imports of binder and baler twine originating in Brazil, terminating the anti-subsidy review proceeding with regard to these imports and terminating the anti-dumping and anti-subsidy review in respect of imports of binder and baler twine originating in Mexico, *O.J.*, 8 October 1993, No L 251/28).

Also increases in demand may result both in findings of no injurious dumping (Commission Regulation (EEC) No 1101/81 of 23 April 1981 imposing a provisional anti-dumping duty on potato granules originating in Canada, *O.J.*, 28 April 1981, No L 116/11) and in findings of injurious dumping (C.J.E.C., joined cases 277 and 300/85, 5 October 1988, *Canon Inc. a.o. v Council, E.C.R.*, 1988, (5731), 5808; Council Regulation (EEC) No 864/87 of 23 March 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union, and definitively collecting the amounts secured as provisional duties, *O.J.*, 27 March 1987, No L 83/1; Commission Regulation (EEC) No 1043/87 of 10 April 1987 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Yugoslavia, *O.J.*, 14 April 1987, No L 102/5; Commission Regulation (EEC) No 129/91 of 11 January 1991 imposing a provisional anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China, *O.J.*, 19 January 1991, No L 14/31; Council Regulation (EEC) No 577/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as EPROMs (erasable programmable read only memories) originating in Japan, *O.J.*, 12 March 1991, No L 65/1; Commission Decision 91/142/EEC of 15 March 1991 terminating the anti-dumping proceeding concerning imports of Atlantic salmon originating in Norway, *O.J.*, 16 March 1991, No L 69/32 (corrigendum, *O.J.*, 21 March 1991, No L 75/64); Council Regulation (EEC) No 1115/91 of 29 April 1991 imposing definitive anti-dumping duties in connection with the review of anti-dumping measures concerning imports of ferro-silicon originating in Brazil, *O.J.*, 3 May 1991, No L 111/1; Commission Decision 91/240/EEC of 29 April 1991 accepting undertakings offered by certain exporters in connection with the review of anti-dumping measures concerning imports of ferro-silicon originating in Brazil and terminating the investigation as regards those exporters, *O.J.*, 3 May 1991, No L 111/47; Commission Decision 91/256/EEC of 14 May 1991 accepting undertakings offered in connection with the anti-dumping

between foreign and Community producers¹³²³, the evolution in world prices¹³²⁴, the

proceeding concerning imports of welded wire-mesh originating in Yugoslavia and terminating the investigation, *O.J.*, 18 May 1991, No L 123/54 ; Commission Regulation (EEC) No 2805/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports into the Community of certain thermal paper originating in Japan, *O.J.*, 26 September 1991, No L 270/15 ; Commission Decision 91/512/EEC of 25 July 1991 accepting undertakings given in connection with the review of anti-dumping measures concerning imports of artificial corundum originating in the Soviet Union, Hungary, Poland, Czechoslovakia and the People's Republic of China and in connection with the anti-dumping proceeding concerning imports of artificial corundum originating in Brazil and Yugoslavia, and terminating the investigation, *O.J.*, 2 October 1991, No L 275/27 ; Commission Decision No 891/92/ECSC of 30 March 1992 imposing a provisional anti-dumping duty on imports of certain semi-finished products of alloy steel, originating in Turkey and Brazil, *O.J.*, 9 April 1992, No L 95/26 ; Commission Regulation (EEC) No 906/92 of 30 March 1992 imposing a provisional anti-dumping duty on imports of silicon metal originating in Brazil, *O.J.*, 10 April 1992, No L 96/17 ; Commission Regulation (EEC) No 1451/92 of 2 June 1992 imposing a provisional anti-dumping duty on imports into the Community of certain large electrolytic aluminium capacitors originating in Japan, *O.J.*, 4 June 1992, No L 152/22 (corrigendum, *O.J.*, 17 June 1992, No L 163/27) ; Council Regulation (EEC) No 2717/93 of 28 September 1993 imposing a definitive anti-dumping duty on imports of ferro-chrome with a carbon content by weight of maximum 0,5 % (low carbon ferro-chrome), originating in Kazakhstan, Russia and Ukraine, *O.J.*, 2 October 1993, No L 246/1 ; Commission Regulation (EEC) No 3029/93 of 29 October 1993 imposing provisional antidumping duties on imports of television camera systems originating in Japan, *O.J.*, 30 October 1993, No L 271/1 ; Commission Decision 94/82/EC of 10 January 1994 terminating the anti-dumping proceeding concerning imports of gum rosin originating in the People's Republic of China, *O.J.*, 12 February 1994, No L 41/50).

1322 Dumping was found to cause injury because :

- the Community industry responded fast enough to a change in the pattern of consumption and had a production capacity to satisfy the increased demand for a specific product type (Commission Regulation (EEC) No 550/93 of 5 March 1993 imposing a provisional anti-dumping duty on imports of bicycles originating in the People's Republic of China, *O.J.*, 11 March 1993, No L 58/12) ;
- the dumping exporters' argument that the Community producers had failed to adapt to changing consumer habits was not convincing ; instead the European anti-dumping authorities were of the opinion that no new market had been created and the product in question was already established on the Community market (Council Regulation (EEC) No 725/89 of 20 March 1989 imposing a definitive anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty on such imports, *O.J.*, 22 March 1989, No L 79/24) ;
- the claimed negative effect of the competition of certain substitute products on the state of the Community industry was not accepted in view of the increase in demand for the like product (Commission Regulation (EEC) No 3798/90 of 21 December 1990 imposing a provisional anti-dumping duty on imports of espadrilles originating in the People's Republic of China, *O.J.*, 28 December 1990, No L 365/25) ;
- the replacement of the like product by alternative products in recent years was considered to represent mainly a threat to the future of the production of the like product and not to affect the injurious impact of the dumping (Commission Decision 91/392/EEC of 21 June 1991 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain asbestos cement pipes originating in Turkey, and terminating the investigation, *O.J.*, 31 July 1991, No L 209/37) ;
- the Community industry was able to provide all types of the like product, including those which met the particular requirements of specific categories of users (Council Regulation (EEC) No 1473/93 of 14 June 1993 imposing a definitive anti-dumping duty on imports of magnesium oxide originating in the People's Republic of China, *O.J.*, 17 June 1993, No L 145/1).

No injury caused by the dumping was found because :

- the dumping exporter was able to offer a broader range of products, some of which may have been more suited to customer requirements (Commission Decision 83/493/EEC of 28 September 1983 terminating the anti-dumping proceeding concerning imports of xanthan gum originating in the United States of America, *O.J.*, 30 September 1983, No L 268/60) ;
- a price increase of the like product would depress demand and lead to substitution of the like product by other, less expensive products (Commission Decision 81/493/EEC of 6 July 1981 terminating the anti-dumping procedure concerning imports of furfural originating in the Dominican Republic, Spain and the People's Republic of China, *O.J.*, 11 July 1981, No L 189/57).

1323 The dumping was found to cause material injury :

- notwithstanding the condemnation of certain aspects of the pricing policy of the French producers by French antitrust authorities (Council Regulation (EEC) No 101/83 of 17 January 1983 imposing a definitive anti-dumping duty on certain chemical fertilizer originating in the United States of America, *O.J.*, 19 January 1983, No L 15/1 ; Commission Regulation (EEC) No 290/83 of 2 February 1983 imposing a provisional anti-dumping duty on imports of urea ammonium nitrate solution fertilizer originating in the United States of America, *O.J.*, 4 February 1983, No L 33/9) ;
- because there was no evidence that the Community producers distorted or restricted competition on the Community market (Commission Regulation (EEC) No 1361/87 of 18 May 1987 imposing a provisional anti-dumping duty on imports of ferro-silico-calcium/calcium silicide originating in Brazil, *O.J.*, 19 May 1987, No L 129/5 ; Council Regulation (EEC) No 3365/87 of 9 November 1987 imposing a definitive anti-dumping duty on imports of ferro-silico-calcium/calcium silicide originating in Brazil, *O.J.*, 12 November 1987, 322/1 ; see also : Council Regulation (EEC) No 3687/87 of 8 December 1987 imposing a definitive anti-dumping duty on imports of mercury originating in the Soviet Union and definitively collecting the provisional anti-dumping duty imposed on such imports, *O.J.*, 10 December 1987, No L 346/27 ; Council Regulation (EEC) No 2808/89 of 18 September 1989 imposing a definitive anti-dumping duty on imports of calcium metal originating in the People's Republic of China and the Soviet Union and definitively collecting the provisional anti-dumping duty imposed on such imports, *O.J.*, 20 September 1989, No L 271/1) ;
- as the condemnation of the Community producer by French antitrust authorities for hindering the setting-up of a competitor in a downstream industry by refusing to supply that competitor, did not pertain to the Community producer's behaviour during the investigation period, and because there was evidence that, during the investigation period, the Community producer has made considerable efforts in order to be able to supply his competitor in the downstream industry (Commission Regulation (EC) No 892/94 of 21 April 1994 imposing a provisional anti-dumping duty on imports of calcium metal originating in the People's Republic of China and Russia, *O.J.*, 23 April 1994, No L 104/5 ; Council Regulation (EC) No 2557/94 of 19 October 1994 imposing a definitive anti-dumping duty on imports of calcium metal originating in the People's Republic of China and Russia, *O.J.*, 21 October 1994, No L 270/27) ;
- notwithstanding the price pressure which the newly established Community producers might have exerted (Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50) ;
- notwithstanding that the market success of a dumping exporter might be explained by the fact that he possessed the exclusive rights to manufacture a type of the like product for which a growing demand had existed (Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12) ;
- in view of the decline in the number of Community producers (Commission Regulation (EEC) No 2297/80 of 29 August 1980 imposing a provisional anti-dumping duty on imports of certain polyester yarn originating in the United States of America, *O.J.*, 2 September 1980, No L 231/5 ; Commission Regulation (EEC) No 1337/81 of 18 May 1981 imposing a provisional anti-dumping duty on imports of certain textured polyester fabrics originating in the United States of America, *O.J.*, 20 May 1981, No L 133/17 ; Commission Regulation (EEC) No 3453/81 of 2 December 1981 imposing a provisional anti-dumping duty on imports of certain cotton yarns originating in Turkey, *O.J.*, 3 December 1981, No L 347/19 ; Council Regulation (EEC) No 789/82 of 2 April 1982 imposing a definitive anti-dumping duty on imports of certain cotton yarns originating in Turkey, *O.J.*, 3 March 1982, No L 90/1).

The European anti-dumping authorities must actually examine whether the Community producers did not inflict injury upon themselves by their allegedly trade-restrictive behaviour. They must not invoke the fact that the national or European antitrust authorities did not yet reach a verdict, as lack of evidence (C.J.E.C., case C-358/89, 11 June 1992, *Extramet Industrie SA v Council*, E.C.R., 1992, I, (3813), 3836 and 3838 (Opinion of Avocate General JACOBS), and 3848-3849).

In several anti-dumping cases, no finding of injurious dumping has been made because :

- of strong contractual ties between the Community industry and its main customers (Commission Regulation (EEC) No 2599/79 of 22 November 1979 imposing a provisional anti-dumping duty on certain sodium carbonate originating in the Soviet Union, *O.J.*, 24 November 1979, No L 297/12 ; Council Regulation (EEC) No 407/80 of 18 February 1980 imposing a definitive anti-dumping duty on certain sodium carbonate originating in the Soviet Union, *O.J.*, 22 February 1980, No L 48/1) ;
- the reduction in production capacity of the Community industry was caused by an arrangement signed by the majority of the Community producers (Commission Decision 87/236/EEC of 10 April 1987 terminating the anti-dumping proceeding on imports of synthetic fibres of polyesters originating in the German Democratic Republic, Romania, Turkey and Yugoslavia, *O.J.*, 15 April 1987, No L 103/38) ;
- of the high degree of competition resulting from intra-Community trade (Commission Decision 86/344/EEC of 17 July 1986 terminating the anti-dumping proceeding concerning imports of Portland cement originating in the German Democratic Republic, Poland and Yugoslavia, *O.J.*, 25 July 1986, No L 202/43 ; Commission Regulation (EEC) No 2800/86 of 9 September 1986 imposing a provisional anti-dumping duty on imports of certain deep freezers originating in the USSR, accepting the undertakings in connection with the investigation of imports of certain deep freezers originating in Yugoslavia or in the German Democratic Republic and terminating the investigation, and terminating the proceeding concerning imports of certain deep freezers, *O.J.*, 11 September 1986, No L 259/14 (with regard to chest freezers)), unless it existed in a previous period (Council Regulation (EEC) No 2370/83 of 19 August 1983 imposing a definitive anti-dumping duty on imports of barium chloride originating in the People's Republic of China and in the German Democratic Republic, *O.J.*, 20 August 1983, No L 228/28).

relocation of Community-owned production facilities to third countries¹³²⁵, the purchasing

It might be astonishing why the factor «trade restrictive practices of and competition between the foreign and domestic producers» has but infrequently resulted in findings of no injury. However, recent economic research has shown that Community industries with high concentration and cohesion are quite successful in obtaining injury finding. This connection between findings of injury and the degree of concentration and cohesion in the Community industry is a matter of concern, since anti-dumping relief may favour collusion among the Community producers (THARAKAN, P.K.M., and WAELEBROECK, J., «Antidumping and countervailing duty decisions in the E.C. and in the U.S. An experiment in comparative political economy», *European Economic Review*, 1994, (171), 183 and 187). Therefore, trade restrictive practices should be more carefully scrutinized.

In connection with the factor «trade restrictive practices of and competition between the foreign and domestic producers», reference has also been made to the product life cycle (in connection with the product life cycle in general, see : DORWARD, N., *The pricing decision : Economic theory and business practice*, London, Harper & Row, 1987, 127-128) :

- in *small screen colour television receivers from the Republic of Korea, Hong Kong and the People's Republic of China*, it was considered normal for prices of consumer electronics items to fall over time, for reasons of increased volume and technical improvements in production. Because it was thought that these factors tend to be very limited when the product is positioned at a mature point on its current technology curve, the dumping was found to cause material injury (Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1 ; Commission Regulation (EEC) No 129/91 of 11 January 1991 imposing a provisional anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China, *O.J.*, 19 January 1991, No L 14/31) ;
- in *radio-broadcast receivers of a kind used in motor vehicles from South Korea* the European anti-dumping authorities were of the opinion that, as the product's technological development curve is near to its maximum possible level, the price reductions found could not be explained by factors deriving from a normal competitive context, such as increased production volumes and improved manufacturing techniques (Commission Regulation (EEC) No 313/92 of 4 February 1992 imposing a provisional anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in South Korea, *O.J.*, 11 February 1992, No L 34/8) ;
- in *compact disc players from Japan and South Korea* it was noted that «(following the launch of CPDs by a very limited number of manufacturers, prices fell rapidly as production expanded and new producers entered the market» and that «(prices quickly bottomed out to a level barely above costs for basic models and competition switched to focus on more advanced features and styling» (Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27)).

The latter case provides a correct interpretation of the product life cycle. Indeed, in that case it was stated that after having passed through the introductory and growth stage the basic models have entered the mature stage in which the price competition from substitutes is the most intense, resulting in prices barely covering production costs. The more advanced models, however, are still in their growth stage in which the maintenance and even the improvement of their quality is emphasized.

The other two cases, however, do not give a correct application of the product life cycle. Indeed, at the mature stage of a product, price decreases are not unusual because at this stage competition is the sharpest. Thus, at the mature stage price decreases are caused by competition and not by other factors such as technological progress.

1324 Injurious dumping was found :

- because the dumping producers had contributed to the decline in world prices of the like product (Commission Regulation (EEC) No 2450/87 of 12 August 1987 imposing a provisional anti-dumping duty on imports of mercury originating in the Union of Soviet Socialist Republics, *O.J.*, 14 August 1987, No L 227/8 ; Council Regulation (EEC) No 3687/87 of 8 December 1987 imposing a definitive anti-dumping duty on imports of mercury originating in the Soviet Union and definitively collecting the provisional anti-dumping duty imposed on such imports, *O.J.*, 10 December 1987, No L 346/27) ;
- despite the worldwide underlying downward trend in the prices of the like product (Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia, *O.J.*, 9 May 1987, No L 121/11 ; Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1).

No injurious dumping was found because the prices had started to rise in the Community but also worldwide (Council Regulation (EEC) No 2702/87 of 4 September 1987 repealing a definitive anti-dumping duty on styrene monomer originating in the United States of America and terminating the investigation, *O.J.*, 8 September 1987, No L 258/20).

policy of the economic group to which the Community producers belong¹³²⁶, the coincidence of trade policy measures with regard to imports from the dumping country in question¹³²⁷)

¹³²⁵ In *small-screen colour television receivers from Hong Kong and the People's Republic of China*, the relocation of Community-owned production facilities to third countries did not prevent a finding of injurious dumping because the market share held by total Community sales (i.e., sourced from both Community and extra-Community production facilities) decreased (Commission Regulation (EEC) No 129/91 of 11 January 1991 imposing a provisional anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China, *O.J.*, 19 January 1991, No L 14/31).

In *radio-broadcast receivers of a kind used in motor vehicles from South Korea and in colour television receivers from Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand*, the relocation of Community-owned production facilities, dictated by the need to improve competitiveness by reducing the costs of components and labour, had led to a considerable increase in imports into the Community of products manufactured by these production facilities and, thus, had enabled the Community industry to better defend its position on the Community market (Commission Regulation (EEC) No 313/92 of 4 February 1992 imposing a provisional anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in South Korea, *O.J.*, 11 February 1992, No L 34/8; Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50).

Conversely, in *audio tapes in cassettes from Japan, the Republic of Korea and Hong Kong*, a finding of injurious dumping was made because the rate of capacity utilization decreased and the increase in production capacity corresponded to the cessation of production by the Community industry in production facilities located outside the Community (Commission Regulation (EEC) No 3262/90 of 5 November 1990 imposing a provisional anti-dumping duty on imports of audio tapes in cassettes originating in Japan, the Republic of Korea and Hong Kong, *O.J.*, 13 November 1990, No L 313/5 (corrigendum, *O.J.*, 12 January 1991, No L 9/36)).

No injury will be found when the Community producers started on a large scale to relocate their production facilities to third countries at the expense of their production in the Community after the imposition of the anti-dumping measures (Commission Decision 93/376/EEC of 16 June 1993 terminating the review of anti-dumping measures adopted under Council Regulation (EEC) 1698/85 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 29 June 1993, No L 157/76).

¹³²⁶ Injurious dumping was found because the purchases of the raw material by the Community producers from associated companies located outside the Community could not have influenced their profit and loss, situation since the costs of their purchases in relation to the overall cost of the finished products were generally in line with the ratios of raw material cost to finished cost of the dumping exporters (Council Regulation (EEC) No 55/93 of 8 January 1993 imposing a definitive anti-dumping duty on imports of outer rings of tapered roller bearings originating in Japan, *O.J.*, 15 January 1993, No L 9/7).

No injurious dumping was found because the financial losses were caused by the group's purchasing policy, i.e., the fact that the transfer price for the like product within the group was too low to allow the group's producers to make a profit (C.J.E.C., case C-315/90, 27 November 1991, *Groupement des Industries de Matériels d'Équipement Électrique et de l'Électronique Industrielle Associée (Gimelec) a.o. v Commission, E.C.R.*, 1991, I, (5589), 5598 (Report for the Hearing: plea in law of the applicants) and 5621-5622; Commission Decision 90/399/EEC of 26 July 1990 terminating an anti-dumping proceeding concerning imports of certain single phase, two-speed electric motors originating in Bulgaria, Romania and Czechoslovakia, *O.J.*, 31 July 1990, No L 202/47).

¹³²⁷ If the dumped imports are subject to quantitative restrictions or voluntary export restraint agreements, the dumping may be found to cause injury (Commission Regulation (EEC) No 84/82 of 14 January 1982 imposing a provisional anti-dumping duty on mechanical wrist-watches originating in the USSR, *O.J.*, 16 January 1982, No L 11/14), unless the quantitative restrictions or voluntary export restraint agreements are not fully respected (Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1; Council Regulation (EEC) No 1048/90 of 25 April 1990 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 27 April 1990, No L 107/56 (corrigendum, *O.J.*, 24 May 1990, No L 133/92)). Nevertheless, the observance of quantitative restrictions and voluntary export restraint agreements is no waterproof guarantee for a finding of no injurious dumping. For injurious dumping has been found in respect of imports subjected to quantitative restrictions of which it was not said whether or not they were observed (Commission Regulation (EEC) No 129/91 of 11 January 1991 imposing a provisional anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China, *O.J.*, 19 January 1991, No L 14/31; Commission Regulation (EEC) No 2818/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports of cotton yarn originating in Brazil, Egypt and Turkey and terminating the anti-dumping proceeding in respect of cotton yarn originating in India and Thailand, *O.J.*, 27 September 1991, No L 271/17; Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7; Council Regulation (EEC) No 738/92 of 23 March 1992 imposing a definitive anti-dumping duty on imports of cotton yarn originating in Brazil and Turkey, *O.J.*, 27 March 1992, No L 82/1).

may result in a finding either of injurious dumping or of no injurious dumping. Like the majority of «other factors», but in a higher number of cases, those factors under identical circumstances may result in opposite conclusions¹³²⁸. Moreover, under divergent circumstances, they may also result in identical conclusions¹³²⁹. Usually no reason is provided, explaining why

A system of minimum prices will not prevent a finding of injurious dumping either when that mechanism is suspended because it was ineffective and could easily be circumvented (Council Regulation (EEC) No 738/92 of 23 March 1992 imposing a definitive anti-dumping duty on imports of cotton yarn originating in Brazil and Turkey, *O.J.*, 27 March 1992, No L 82/1).

If the injury suffered by the Community industry is already remedied by countervailing duties, no anti-dumping relief will be granted (Commission Decision 81/430/EEC of 15 June 1981 terminating the anti-dumping proceeding concerning imports of certain seamless tubes or non-alloy steels originating in Spain, *O.J.*, 23 June 1981, No L 165/27; conversely, a countervailing duty will not be imposed in combination with an anti-dumping duty, see: Commission Recommendation No 2129/83/ECSC of 27 July 1983 imposing a definitive countervailing duty on imports of certain steel plates originating in Brazil and suspending the application of this duty, *O.J.*, 29 July 1983, L 205/29). It is expressly provided in European anti-dumping law that a product cannot be subject to both anti-dumping and countervailing duties for the purpose of dealing with one and the same situation arising from dumping or a subsidy (Article 14(1) basic EC Regulation; Article 13(9) basic ECSC Decision). According to the European anti-dumping authorities, the prohibition of cumulating anti-dumping and countervailing duties is only aimed at preventing double counting (Commission Regulation (EEC) No 1613/90 of 13 June 1990 imposing a provisional anti-dumping duty on imports of ball bearings with a greatest external diameter not exceeding 30 mm originating in Thailand, *O.J.*, 16 June 1990, No L 152/24, upheld in Council Regulation (EEC) No 2934/90 of 9 October 1990 imposing a definitive anti-dumping duty on imports of ball bearings with greatest external diameter not exceeding 30 mm originating in Thailand and collecting definitively the provisional duty, *O.J.*, 12 October 1990, No L 281/1). Double counting may be caused by the fact that the countervailable subsidy, increases the dumping margin because it causes a decline in the export price or a rise in the normal value. If that effect of a subsidy on the dumping margin is not taken into account, the injury caused by the subsidy would be twice countervailed, i.e., once by the countervailing duty and once by the anti-dumping duty. For preventing such double counting, the impact of the countervailable subsidy on the dumping margin must be examined. If the net dumping margin (i.e., the dumping margin less the effect of the countervailable subsidy) is positive, anti-dumping relief may be granted.

¹³²⁸ For example, in connection with the factor «trade restrictive practices of and competition between the foreign and domestic producers», the existence of a high degree of competition between the Community producers has underbuilt a finding of no injurious dumping (Commission Decision 86/344/EEC of 17 July 1986 terminating the anti-dumping proceeding concerning imports of Portland cement originating in the German Democratic Republic, Poland and Yugoslavia, *O.J.*, 25 July 1986, No L 202/43; Commission Regulation (EEC) No 2800/86 of 9 September 1986 imposing a provisional anti-dumping duty on imports of certain deep freezers originating in the USSR, accepting the undertakings in connection with the investigation of imports of certain deep freezers originating in Yugoslavia or in the German Democratic Republic and terminating the investigation, and terminating the proceeding concerning imports of certain deep freezers, *O.J.*, 11 September 1986, No L 259/14 (with regard to chest freezers)). However, evidence that competition between Community producers affects the level of market prices does not always underbuilt a finding of no injurious dumping (Commission Regulation (EEC) No 2800/86 of 9 September 1986 imposing a provisional anti-dumping duty on imports of certain deep freezers originating in the USSR, accepting the undertakings in connection with the investigation of imports of certain deep freezers originating in Yugoslavia or in the German Democratic Republic and terminating the investigation, and terminating the proceeding concerning imports of certain deep freezers, *O.J.*, 11 September 1986, No L 259/14 (with regard to upright freezers); Commission Regulation (EEC) No 3019/86 of 30 September 1986 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania and the USSR, *O.J.*, 1 October 1986, No L 280/68).

¹³²⁹ For example, in connection with the factor «trade restrictive practices of and competition between the foreign and domestic producers» findings of no injury have been based on the existence of a high degree of competition between the Community producers (Commission Decision 86/344/EEC of 17 July 1986 terminating the anti-dumping proceeding concerning imports of Portland cement originating in the German Democratic Republic, Poland and Yugoslavia, *O.J.*, 25 July 1986, No L 202/43; Commission Regulation (EEC) No 2800/86 of 9 September 1986 imposing a provisional anti-dumping duty on imports of certain deep freezers originating in the USSR, accepting the undertakings in connection with the investigation of imports of certain deep freezers originating in Yugoslavia or in the German Democratic Republic and terminating the investigation, and terminating the proceeding concerning imports of certain deep freezers, *O.J.*, 11 September 1986, No L 259/14 (with regard to chest freezers)) as well as on a restriction of competition between them (Commission Regulation (EEC) No 2599/79 of 22 November 1979 imposing a provisional anti-dumping duty on certain sodium carbonate originating in the Soviet Union, *O.J.*, 24 November 1979, No L 297/12; Council Regulation (EEC) No 407/80 of 18 February 1980 imposing a definitive anti-dumping duty on certain sodium carbonate originating in the Soviet Union, *O.J.*, 22 February 1980, No L 48/1; Commission Decision 87/236/EEC of 10 April 1987 terminating the anti-dumping proceeding on imports of synthetic fibres of polyesters originating in the German Democratic Republic, Romania, Turkey and Yugoslavia, *O.J.*, 15 April 1987, No L 103/38).

identical circumstances result in opposite conclusions and why divergent circumstances result in identical conclusions¹³³⁰.

- 1330 With regard to the factor «volume of imports not sold at dumping prices» an explanation is sometimes provided, explaining why, despite of the high volume of non-dumped imports or its increase, the dumping is found to cause material injury, namely :
- the fact that the volume of non-dumped imports has not shown the sudden increase as the volume of dumped imports (Commission Regulation (EEC) No 2999/80 of 20 November 1980 imposing a provisional anti-dumping duty on vinyl acetate monomer originating in the United States of America, *O.J.*, 21 November 1980, No L 311/13) ;
 - the fact that the increase was mainly attributable to the fuller use third countries made of the tonnages agreed under trade arrangements with the Community, without exceeding them (see e.g., Commission Decision No 3599/88/ECSC of 18 November 1988 imposing definitive anti-dumping duties on imports of certain iron or steel sections originating in Yugoslavia and Turkey, definitively collecting the provisional anti-dumping duties imposed on those imports, accepting undertakings given in connection with imports of iron or steel sections originating in Yugoslavia and Turkey and terminating the investigation with regard to the exporters concerned, *O.J.*, 19 November 1988, No L 313/18) ;
 - the fact that the increase was limited to the quantitative maximum determined in trade arrangements (Commission Decision No 708/89/ECSC of 17 March 1989 imposing a provisional anti-dumping duty on imports of certain flat-rolled products of iron or non-alloy steel, cold-rolled, originating in Yugoslavia, *O.J.*, 21 March 1989, No L 78/14).

With regard to the factor «demand» an explanation is more frequently provided, pointing out why :

- findings of injurious dumping have been made :
 - because the increase in demand benefited the dumped imports more than the Community industry (see e.g., Commission Regulation (EEC) No 2051/90 of 17 July 1990 imposing a temporary anti-dumping duty on imports of woven polyolefin bags originating in the People's Republic of China, *O.J.*, 19 July 1990, No L 187/36 (corrigendum, *O.J.*, 20 September 1990, No L 256/38) ;
 - because the Community industry did not benefit from the increased demand (Commission Regulation (EEC) No 1451/92 of 2 June 1992 imposing a provisional anti-dumping duty on imports into the Community of certain large electrolytic aluminium capacitors originating in Japan, *O.J.*, 4 June 1992, No L 152/22 (corrigendum, *O.J.*, 17 June 1992, No L 163/27) ; Commission Decision 94/82/EC of 10 January 1994 terminating the anti-dumping proceeding concerning imports of gum rosin originating in the People's Republic of China, *O.J.*, 12 February 1994, No L 41/50) ;
 - because the decline in demand affected the Community industry more than the dumped imports (see e.g., Commission Regulation (EEC) No 1994/92 of 14 July 1992 imposing a provisional anti-dumping duty on imports into the Community of outer rings of tapered roller bearings originating in Japan, *O.J.*, 18 July 1992, No L 199/8) ;
 - because the Community producers' sales or market share did not run parallel to the evolution in demand, thereby generating a decrease in the market share of the Community industry (see e.g., Commission Regulation (EC) No 1076/94 of 6 May 1994 imposing a provisional anti-dumping duty on imports of certain watch movements originating in Malaysia and Thailand, *O.J.*, 11 May 1994, No L 120/3) ;
 - because the dumped imports increased by more than the Community demand (see e.g., Commission Regulation (EEC) No 3262/90 of 5 November 1990 imposing a provisional anti-dumping duty on imports of audio tapes in cassettes originating in Japan, the Republic of Korea and Hong Kong, *O.J.*, 13 November 1990, No L 313/5 (corrigendum, *O.J.*, 12 January 1991, No L 9/36), because they have increased while Community demand was falling (see e.g., Commission Regulation (EEC) No 761/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten ores and concentrates originating in the People's Republic of China, and terminating the proceeding concerning imports originating in Hong Kong, *O.J.*, 30 March 1990, No L 83/23) or because they have decreased by less than the Community demand (see e.g., Commission Regulation (EEC) No 1472/91 of 29 May 1991 imposing a provisional anti-dumping duty on imports of oxalic acid originating in India or China and terminating the anti-dumping proceeding in respect of imports of oxalic acid originating in Czechoslovakia, *O.J.*, 1 June 1991, No L 138/62) (i.e., in all these cases an increase in the market share of the dumped imports) ;
 - because the increase in the Community producers' sales reflected only the increase in consumption and, therefore, the market share of the Community industry remained constant (see e.g., Commission Regulation (EEC) No 761/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten ores and concentrates originating in the People's Republic of China, and terminating the proceeding concerning imports originating in Hong Kong, *O.J.*, 30 March 1990, No L 83/23) ;
 - because the evolution in the volume of dumped imports coincided with the evolution in Community demand (i.e., a stable market share of the dumped imports) (Commission Decision 90/240/EEC of 22 May 1990 terminating the proceeding in connection with a review of anti-dumping measures regarding imports of fibre building-board (hardboard) originating in Finland, Argentina, Switzerland and Yugoslavia and repealing Decisions 86/35/EEC and 86/232/EEC accepting the undertakings given by the exporters concerned, *O.J.*, 31 May 1990, No L 138/44 ; Council Regulation (EC) No 643/94 of 21 March 1994 amending Regulation (EEC) No 3068/92 in respect of definitive anti-dumping duties on imports of potassium chloride originating in Belarus, Russia and Ukraine, *O.J.*, 24 March 1994, No L 80/1) ;
 - because the reduction in Community consumption took place in a period during which the Community producer did not suffer financial losses (Commission Regulation (EC) No 1783/94 of 18 July 1994 imposing a provisional anti-dumping duty on imports of furfuraldehyde originating in the People's Republic of China, *O.J.*, 21 July 1994, No L 186/11) ;
- findings of no injury have been made :
 - because the Community producers' sales decreased in volume at a lower rate than demand, thereby generating an increase in the market share of the Community industry (Commission Decision 85/143/EEC of 18 February 1985

European anti-dumping case law, therefore, seems not to be very clear. The complexity of each case (*e.g.*, the interrelationship between various factors, including dumping) does make European anti-dumping case law complex and, to some extent, vague. However, since only rarely the complexity of the case is invoked to explain why identical circumstances result in opposite conclusions and *vice versa*, the vagueness may disguise «one-way flexibility».

Indeed, only «one-way flexibility» may explain why the examination of «other factors» usually does not result in findings of no injurious dumping. The presence of «one-way flexibility» may easily be shown by means of two examples. First, there seems to be no other explanation why factors, such as «developments in technology» and «over-capacity», in cases concerning Japanese imports of technologically advanced products, such as photocopiers, printers, DRAMs, EPROMs, compact disc players and video cassette recorders, are not accepted as a cause of the injury suffered by the Community industry, for it is generally known that Japan is on the edge of technology and, especially of its application in the sector of consumer electric and electronic products. Second, only «one-way flexibility» may explain why European anti-dumping case law is not consistent as to the problem of technical dumping and the problem of high unit costs during a start-up or expansion phase :

- The factor «prices of imports not sold at dumping prices» has not prevented a finding of no injurious dumping in cases where the non-dumping exporters were obliged to align their prices to those charged by the dumping

terminating the anti-dumping proceeding concerning imports of certain boots with fitted ice skates originating in Czechoslovakia, Yugoslavia, Romania and Hungary, *O.J.*, 22 February 1985, No L 52/48 ;

- because the dumped imports have increased in volume at a lower rate than Community demand, thereby generating a smaller market share of the dumped imports (Commission Decision 90/399/EEC of 26 July 1990 terminating an anti-dumping proceeding concerning imports of certain single phase, two-speed electric motors originating in Bulgaria, Romania and Czechoslovakia, *O.J.*, 31 July 1990, No L 202/47) ;
- because the evolution in the volume of dumped imports coincided with the evolution in Community demand (*i.e.*, a stable market share of the dumped imports) (Commission Decision 85/470/EEC of 7 October 1985 terminating the anti-dumping proceeding concerning imports of standard wood particle board originating in Bulgaria, Czechoslovakia, Poland, Romania, the Soviet Union, Spain and Yugoslavia, *O.J.*, 10 October 1985, No L 268/22 ; Commission Decision 90/240/EEC of 22 May 1990 terminating the proceeding in connection with a review of anti-dumping measures regarding imports of fibre building-board (hardboard) originating in Finland, Argentina, Switzerland and Yugoslavia and repealing Decisions 86/35/EEC and 86/232/EEC accepting the undertakings given by the exporters concerned, *O.J.*, 31 May 1990, No L 138/44).

In connection with the factor «demand», European anti-dumping case law, thus, seems to be clear : an increase in the market share of the dumped imports results in a finding of injurious dumping, an increase in the market share of the Community industry results in a finding of no injury, and a constant market share of either the dumped imports or the Community industry can have both results.

However, if European anti-dumping case law in connection with the factor «market share» (which is used as indication for the effect of the dumping on the state of the Community industry (Articles 3.2. and 3.4. GATT Anti-dumping Code ; Article 3(3) and (5) basic EC Regulation ; Article 4(2)(a) and (c) basic ECSC Decision)) is taken into account (*see : supra*, 447 and 488), such a clear conclusion cannot be made in connection with the factor «demand». Findings of no injury and findings of injury have been made regardless of the evolution in the market share of the dumped imports and the Community industry. It, therefore, seems, that the factor «demand» is invoked in order to stress the factor «market share» if that factor is decisive.

exporters in order to find a buyer¹³³¹. This contrasts sharply with the attitude of the European anti-dumping authorities *vis-à-vis* technical dumping, not accepting a price alignment defence made by the dumping exporters with regard to dumped imports from third countries¹³³². Thus, in fact, price alignment to dumped prices is allowed in so far it does not result in dumping.

- Similarly, the factor «over-capacity» was not found to be convincing in a case where the dumping exporters' argument that the Community industry was suffering injury because its significant investment in over-capacity had entailed high unit costs, was rejected. Their argument was rejected because the European anti-dumping authorities considered that «it is a normal consequence of the early years of any industry that unit costs do not reach an optimum level»¹³³³. In other cases, the European anti-dumping authorities accepted that financial losses may be expected at the start of production¹³³⁴. This contrasts sharply with European anti-dumping case law, dating from before the 1994 GATT Anti-dumping Code, where the same idea *vis-à-vis* allegedly dumping exporters in a start-up or expansion phase was rejected¹³³⁵. The latter contradiction is even more striking as the principle of non-discrimination has been invoked explicitly as the reason why a differentiated treatment is refused to allegedly dumping exporters in a start-up or expansion phase, whereas no explanation is given why a different treatment of Community producers in a start-up or expansion phase does not violate this principle with regard to the other Community producers as well as with regard to the allegedly dumping exporters in a start-up or expansion phase. As the 1994 GATT Anti-dumping Code explicitly requires to take account of the fact that production costs of the dumping exporters may be affected by start-up operations (Article 2.2.1.1.; see also : Article 2(5)(b) basic EC Regulation)¹³³⁶, this unequal treatment between the dumping exporters and the Community producers should normally disappear in European anti-dumping case law.

Both contradictions in European anti-dumping case law show a «one-way flexibility». Indeed, by refusing the technical dumping argument to the dumping exporters, the European anti-dumping

1331 Council Regulation (EEC) No 3687/87 of 8 December 1987 imposing a definitive anti-dumping duty on imports of mercury originating in the Soviet Union and definitively collecting the provisional anti-dumping duty imposed on such imports, *O.J.*, 10 December 1987, No L 346/27 ; Commission Regulation (EEC) No 2684/88 of 26 August 1988 imposing a provisional anti-dumping duty on certain imports of video cassette recorders originating in Japan and the Republic of Korea, *O.J.*, 31 August 1988, No L 240/5 ; Commission Regulation (EEC) No 761/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten ores and concentrates originating in the People's Republic of China, and terminating the proceeding concerning imports originating in Hong Kong, *O.J.*, 30 March 1990, No L 83/23.

See also : *vinyl acetate monomer from the United States of America*, where the highly competitive nature of the Community market was invoked in order to explain why non-dumped imports, which were sold at prices not substantially different from the dumped prices, did not prevent that the dumped imports were considered to cause injury to the Community industry (Commission Regulation (EEC) No 2999/80 of 20 November 1980 imposing a provisional anti-dumping duty on vinyl acetate monomer originating in the United States of America, *O.J.*, 21 November 1980, No L 311/13).

1332 *Supra*, 469-470.

1333 Commission Regulation (EEC) No 2079/83 of 25 July 1983 imposing a provisional anti-dumping duty on imports of dicumyl peroxide originating in Japan, *O.J.*, 27 July 1983, No L 203/13. See also : Commission Regulation (EEC) No 3421/90 of 26 November 1990 imposing a provisional anti-dumping duty on imports of aspartame originating in Japan and the United States of America, *O.J.*, 29 November 1990, No L 330/16.

1334 Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5 ; Commission Regulation (EEC) No 2686/92 of 16 September 1992 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea, *O.J.*, 17 September 1992, No L 272/13.

See also : Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5 ; Council Regulation (EC) No 2199/94 of 9 September 1994 imposing a definitive anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, and collecting definitively the provisional duty imposed, *O.J.*, 10 September 1994, No L 236/2.

1335 *Supra*, 164-166.

1336 *Supra*, 165-166.

authorities deprive them of an excuse for their dumping ; but, by accepting price alignments by non-dumping exporters to low-priced dumped imports, they neutralise the factor «prices of imports not sold at dumping prices» which would otherwise have been a ground for not finding the dumping causing material injury. Similarly, by refusing a differentiated treatment to allegedly dumping exporters, they increase the chance of finding dumping ; but, by accepting that Community producers are not able to cover all their production costs during a start-up or expansion phase, they neutralise the factor «over-capacity» which could otherwise have been invoked as a reason for not finding injurious dumping. The latter contradiction, however, is expected to disappear, but only because the new GATT Anti-dumping Code restricts the room for manoeuvre of the European anti-dumping authorities by requiring special adjustments *vis-à-vis* dumping exporters whose production costs are affected by start-up operations (Article 2.2.1.1. GATT Anti-dumping Code ; see also : Article 2(5)(b) basic EC Regulation).

4.3. CAUSAL RELATIONSHIP

4.3.1. Trends analysis : the European approach

Under GATT and European anti-dumping law, the injury caused by other factors must not be attributed to the dumping (Article 3.5. GATT Anti-dumping Code ; Article 3(7) basic EC Regulation ; Article 4(1) basic ECSC Decision). Thus, the injury caused by the dumping must be separated from the injury caused by other factors. Contrary to initial GATT and European anti-dumping law¹³³⁷, it is no longer required that dumping is the principal cause of the injury nor that the consequences of dumping are weighed against the effect of all other factors together¹³³⁸. It must only be demonstrated that the dumping has caused some material injury,

¹³³⁷ 1968 GATT Anti-dumping Code ; Council Regulation (EEC) No. 459/68.

¹³³⁸ C.J.E.C., joined cases 277 and 300/85, 5 October 1988, *Canon Inc. a.o. v Council*, E.C.R., 1988, (5731), 5809 ; BESELER, J.-F., *Die Abwehr von Dumping und Subventionen durch die Europäische Gemeinschaften*, Baden-Baden, Nomos, 1980, 96-99 ; BESELER, J.-F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 166-167 ; BOUDANT, J., *L'anti-dumping communautaire*, Paris, Economica, 1991, 127-129 ; BRYAN, G., and BOURSERAU, D.G., «Antidumping Law in the European Communities and the United States : A Comparative Analysis», *George Washington Journal of International Law and Economics*, 1984-1985, (631), 648 ; KRETSCHMER, H., *Das Antidumping- und Antisubventionsrecht der Europäischen Gemeinschaften*, Frankfurt, VVV-Verlag, 1980, 66 ; LESGUILLONS, H., *Le régime communautaire de protection contre le dumping et les subventions*, Paris, F.E.D.U.C.I., 1983, 101-102 ; STANBROOK, C., *Dumping. A Manual on the EEC Anti-Dumping Law and Procedure*, Chequers, European Business Publications, 1980, 32 ; VAN BAEL, I., and BELLIS, J.-F., *Anti-Dumping and other Trade Protection Laws of the EEC*, Bicester, CCH Editions Ltd., 1990, 136 ; VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 646.

irrespective of the injury caused by other factors¹³³⁹. The watering down of the causality test, however, did not have any discernable impact on European anti-dumping case law¹³⁴⁰.

As required by GATT and EC anti-dumping law, the determination of injury must be based on positive evidence and must involve an objective analysis of the impact of the dumped imports on the Community industry (Article 3.1. GATT Anti-dumping Code ; Article 3(1) basic EC Regulation). Thus, the European anti-dumping authorities cannot find a causal relationship merely because, for instance, the dumping exporters are unable to prove that their imports did not inflict injury upon the Community industry. They must demonstrate that the dumping is responsible for the injury suffered by the Community industry (see : Article 3(6) basic EC Regulation). ECSC anti-dumping law does contain such explicit requirement. However, even in ECSC anti-dumping cases, the determination of the causal relationship on the basis of positive evidence, as well as an objective examination of the impact of the dumping on the Community industry should be made ; otherwise, those cases would be at variance with GATT anti-dumping law.

The method the European anti-dumping authorities have always adopted, is the method of trends analysis. That method bifurcates the investigation into injury and causality. First, the European anti-dumping authorities investigate whether the Community industry suffers injury, regardless of whether this injury is caused by the dumping¹³⁴¹. If the Community industry does not suffer

1339 In *serial-impact dot-matrix printers from Japan*, «the Council (was) of the opinion, in keeping with the case law of the court (see Judgement of 5 October 1988, *Canon v. Council*, joint cases No 277/85 and No 300/85, not yet published) that findings of injury are not confined to cases where dumping is the principal cause and accordingly that responsibility for injury is attributable to the exporters, even if the losses resultant from dumping are just a part of a greater injury arising from other factors. Finally, the fact that a Community producer is facing difficulties attributable to causes other than dumping is not a reason to deprive that producer of all protection against the injury caused by dumping» (Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 24 November 1988, No L 317/33 ; C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, *E.C.R.*, 1991, I, (2069), 2105 (Report for the Hearing : conclusions of the Council)).

In the same sense : Commission Decision 91/392/EEC of 21 June 1991 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain asbestos cement pipes originating in Turkey, and terminating the investigation, *O.J.*, 31 July 1991, No L 209/37 ; Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50.

1340 VAN BAEL, I., and BELLIS, J.-F., *Anti-Dumping and other Trade Protection Laws of the EEC*, Bicester, CCH Editions Ltd., 1990, 140-141 ; VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 647.

1341 Advocate General LENZ has argued that all the losses of the Community industry in respect of which the lack of relationship with the dumped imports is not established from the outset, may be included in the determination of injury (C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, *E.C.R.*, 1991, I, (2069), 2159 (Opinion of Advocate General LENZ)).

(material) injury, the proceeding is terminated because of lack of injury¹³⁴². If the Community industry does suffer material injury, causality is examined. A direct causal relationship between dumping and injury is required¹³⁴³. It is not sufficient to establish that the dumping is just one among various causes of injury. Therefore, some anti-dumping cases have been terminated on the ground that the injury caused by the dumping could not be isolated from that caused by other factors¹³⁴⁴. In most anti-dumping cases, however, the injury caused by the dumping could be distinguished from the injury caused by other factors¹³⁴⁵. In those cases the dumping is usually found to cause injury if at the same time the volume of the dumped imports increases and the state of the Community industry, measured by factors such as volume of sales, production, profits, deteriorates¹³⁴⁶, regardless of whether the other factors at the same time show an improvement.

From an economic point of view, the trends analysis is characterized by three fundamental flaws¹³⁴⁷. First, because of the bifurcation between the investigation into injury and causality, anti-dumping relief may only be granted if the Community industry is not doing well. Indeed, the investigation into causality is initiated only when injury suffered by the Community industry has

¹³⁴² Council Decision 86/59/EEC of 6 March 1986 terminating the anti-dumping proceeding concerning imports of dead-burned (sintered) natural magnesite originating in the People's Republic of China and North Korea, *O.J.*, 13 March 1986, No L 70/41; Commission Decision 88/651/EEC of 23 December 1988 terminating the anti-dumping proceeding concerning imports of certain cellular mobile radio telephones originating in Canada, Hong Kong and Japan, *O.J.*, 30 December 1988, No L 362/59; Commission Decision 89/511/EEC of 22 August 1989 terminating the anti-dumping proceeding concerning imports of hydraulic excavators originating in Japan, *O.J.*, 25 August 1989, No L 249/71; Commission Decision 89/537/EEC of 27 September 1989 terminating the anti-dumping proceeding concerning imports of mica originating in Japan, *O.J.*, 3 October 1989, No L 284/45.

¹³⁴³ KAPLAN, S., «Injury and Causation in USITC Antidumping Determinations: Five Recent Approaches», in *Policy Implications of Antidumping Measures*, THARAKAN, P.K.M. (ed.), Amsterdam, North-Holland, 1991, (143), 147-149;

¹³⁴⁴ Council Regulation (EEC) No 2907/83 of 17 October 1983 terminating the anti-dumping proceeding concerning imports of unwrought nickel, not alloyed, in the form of cathodes produced by electrolysis, either uncut or cut into squares, originating in the Soviet Union, *O.J.*, 19 October 1983, No L 286/29; Commission Decision 83/626/EEC of 12 December 1983 terminating the anti-dumping proceeding concerning imports of saccharin and its salts originating in China, the Republic of Korea and the United States of America, *O.J.*, 15 December 1983, No L 352/49; Commission Decision 86/536/EEC of 7 November 1986 terminating the anti-dumping proceeding concerning imports of certain tube and pipe fittings originating in Brazil, Taiwan, Yugoslavia and Japan, *O.J.*, 8 November 1986, No L 313/20; VAN BAEL, I., and BELLIS, J.F., *Anti-Dumping and other Trade Protection Laws of the EEC*, Bicester, CCH Editions Ltd., 1990, 142-143.

¹³⁴⁵ See e.g., Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24; Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50.

¹³⁴⁶ Usually, this coincidence in time is explicitly underscored, see e.g.: Commission Decision No 67/94/ECSC of 12 January 1994 imposing a provisional anti-dumping duty on imports into the Community of hematite pig iron, originating in Brazil, Poland, Russia and Ukraine, *O.J.*, 15 January 1994, No L 12/5.

¹³⁴⁷ See: KAPLAN, S., «Injury and Causation in USITC Antidumping Determinations: Five Recent Approaches», in *Policy Implications of Antidumping Measures*, THARAKAN, P.K.M. (ed.), Amsterdam, North-Holland, 1991, (143), 149-155; KNOLL, M.S., «Legal and Economic Framework for the Analysis of Injury by the U.S. International Trade Commission», *Journal of World Trade Law*, 1989, (96), 104-106.

been established. However, under European anti-dumping law, the state of the Community industry as such is not relevant. The issue is whether the Community industry would be doing better but for the practice of dumping. Indeed, a Community industry doing well may suffer from dumping because the dumping may have prevented the Community industry from doing even better than is actually the case.

Second, because only a weak causation test is applied, the state of the Community industry is more preponderant than the effect of the dumping on it. According to this test, it is usually sufficient that a deterioration in the state of the Community industry coincides in time with an increase in (dumped) imports sold at prices which undercut the price charged by the Community industry on the Community market. Such a coincidence, however, does not explain the relationship between the state of the Community industry and the effects of the dumping. Coinciding factors do not prove a causal relationship between them. The state of the Community industry and the dumping may depend both on a common, or even a different cause. The investigation into other factors which could also have a negative effect on the Community industry, is not a remedy. It suffers from the same defect, *i.e.*, the assumption that a coincidence necessarily proves a causal relationship between those other factors and the state the Community industry is in.

Third, the question most certainly arises whether it is possible to discern all the factors which could adversely affect the Community industry. If some factors are overlooked, the negative effects of dumping on the Community industry will be overestimated. Moreover, also the factors which might benefit the Community industry should be taken into account. Indeed, by disregarding them, the negative effects of dumping on the Community industry will be underestimated.

Therefore, it may be argued that the trends analysis, upheld, though, by the Court of Justice¹³⁴⁸, poses a problem under GATT and EC anti-dumping law which require positive evidence and an objective examination of causality (Article 3.1. GATT Anti-dumping Code ; Article 3(2) basic EC Regulation). The trends analysis is, indeed, based on positive evidence : the practise of dumping and the existence of injury are demonstrated on the basis of facts (though the interpretation of those facts can be discussed). However, it may called in question whether the trends analysis involves an objective examination of the impact of the dumping on the Community industry. The determination that dumping and injury coincide in time, is, indeed, objective. However, the choice of the trends analysis as the method to determine causality is

¹³⁴⁸ According to the Court of Justice, the European anti-dumping authorities do not exceed the bounds of their discretion by concluding that the loss of market share incurred by the Community industry is attributable to the dumping when, over the same period, there is an increase in the market share of the dumping exporters (C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, E.C.R., 1991, I, (2069), 2195).

perhaps less objective since it is (or should be) generally known that coincidence in time is no proof of causality. It may even be said that the choice of this method is tainted by «one-way flexibility». For usually the Community industry will only complain about dumping if it is not doing well ; hence, if dumping is being practised, the trends analysis will «automatically» result in the finding of a causal connection between the dumping and the injury suffered by the Community industry.

In European anti-dumping case law only the *de minimis*-rule interferes with the method of trends analysis. Under that rule¹³⁴⁹, minimal dumping margins (usually below 1 %) are an indication that the dumping probably could not have caused (material) injury¹³⁵⁰. However,

¹³⁴⁹ The *de minimis*-rule should not be confused with the margins analysis (see : *supra*, 470-472). Under the margins analysis, the injurious effect of dumping is evaluated on the basis of the relationship between the dumping margin and the margin of price undercutting. Under the *de minimis*-rule, the probability that dumping causes material injury, depends merely on the amount of the dumping margin as such.

¹³⁵⁰ Commission Regulation (EEC) No 2695/80 of 21 October 1980 amending Regulation (EEC) No 2297/80 imposing a provisional anti-dumping duty on imports of certain polyester yarn originating in the United States of America, *O.J.*, 23 October 1980, No L 279/18 (Unifi Incorporated : 1.05 %) ; Commission Regulation (EEC) No 1337/81 of 18 May 1981 imposing a provisional anti-dumping duty on imports of certain textured polyester fabrics originating in the United States of America, *O.J.*, 20 May 1981, No L 133/17 (Greenwood Mills : 0.7 %) ; Council Regulation (EEC) No 2664/81 of 14 September 1981 imposing a definitive anti-dumping duty on imports of certain textured polyester fabrics originating in the United States of America, *O.J.*, 16 September 1981, No L 262/1 (corrigendum, *O.J.*, 4 May 1985, No L 120/18) (Texfi : 0.61 % ; Burlington : 0.64 % ; Greenwood Mills : 0.7 %) ; Council Regulation (EEC) No 3439/80 of 22 December 1980 imposing a definitive anti-dumping duty on imports of certain polyester yarn originating in the United States of America, *O.J.*, 31 December 1980, No L 358/91 (Burlington : 0.5 % ; Titan Textile : 1.1 %) ; Commission Decision 81/247/EEC of 15 April 1981 terminating the anti-dumping procedure concerning imports of hermetic compressors originating in Brazil, Spain, Hungary, Japan and Singapore, *O.J.*, 25 April 1981, No L 113/53 (Spain : 0.15 % ; Brazil : 0.2 %) ; Commission Decision 83/305/EEC of 16 June 1983 terminating the anti-dumping proceeding concerning imports of non-alloyed unwrought aluminium originating in Egypt, *O.J.*, 21 June 1983, No L 161/13 (0.3 %) ; Commission Decision 84/131/EEC of 5 March 1984 accepting an undertaking in connection with the anti-dumping proceeding concerning imports of certain synthetic fibre hand-knitting yarn originating in Turkey and terminating that proceeding, *O.J.*, 9 March 1984, No L 67/60 (Hasköy Yün Iplik Fabrikası AS : 0.9 %) ; Commission Decision 84/334/EEC of 26 June 1984 terminating the anti-dumping proceeding concerning imports of certain ceramic tiles originating in Spain, *O.J.*, 28 June 1984, No L 168/35 (less than 0.5 %) ; Commission Decision 85/252/EEC of 23 April 1985 terminating the anti-dumping proceeding concerning imports of certain titanium mill products originating in Japan and the United States of America, *O.J.*, 26 April 1985, No L 113/30 (Sumitomo Metal Industries and RMI Company : 0.2 % ; Nippon Mining Co. Ltd : 0.4 % ; Teledyne Allvac : 0.9 % ; Oregon Metallurgical Corporation : 1.0 %) ; Council Regulation (EEC) No 1739/85 of 24 June 1985 imposing a definitive anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan, *O.J.*, 27 June 1985, No L 167/3 (Matsuo Bearing : 0.98 % ; Minamiguchi Bearing : 0.97 %) ; Commission Regulation (EEC) No 2823/85 of 7 October 1985 imposing a provisional anti-dumping duty on imports of certain clogs originating in Sweden, *O.J.*, 10 October 1985, No L 268/11 (Ugglebo Toffeln : 0.3 %) ; Commission Decision 86/21/EEC of 4 February 1986 accepting undertakings given in connection with the anti-dumping investigation concerning imports of certain clogs originating in Sweden, *O.J.*, 7 February 1986, No L 32/28 (Ugglebo Toffeln : 0.3 %) ; Commission Decision 85/501/EEC of 11 November 1985 terminating the anti-dumping proceeding concerning imports of wire rod originating in Brazil, Portugal, Trinidad and Tobago and Venezuela, *O.J.*, 13 November 1985, No L 299/18 (Venezuela : 0.3 %) ; Commission Decision 86/464/EEC of 17 September 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of artificial corundum originating in Hungary, Poland and the USSR, and terminating the investigation, *O.J.*, 23 September 1986, No L 271/26 (Poland : 0.1 %) ; Commission Decision 86/536/EEC of 7 November 1986 terminating the anti-dumping proceeding concerning imports of certain tube and pipe fittings originating in Brazil, Taiwan, Yugoslavia and Japan, *O.J.*, 8 November 1986, No L 313/20 (Taiwan : less than 1 %) ; Council Regulation (EEC) No 2253/87 of 23 July 1987 terminating the review proceeding and repealing the anti-dumping measures concerning imports of urea and ammonium nitrate in liquid solution originating in the United States of America, *O.J.*, 30 July 1987, No L 208/1 (less than 1 %) ; Commission Regulation (EEC) No 1695/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of polyester yarn originating in Mexico, South Korea, Taiwan and Turkey, *O.J.*, 17 June 1988, No L 151/39 (corrigendum, *O.J.*, 18 June 1988, No L 152/58) (Far Eastern Textile Ltd : 0.27 % ; Tuntex Fibre Co. : 0.45 % ; Nan Ya Plastics Corp. : 0.53 %) ; Council Regulation (EEC) No 3905/88 of 12 December 1988 imposing a definitive anti-dumping duty on imports of polyester yarn originating in Mexico, South Korea, Taiwan and Turkey, *O.J.*, 16 December 1988, No L 347/10 (Kolon Industries Inc. : 0.02 % ; Far Eastern Textile Ltd : 0.09 % ; Tuntex Distinct Corp. : 0.31 % ; Nan Ya Plastics Corp. : 0.52 % ; Council Regulation (EEC) No 1768/89 of 19 June 1989 imposing a definitive anti-dumping duty on imports of video cassettes originating in the Republic of Korea and Hong Kong, collecting definitively the provisional duty and terminating the anti-dumping proceeding with regard to the imports of video tape reels originating in the

the *de minimis*-rule has been applied in an arbitrary way : whereas a dumping margin of

Republic of Korea, *O.J.*, 22 June 1989, No L 174/1 (Swilynn Ltd : 0.02 % ; Saehan Media Co. : 1.06 %) ; Commission Decision 90/421/EEC of 6 August 1990 terminating the anti-dumping proceeding concerning imports of denim fabric originating in Turkey, Indonesia, Hong Kong and Macao, *O.J.*, 17 August 1990, No L 222/50 (remaining companies : less than 1.0 %) ; Commission Regulation (EEC) No 3262/90 of 5 November 1990 imposing a provisional anti-dumping duty on imports of audio tapes in cassettes originating in Japan, the Republic of Korea and Hong Kong, *O.J.*, 13 November 1990, No L 313/5 (corrigendum, *O.J.*, 12 January 1991, No L 9/36) (Forward Electronics : 0.43 % ; Magnetic Enterprise : 0.50 %) ; Commission Regulation (EEC) No 1472/91 of 29 May 1991 imposing a provisional anti-dumping duty on imports of oxalic acid originating in India or China and terminating the anti-dumping proceeding in respect of imports of oxalic acid originating in Czechoslovakia, *O.J.*, 1 June 1991, No L 138/62 (Czechoslovakia : 0.01 %) ; Council Regulation (EEC) No 2899/91 of 1 October 1991 amending Regulation (EEC) No 3905/88 and repealing the definitive anti-dumping duty imposed on imports into the Community of polyester yarn originating in Mexico, *O.J.*, 2 October 1991, No L 275/21 (dumping margin of 0.53 %) ; Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7 (P.T. Kewaleam Indonesia : 0.26 % ; Guangying Spinning Co., Ltd : 0.42 %) ; Commission Decision No 3692/91/ECSC of 12 December 1991 repealing Decision No 2132/88/ECSC imposing definitive anti-dumping duties on imports of certain iron or steel coils, originating in Algeria, Mexico and Yugoslavia, *O.J.*, 19 December 1991, No L 350/11 (Algeria : 0.67 % ; Yugoslavia : 0.13 %) ; Commission Regulation (EEC) No 313/92 of 4 February 1992 imposing a provisional anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in South Korea, *O.J.*, 11 February 1992, No L 34/8 (Samsung Electronic Co. Ltd : 0.25 % ; Haitai Electronics Co., Ltd : 1.06 %) ; Council Regulation (EEC) No 830/92 of 30 March 1992 imposing a definitive anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and collecting definitively the provisional duty, *O.J.*, 3 April 1992, No L 88/1 (corrigendum, *O.J.*, 5 June 1992, No L 153/16) (Guangying Spinning Co. Ltd : 0.2 % ; PT Kawalram Indonesia : 0.2 %) ; Commission Decision No 1775/92/ECSC of 30 June 1992 imposing a definitive anti-dumping duty on imports of certain semi-finished products of alloy steel, originating in Turkey and Brazil, definitively collecting the provisional anti-dumping duty imposed on such imports and accepting an undertaking offered in connection with the anti-dumping proceeding concerning imports of these products, *O.J.*, 2 July 1992, No L 182/23 (Aços Finos Piratini SA : 1.7 %) ; Council Regulation (EEC) No 2306/92 of 4 August 1992 imposing a definitive anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in the Republic of Korea, *O.J.*, 7 August 1992, No L 222/8 (corrigendum, *O.J.*, 21 January 1993, No L 13/20) (Haitai Electronics Co. Ltd : 0.6 %) ; Council Regulation (EEC) No 3498/92 of 30 November 1992 amending Regulation (EEC) No 1768/69 in respect of definitive anti-dumping duty on certain imports of video cassettes originating in Hong Kong, *O.J.*, 4 December 1992, No L 354/1 (Inter-Cassette : 1.4 %) ; Commission Regulation (EEC) No 550/93 of 5 March 1993 imposing a provisional anti-dumping duty on imports of bicycles originating in the People's Republic of China, *O.J.*, 11 March 1993, No L 58/12 (Taiwan : 1.05 %) ; Council Regulation (EC) No 3009/94 of 8 December 1994 amending Regulation (EEC) No 830/92 by repealing the anti-dumping duty on imports of certain polyester yarns originating in India, *O.J.*, 13 December 1994, No L 320/1 (several exporters : between 0.01 and 1.97 %) ; VAN BAEL, I., and BELLIS, J.-F., *Anti-Dumping and other Trade Protection Laws of the EEC*, Bicester, CCH Editions Ltd., 1990, 140 and 143 ; VERMULST, E.A., *Antidumping Law and Practice in the United States and the European Communities. A Comparative Analysis*, Amsterdam, North-Holland, 1987, 650.

Conversely, substantial dumping margins are considered to prove a causal link between the dumping and the injury (Commission Regulation (EEC) No 84/82 of 14 January 1982 imposing a provisional anti-dumping duty on mechanical wrist-watches originating in the USSR, *O.J.*, 16 January 1982, No L 11/14 ; Commission Decision 82/397/EEC of 14 June 1982 accepting undertakings in connection with the anti-dumping procedure concerning imports of certain polypropylene film for capacitors originating in Japan and terminating that procedure, *O.J.*, 18 June 1982, No L 172/44 ; Commission Regulation (EEC) No 2865/85 of 14 October 1985 imposing a provisional anti-dumping duty on imports of certain electronic scales originating in Japan and accepting undertakings and terminating the proceeding in respect of certain imports of such products originating in Japan, *O.J.*, 16 October 1985, No L 275/5).

Substantially increasing dumping margins are also proof of a causal link between the dumping and the injury (Commission Regulation (EEC) No 2865/85 of 14 October 1985 imposing a provisional anti-dumping duty on imports of certain electronic scales originating in Japan and accepting undertakings and terminating the proceeding in respect of certain imports of such products originating in Japan, *O.J.*, 16 October 1985, No L 275/5).

2.29 %¹³⁵¹ has been found to be *de minimis*, anti-dumping relief has been granted when the dumping margin amounted to only 1.21 %¹³⁵². Moreover, if necessary, the European anti-

¹³⁵¹ Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27); Council Regulation (EEC) No 112/90 of 16 January 1990 imposing a definitive anti-dumping duty on imports of certain compact disc players originating in Japan and the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 17 January 1990, No L 13/21 (Marantz Japan Inc. : 2.29 %; see also : Lux Corporation : 1.54 %).

See also : Commission Regulation (EEC) No 3643/84 of 20 December 1984 imposing a provisional anti-dumping duty on imports of electronic typewriters originating in Japan and terminating the anti-dumping proceeding with regard to Nakajima All Co. Ltd, *O.J.*, 22 December 1984, No L 335/43 (Nakajima All Co. Ltd : 1.2 %); Commission Decision 85/252/EEC of 23 April 1985 terminating the anti-dumping proceeding concerning imports of certain titanium mill products originating in Japan and the United States of America, *O.J.*, 26 April 1985, No L 113/30 (Martin Marietta Aluminium Inc. and Titanium Metals Corporation of America : 1.3 %); Commission Decision 86/34/EEC of 12 February 1986 terminating the anti-dumping proceeding concerning imports of electronic typewriters manufactured by Nakajima All Precision Co. Ltd and originating in Japan, *O.J.*, 15 February 1986, No L 40/29 (1.48 %); Council Regulation (EEC) No 1768/89 of 19 June 1989 imposing a definitive anti-dumping duty on imports of video cassettes originating in the Republic of Korea and Hong Kong, collecting definitively the provisional duty and terminating the anti-dumping proceeding with regard to the imports of video tape reels originating in the Republic of Korea, *O.J.*, 22 June 1989, No L 174/1 (SKC Ltd : 1.40 %); Council Regulation (EC) No 3009/94 of 8 December 1994 amending Regulation (EEC) No 830/92 by repealing the anti-dumping duty on imports of certain polyester yarns originating in India, *O.J.*, 13 December 1994, No L 320/1 (Indo Rama Synthetics (India) Ltd : 1.97 %).

¹³⁵² Council Regulation (EEC) No 1739/85 of 24 June 1985 imposing a definitive anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan, *O.J.*, 27 June 1985, No L 167/3 (FKC Bearing Co. Ltd : 1.21 %; see also : Sapporo Precision Inc. : 1.86 %; NTN Toyo Bearing Ltd : 2.09 %).

See also : Commission Decision 82/397/EEC of 14 June 1982 accepting undertakings in connection with the anti-dumping procedure concerning imports of certain polypropylene film for capacitors originating in Japan and terminating that procedure, *O.J.*, 18 June 1982, No L 172/44 (Mitsui : 1.3 %); Commission Regulation (EEC) No 1633/82 of 23 June 1982 imposing a provisional anti-dumping duty on imports of fibre building board (hardboard) originating in Romania, repealing Commission Decision No 80/564/EEC of 4 June 1980 and accepting undertakings in connection with the proceeding in respect of imports of fibre building board from Czechoslovakia, Finland, Hungary, Norway, Poland, Spain, Sweden and the Soviet Union and terminating the proceeding with regard to those countries and Bulgaria, *O.J.*, 25 June 1982, No L 181/19 (Enso Gutzeit and Schauman : 1.4 %; Svaneholms : 1.7 %); Council Regulation (EEC) No 407/83 of 21 February 1983 amending Regulation (EEC) No 3439/80 imposing a definitive anti-dumping duty on imports of certain polyester yarn originating in the United States of America, *O.J.*, 23 February 1983, No L 50/1 (Unifi Inc. : 1.87 %); Council Regulation (EEC) No 906/83 of 18 April 1983 amending Regulation (EEC) No 2761/81 imposing a definitive anti-dumping duty on o-xylene (ortho-xylene) originating in Puerto Rico and the United States of America, *O.J.*, 20 April 1983, No L 101/4 (Sun Refining & Marketing Co. : 1.8 %; Arco Chemical Co. 2 %); Commission Regulation (EEC) No 1500/83 of 9 June 1983 imposing a provisional anti-dumping duty on imports of outboard motors originating in Japan, *O.J.*, 10 June 1983, No L 152/18 (Honda Motor Company Ltd : 2 %); Council Regulation (EEC) No 2879/87 of 28 September 1987 amending Regulation (EEC) No 1826/84 imposing a definitive anti-dumping duty on imports of vinyl acetate monomer originating in Canada, *O.J.*, 29 September 1987, No L 275/1 (Honda Motor Company Ltd : 2 %); Commission Regulation (EEC) No 3669/84 of 21 December 1984 imposing a provisional anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan, *O.J.*, 28 December 1984, No L 340/37 (NTN Toyo Bearing : 2.01 (ball bearings) and 2.16 % (tapered roller bearings)); Commission Regulation (EEC) No 2865/85 of 14 October 1985 imposing a provisional anti-dumping duty on imports of certain electronic scales originating in Japan and accepting undertakings and terminating the proceeding in respect of certain imports of such products originating in Japan, *O.J.*, 16 October 1985, No L 275/5 (Yamato : 1.0 %; Ishida : 1.5 %; Teraoka : 2.2 %); Commission Decision 86/497/EEC of 7 October 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of silicon carbide originating in the People's Republic of China, Norway, Poland and the USSR, and terminating the investigation regarding imports of that product originating in the People's Republic of China, Norway, Poland, Czechoslovakia, the USSR and Yugoslavia, *O.J.*, 10 October 1986, No L 287/25 (Orkla Exolon A/S & Co. : 1.7 %); Commission Decision 88/623/EEC of 12 December 1988 accepting undertakings given in connection with the anti-dumping review concerning imports of oxalic acid originating in China or Czechoslovakia and terminating the review, *O.J.*, 13 December 1988, No L 343/34 (Chemapol : 1.87 %); Council Regulation (EEC) No 3905/88 of 12 December 1988 imposing a definitive anti-dumping duty on imports of polyester yarn originating in Mexico, South Korea, Taiwan and Turkey, *O.J.*, 16 December 1988, No L 347/10 (Chung Shing Textile Company Ltd : 1.67 %); Council Regulation (EEC) No 1768/89 of 19 June 1989 imposing a definitive anti-dumping duty on imports of video cassettes originating in the Republic of Korea and Hong Kong, collecting definitively the provisional duty and terminating the anti-dumping proceeding with regard to the imports of video tape reels originating in the Republic of Korea, *O.J.*, 22 June 1989, No L 174/1 (Saehan Media Co. : 1.96 %; Kolon Industries Inc. : 2.03 %); Commission Regulation (EEC) No 129/91 of 11 January 1991 imposing a provisional anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China, *O.J.*, 19 January 1991, No L 14/31 (Tai Wah Television Industries Ltd : 2.16 %); Council Regulation (EEC) No 2093/91 of 15 July 1991 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China and collecting definitively the provisional duty, *O.J.*, 18 July 1991, No L 195/1 (Tai Wah Television Industries Ltd : 2.16 %); Commission Regulation (EEC) No

dumping authorities always have found some reason to waive a straightforward application of the *de minimis*-rule¹³⁵³. Of course, this arbitrary application must be criticized. The new GATT Anti-dumping Code and the new EC anti-dumping legislation should be welcomed as they put a stop to this arbitrary application by obliging the anti-dumping authorities to terminate immediately anti-dumping proceedings in cases where the dumping margin is less than 2 % (Article 5.8. GATT Anti-dumping Code ; Article 9(3) basic EC Regulation). The basic criticism of the *de minimis*-rule, though, pertains to the fact that the amount of the dumping margin is no evidence of there being a causal relationship between dumping and injury. Indeed, even if there is but a small dumping margin, dumping may cause injury. For a small decrease in the prices of the dumped products may cause large shifts on a highly price-sensitive and, thus, price-elastic market.

2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7 (Reliance Chemotex Industries Ltd : 2.16 % ; Chung Shing Textile Company Ltd : 2.24 %) ; Council Regulation (EEC) No 3091/91 of 21 October 1991 imposing a definitive anti-dumping duty on imports of video tapes in cassettes originating in the People's Republic of China and definitively collecting the provisional duty, *O.J.*, 24 October 1991, No L 293/2 (Song Gang Hang Sing Cassette Factory : 1.3 %) ; Commission Regulation (EEC) No 1956/92 of 7 July 1992 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in India and the Republic of Korea, *O.J.*, 16 July 1992, No L 197/25 (Sunkyoung Industries : 1.68 %) ; Council Regulation (EEC) No 54/93 of 8 January 1993 imposing a definitive duty on imports of synthetic fibres of polyesters originating in India and the Republic of Korea, *O.J.*, 15 January 1993, No L 9/2 (Sunkyoung : 1.6 % ; Indian Organic Chemicals : 2 % ; Reliance Industries : 2.1 %).

1353 European anti-dumping case law provides the following explanations :

- a weighted average dumping margin of 1.3 % was not considered to be *de minimis*, because the dumping margins were divergent and amounted in some cases up to 27 % ; strikingly, in connection with the weighted average dumping margin of another exporter amounting up to 86.4 % no reference was made to specific dumping margins (Commission Decision 82/397/EEC of 14 June 1982 accepting undertakings in connection with the anti-dumping procedure concerning imports of certain polypropylene film for capacitors originating in Japan and terminating that procedure, *O.J.*, 18 June 1982, No L 172/44) ;
- a dumping margin of 1.7 % was not considered to be *de minimis*, because it was an «overall margin (which did) not illustrate (...) an important feature (...) - namely the concentration of more significant levels of dumping in two particular categories which accounted for some 35 % of the total quantities exported to the EEC by Norway» ; for all the Norwegian exporters the dumping margin for first metallurgical grades ranged between 14.6 and 40.6 %, and the dumping margin for wiresawing grain mixes varied between 5.0 and 8.9 % (Commission Decision 86/497/EEC of 7 October 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of silicon carbide originating in the People's Republic of China, Norway, Poland and the USSR, and terminating the investigation regarding imports of that product originating in the People's Republic of China, Norway, Poland, Czechoslovakia, the USSR and Yugoslavia, *O.J.*, 10 October 1986, No L 287/25) ;
- weighted average dumping margins of only 1.0 %, 1.5 and 2.2 % were not be considered to be *de minimis*, because the dumping margins varied considerably from one Member State to another, ; these dumping margins ranged between 0 % in Greece and 5.8 % in the Netherlands, which can neither be said to be excessively high (Commission Regulation (EEC) No 2865/85 of 14 October 1985 imposing a provisional anti-dumping duty on imports of certain electronic scales originating in Japan and accepting undertakings and terminating the proceeding in respect of certain imports of such products originating in Japan, *O.J.*, 16 October 1985, No L 275/5) ;
- a dumping margin of 1.40 % was considered to be *de minimis*, because it was low as such, but also because the dumped products were exclusively exported to small and medium-sized assembly companies in the Community for further processing (Council Regulation (EEC) No 1768/89 of 19 June 1989 imposing a definitive anti-dumping duty on imports of video cassettes originating in the Republic of Korea and Hong Kong, collecting definitively the provisional duty and terminating the anti-dumping proceeding with regard to the imports of video tape reels originating in the Republic of Korea, *O.J.*, 22 June 1989, No L 174/1) ;
- dumping margins of 0.43 and 0.50 % were considered to be *de minimis*, because they were low as such, but also because only small quantities were exported to the Community (Commission Regulation (EEC) No 3262/90 of 5 November 1990 imposing a provisional anti-dumping duty on imports of audio tapes in cassettes originating in Japan, the Republic of Korea and Hong Kong, *O.J.*, 13 November 1990, No L 313/5 (corrigendum, *O.J.*, 12 January 1991, No L 9/36)).

Neither does a high dumping margin necessarily imply that the prices of the dumped imports on the Community market are extremely low. Since the height of the dumping margin is the difference between the prices charged by the dumping exporters in their domestic market and the dumping prices, high dumping margins may also result from extremely high prices in the domestic market.

4.3.2. *Comparative analysis : an alternative approach*

4.3.2.1. General characteristics

The flaws in the trends analysis may be remedied out by adopting the so-called comparative analysis. The comparative analysis is based on the analysis given in figure 17 in this Chapter¹³⁵⁴. It considers dumping as the cause of the possible injury to the Community industry and focuses on the question whether and to what extent the dumping has caused injury to the Community industry. In order to solve that question, the factual world is compared with a counterfactual world, which is totally identical to the factual world but for the dumping. No investigation into the effect of other factors than the dumping on the Community industry is, therefore, required merely because all other factors remain unchanged.

Since the other factors are the same in both the factual and the counterfactual world, the effect of dumping on the Community industry will not be overestimated or underestimated. Moreover, by comparing factual and counterfactual world, the injury and causality test are carried out simultaneously : if the situation of the Community industry is different in the counterfactual world and in the factual world, only the dumping may account for it. The comparative analysis may also find injurious dumping, even if the Community industry is actually doing well. The only thing that matters is that the Community industry is doing better in the counterfactual world than in the factual world in order to lead to the conclusion that the dumping causes injury to the Community industry¹³⁵⁵.

The major problem, however, is the reconstruction of the situation of the Community industry without the dumping. This requires an economic model which has to be based on assumptions

¹³⁵⁴ *Supra*, 435-437.

¹³⁵⁵ BOLTUCK, R.D., «An Economic Analysis of Dumpings», *Journal of World Trade Law*, 1987, (45), 45-54 ; BOLTUCK, R.D., «Reply to Professor Lazar's Comment on "An Economic Analysis of Dumping"», *Journal of World Trade Law*, 1988, (129), 129-131 ; KAPLAN, S., «Injury and Causation in USITC Antidumping Determinations : Five Recent Approaches», in *Policy Implications of Antidumping Measures*, THARAKAN, P.K.M. (ed.), Amsterdam, North-Holland, 1991, (143), 158-163 ; KNOLL, M.S., «Legal and Economic Framework for the Analysis of Injury by the U.S. International Trade Commission», *Journal of World Trade Law*, 1989, (95), 103-107 ; LAZAR, F., «Structural/Strategic Dumping : A Comment on Richard Boltuck's "An Economic Analysis of Dumping"», *Journal of World Trade Law*, 1988, (91), 91-93.

which do not always correspond to the real situation¹³⁵⁶. However, this disadvantage does not render the comparative analysis useless.

4.3.2.2. The comparative analysis applied

As is shown by the analysis of the injury investigation in European anti-dumping case law, thresholds with regard to the criteria used to establish injury are difficult to determine. Economic reality is, indeed, difficult to capture in strict numbers. It is, however, difficult to undo the impression that the injury determination is a political decision based not only on objective criteria, but also on motives of mere political expediency, which are clearly influenced by the effective lobbying of the Community producers to the European anti-dumping authorities and the authorities of the Member States¹³⁵⁷. It may indeed be wondered why - if not for any politically motivated decision -, it has never been properly explained why in some cases an increase of x % is held to show injurious dumping while in other cases, showing the same increase of x %, the dumping was not considered to injure the Community industry¹³⁵⁸.

Injury determinations which are the result of a bargain struck between the Community industry, the dumping exporters, the European authorities and the national authorities of the Member States, are not predictable and, therefore, create legal uncertainty. In order to render the injury determination more objective and, consequently, more predictable, the comparative analysis may be useful. It should, at least, be used as a touchstone in such a way that the European anti-dumping authorities should explain in plain terms why they make an injury determination contrary to the results under the comparative analysis. Their explanation should rely on the basic characteristics and assumptions and, thus, defaults of the economic model by means of which the counterfactual world used in the comparative analysis is determined.

In order to prove the usefulness of the comparative analysis, it is applied hereinafter to four European anti-dumping cases. The results of the comparative analysis are compared with those of the injury findings of the European anti-dumping authorities. For the application of the

¹³⁵⁶ KAPLAN, S., «Injury and Causation in USITC Antidumping Determinations: Five Recent Approaches», in *Policy Implications of Antidumping Measures*, THARAKAN, P.K.M. (ed.), Amsterdam, North-Holland, 1991, (143), 163-165 ; VERMULST, E., and WAER, P., «The Calculation of Injury Margins in EC Anti-Dumping Proceedings», *Journal of World Trade*, 1991/6, (5), 26-27.

¹³⁵⁷ See : THARAKAN, P.K.M., and WAELEBROECK, J., «Antidumping and countervailing duty decisions in the E.C. and in the U.S. An experiment in comparative political economy», *European Economic Review*, 1994, (171), 171-193.

¹³⁵⁸ For a similar critical comment, see : BELLSTEDT, C., «Antidumpingverfahren der Kommission der Europäischen Gemeinschaften», *Recht der Internationalen Wirtschaft*, 1979, (530), 532 ; DAILLIER, P. «La pratique communautaire de lutte contre le dumping», *Revue du Marché Commun*, 1979, (557), 562-563.

comparative analysis, the economic model elaborated by R.D. BOLTUCK is used¹³⁵⁹. The model has two main limitations: it is based on the assumption of constant marginal cost of production of the dumping exporter and it assumes dumping to be third-degree price discrimination. The first assumption can be challenged for not being always realistic. Because of the second assumption, the model does not fully comprise European anti-dumping law, which defines dumping not only as third-degree price discrimination, but also as second-degree price discrimination, sales at a loss and NME dumping.

Nevertheless, an application of the method of the comparative analysis on the basis of the model of R.D. BOLTUCK is made, be it only because of the simplicity of the model. First, it is easy to interpret the results of the application of the model. Its application yields numerical values of the change in terms of percentage of the Community industry's price ($d \ln P_d$) and of the quantity they have sold on the Community market ($d \ln Q_d$) in the factual world, as compared with the counterfactual world. Negative (positive) values indicate that the dumping has (not) inflicted injury upon the Community industry. Hence, it is easy to conclude whether or not the Community industry is being injured. As, under GATT and European anti-dumping law, material injury is required, only substantial negative changes should result in findings of injury.

Second, no complicated calculations are required and the calculations are based on only seven parameters, which are:

- the share of the dumping exporter's sales made at home with regard to his combined Community and home sales if he does not practise dumping (in the model called «a»);
- the own-price elasticity of the Community industry's supply of the like product in the Community market (in the model called « E_d »);
- the own-price elasticity of demand in the Community market for the Community producers' like product (in the model called « N_d »);
- the own-price elasticity of demand in the home market of the dumping exporter for the dumped product (in the model called « N_h »);
- the own-price elasticity of demand in the Community market for the dumped product (in the model called « N_c »);
- the cross-price elasticity of demand in the Community for the Community producers' like product with respect to the price of the dumped product on the Community market (in the model called « N_{dc} »);
- the cross-price elasticity of demand in the Community for the dumped product with respect to the price of the Community producers' like product (in the model called « N_{cd} »).

¹³⁵⁹ BOLTUCK, R.D., *Assessing the Effects on the Domestic Industry of Price Dumping. Parts I and II*, Washington, mimeographed, 1988 (presented at the ELASM International Workshop on Policy Implications of Anti-Dumping Measures, Brussels, October 19-20, 1989), 35 p. + 18 p; (including: *The Cadic Bulletin*, BOLTUCK, R.D. (ed.), s.l., 15 February 1989, 5 p.; *The Cadic Bulletin*, BOLTUCK, R.D. (ed.), s.l., 15 June 1989, 18 p.); BOLTUCK, R.D., «Assessing the Effects on the Domestic Industry of Price Dumping», in *Policy Implications of Antidumping Measures*, THARAKAN, P.K.M. (ed.), Amsterdam, North-Holland, 1991, (99), 99-141. The model of R.D. BOLTUCK is discussed and applied later because it is the basis of one of the different views concerning injury and causation in anti-dumping determinations of the United States International Trade Commission (KAPLAN, S., «Injury and Causation in USITC Antidumping Determinations: Five Recent Approaches», in *Policy Implications of Antidumping Measures*, THARAKAN, P.K.M. (ed.), Amsterdam, North-Holland, 1991, (143), 158).

All these parameters refer to the factual world, with the exception of parameter «a» which refers to the counterfactual world, but which can be calculated easily. Moreover, if the parameters which refer to the factual world, are also unknown, they can be calculated on the basis of some plausible assumptions. Then it is sufficient to know the value of the following parameters :

- the actual share of the dumping exporter's sales made at home with regard to his combined Community and home sales (quantity basis) (in the model called «a'»);
- the quantity sold by the dumping exporter on the Community market (quantity basis) (in the model called «D_c»);
- the market share of the sales of the Community industry on the Community market of the like product (value basis) (in the model called «V_d»);
- the market share of the sales of the dumping exporter on the Community market of the like product (value basis) (in the model called «V_c»);
- the dumping margin (in the model called «M»);
- the own-price elasticity of the Community industry's supply of the like product in the Community market (in the model called «E_d»);
- the own-price elasticity of demand in the Community market for the aggregate product category (Community industry's like product + dumped product + imported non-dumped like product) (in the model called «N_A»);
- the elasticity of substitution of the Community producers' like product with respect to the price of the dumped product on the Community market (in the model called «S_{dc}»);
- the Herfindhal index (in the model called «H»).

As European anti-dumping determinations are very brief as to the parameters necessary for the economic model, many of these parameters will have to be estimated. Moreover, it is not always possible to deduct, from the anti-dumping determinations, the exact value of the parameters for which the value must be entered into the economic model and which will be used as basis for calculating the other parameters. This shows that the European anti-dumping authorities ignores some criteria which provide useful information as to the effect of the dumping on the condition of the Community industry. If, nevertheless, the European anti-dumping authorities take such data into consideration, without mentioning them in their anti-dumping determinations, their assessments would be unduly motivated and, therefore, contrary to Article 190 of the EC Treaty¹³⁶⁰.

As European anti-dumping case law does not provide much information, the results obtained through applying the economic model do not measure in precise quantitative terms by how much Community industry's prices and sales volume have changed as a result of the dumping. Nevertheless, the results provide some general idea as to the degree of legality of the European anti-dumping authorities' determinations.

¹³⁶⁰ *Contra*: C.J.E.C., case 121/86, 28 November 1989, *Anonymos Etaireia Epicheiriseon Metalleftikon Viomichanikon kai Naftiliakon AE a.o. v Council*, E.C.R., 1989, (3919), 3952. According to the Court of Justice, Article 190 EC Treaty will not be violated if the data not expressly mentioned are not of such a nature as to alter the anti-dumping finding. The Court of Justice cannot be agreed with. Data which do not alter the findings of the European anti-dumping authorities, but which have actually been taken into account, should be mentioned merely because they underlie the findings made.

Because of the poor information provided in the European anti-dumping determinations, the following has to be borne in mind for the examination of the four applications of the economic model made hereinafter :

- the dumping margin used is the dumping margin as provided by the European anti-dumping authorities ; no adjustment is made for possible differences between the export price and the price charged on the Community market for the dumped product ;
- the own-price elasticity of the foreign non-dumping producers' supply of the like product in the Community market, E_f , is assumed to equal infinity ;
- the elasticity of substitution of the Community producers' like product with respect to the price of the dumped product on the Community market, S_{dc} , is assumed to be equal to the elasticity of substitution of the Community producers' like product with respect to the price of the imported non-dumped like product on the Community market, S_{df} , and the elasticity of substitution of the imported non-dumped like product with respect to the price of the dumped product on the Community market, S_{fc} ;
- for each individual exporting country the Herfindhal index is assumed to equal one, merely because the market shares of each individual exporter are not provided ;
- if the parameter a' is not provided, it is assumed as high as possible ; the higher the value of a' , the higher, *ceteris paribus*, the injury will be ;
- if the anti-dumping determination provides several figures for the same parameter, the weighted average of these data is calculated ; if no information is provided about the weighing factor, the arithmical average is calculated.

4.3.2.2.1. Ball bearings from Thailand : desperately seeking for injurious dumping

The Federation of European Bearing Manufacturers' Associations (FEBMA) is a quite active and successful complainant within the framework of European anti-dumping law. It has obtained anti-dumping relief against dumped imports of ball bearings and tapered roller bearings originating in Japan¹³⁶¹, Singapore¹³⁶², Poland¹³⁶³, Romania¹³⁶⁴ and the Soviet Union¹³⁶⁵.

¹³⁶¹ Council Regulation (EEC) No 2089/84 of 19 July 1984 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 21 July 1984, No L 193/1 ; Council Regulation (EEC) No 3280/84 of 22 November 1984 amending the definitive anti-dumping duty on imports of certain ball bearings originating in Japan and exported by NTN Toyo Bearing Co. Ltd., *O.J.*, 24 November of 1984, No L 307/15 ; Council Regulation (EEC) No 1238/85 of 13 May 1985 amending the definitive anti-dumping duty on imports of certain ball bearings originating in Japan and exported by Nippon Seiko KK and others, *O.J.*, 15 May 1985, No L 129/1 ; Council Regulation (EEC) No 1739/85 of 24 June 1985 imposing a definitive anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan, *O.J.*, 27 June 1985, No L 167/3 ; Council Regulation (EEC) No 3528/87 of 23 November 1987 amending Regulation (EEC) No 2089/84 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 26 November 1987, No L 336/1 ; Commission Regulation (EEC) No 486/88 of 22 February 1988 amending the regulations, recommendations and decisions imposing anti-dumping duties, *O.J.*, 24 February 1988, No L 50/5.

¹³⁶² Council Regulation (EEC) No 2089/84 of 19 July 1984 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 21 July 1984, No L 193/1 ; Council Regulation (EEC) No 3528/87 of 23 November 1987 amending Regulation (EEC) No 2089/84 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 26 November 1987, No L 336/1 ; Commission Regulation (EEC) No 486/88 of 22 February 1988 amending the regulations, recommendations and decisions imposing anti-dumping duties, *O.J.*, 24 February 1988, No L 50/5.

Nevertheless, the Commission withdrew the anti-dumping relief against Poland, Romania and the Soviet Union after having re-opened on its own initiative the anti-dumping investigation against these three countries¹³⁶⁶. With respect to ball bearings originating in Thailand, FEBMA was rather unsuccessful until 1990. Indeed, the first complaint stranded because the ball bearings were not of Thai origin¹³⁶⁷. The second complaint did not result either in anti-dumping relief because of lack of dumping¹³⁶⁸. Only after a third complaint, the Commission found injurious dumping and, consequently, granted anti-dumping relief¹³⁶⁹. The dumping margin amounted to a mere 6.71 %.

Precisely that low dumping margin, combined with the history of this anti-dumping case, makes it worthwhile to subject it to the comparative analysis. Therefore, the following parameters were entered into the economic model :

- (i) *the actual share of the dumping exporters' sales made at home with regard to their combined Community and home sales (quantity basis)*

In view of $D_h = 62\,650$ pieces and $D_c = 31\,500\,000$ pieces, the following expression holds :

$$a' = 62\,650 / (62\,650 + 31\,500\,000) = 0.0020$$

- (ii) *the quantity sold by the dumping exporters on the Community market (quantity basis)*

According to the Commission and the Council Regulations : $D_c = 31\,500\,000$ pieces.

¹³⁶³ Commission Decision 81/406/EEC of 4 June 1981 accepting undertakings in connection with the anti-dumping proceeding concerning imports of ball and tapered roller bearings, originating in Japan, Poland, Romania and the Soviet Union and terminating that proceeding, *O.J.*, 11 June 1981, No L 152/44.

¹³⁶⁴ Commission Decision 81/406/EEC of 4 June 1981 accepting undertakings in connection with the anti-dumping proceeding concerning imports of ball and tapered roller bearings, originating in Japan, Poland, Romania and the Soviet Union and terminating that proceeding, *O.J.*, 11 June 1981, No L 152/44.

¹³⁶⁵ Commission Decision 81/406/EEC of 4 June 1981 accepting undertakings in connection with the anti-dumping proceeding concerning imports of ball and tapered roller bearings, originating in Japan, Poland, Romania and the Soviet Union and terminating that proceeding, *O.J.*, 11 June 1981, No L 152/44.

¹³⁶⁶ Commission Decision 86/100/EEC of 15 April 1986 terminating the anti-dumping proceeding concerning imports of ball bearings and tapered roller bearings originating in Poland, Romania and the Soviet Union, *O.J.*, 18 April 1986, No L 102/31.

¹³⁶⁷ Commission Decision 85/158/EEC of 22 February 1985 terminating the anti-dumping proceeding concerning imports of certain ball bearings originating in Thailand, *O.J.*, 27 February 1985, No L 59/30.

¹³⁶⁸ Commission Decision 86/151/EEC of 29 April 1986 terminating the anti-dumping proceeding concerning imports of certain ball bearings originating in Thailand, *O.J.*, 30 April 1986, No L 113/61.

¹³⁶⁹ Commission Regulation (EEC) No 1613/90 of 13 June 1990 imposing a provisional anti-dumping duty on imports of ball bearings with a greatest external diameter not exceeding 30 mm originating in Thailand, *O.J.*, 16 June 1990, No L 152/24 ; Council Regulation (EEC) No 2934/90 of 9 October 1990 imposing a definitive anti-dumping duty on imports of ball bearings with greatest external diameter not exceeding 30 mm originating in Thailand and collecting definitively the provisional duty, *O.J.*, 12 October 1990, No L 281/1.

(iii) *the market share of the sales of the Community industry on the Community market of the like product (value basis)*

According to the Commission and the Council Regulations, overall consumption on the Community market equals 356 100 000 pieces, and the prices of the dumped imports undercut Community producers' prices by 17 %. Due to lack of precise information, assume that the prices of the imported non-dumped ball bearings originating in third countries equal the prices charged by the Community producers¹³⁷⁰. Moreover, assume that the prices of the dumped Thai ball bearings on the Community market equal unity. In view of the price undercutting of 17 %, the Community producers' prices and those of the imported non-dumped ball bearings equal 1.20 [= 1/(1-17 %)]. As a consequence, overall consumption (value basis) amounts to :

$$31\,500\,000 + 1.20 * (356\,100\,000 - 31\,500\,000) = 422\,584\,337.4$$

Therefore and in view of D_d amounting to 116 000 000 pieces, V_d (value basis) equals :

$$V_d = 1.20 * 116\,000\,000 / 422\,584\,337.4 = 33.07 \%$$

(iv) *the market share of the sales of the dumping exporters on the Community market of the like product (value basis)*

On the basis of the same assumptions made in (iii), V_c (value basis) equals :

$$V_c = 31\,500\,000 / 422\,584\,337.4 = 7.45 \%$$

(v) *the dumping margin*

According to the Commission and the Council Regulations, the weighted average dumping margin M amounts to 6.71 %.

(vi) *the own-price elasticity of the Community industry's supply of the like product in the Community market*

The Commission and the Council Regulations do not provide direct information on E_d . They do give information about Community producers' prices, production volume, capacity, rate of capacity utilization and employment. However, these changes are always intertemporal changes whereas E_d is not.

According to the Commission Regulation, Community production has declined by 9.7 % between 1985 and March 1988. Over the same period, the average decreases of the Community producers' prices, in current terms, varied from 2.6 to 9 %. The relationship between the arithmetical average of 2.6 and 9 %, i.e., 5.8 %, and the decline in Community production equals + 1.69 %. Since the rate of capacity utilization amounts to 83 % in March 1988, Community production may increase smoothly if prices would rise. Moreover, employment has decreased by 11.76 % over the period 1985-March 1988, which exceeds the decline by 9.7 % of Community production over the same period. Thus, employment is a rather flexible production factor.

Therefore, E_d is assumed to equal 2.

(vii) *the own-price elasticity of demand in the Community market for the aggregate product category*

According to the Commission and the Council Regulations, the global demand for ball bearings depends directly on the demand for the final product in which the ball bearings are incorporated. As the ball bearings generally account for only a small fraction of the cost of the final product, the price of ball bearings can only marginally affect the price of and, thus, the demand for the final product. Therefore, a small change in the price of ball bearings will not induce a change in the demand for ball bearings. As a consequence, N_A may be assumed to equal zero.

¹³⁷⁰ This assumption is not entirely correct, as the Commission pointed out that the Japanese ball bearings undercut the Community producers' prices, but by a smaller amount than the Thai ball bearings. However, no quantification of the Japanese price undercutting is supplied.

(viii) *the elasticity of substitution of the Community producers' like product with respect to the price of the dumped product on the Community market*

According to the Commission Regulation, the category of ball bearings covers a large number of standard bearing types, all available with different accessories, plus many special types made to the specification of the customer. Therefore, a not too high elasticity of substitution is assumed : $S_{dc} = 2$.

The introduction of these parameters into the economic model, yields :

$$d\ln P_d = -0.00 \%$$

$$d\ln Q_d = -0.00 \%$$

Thus, contrary to the conclusion of the European anti-dumping authorities, the dumping of Thai ball bearings does not cause injury to the Community industry. The results of the comparative analysis cannot be challenged by arguing that the parameter values for E_d , N_A and S_{dc} are only rough estimates on the basis of incomplete data. Indeed, the comparative analysis shows the same results, even though different parameter values are introduced for E_d , N_A and S_{dc} .

4.3.2.2.2. Ammonium paratungstate from the People's Republic of China and the Republic of Korea : about finding no causal relationship where it exists

Originally the anti-dumping complaint against imports of ammonium paratungstate from the People's Republic of China and the Republic of Korea was supported by three Community producers. At the time of the termination of the investigation by the Commission, two of them did no longer support anymore the anti-dumping complaint, undoubtedly because they themselves imported Chinese and Korean ammonium paratungstate. This made the complaint of the remaining complainant Community producer less convincing, especially as the latter also used imported Chinese ammonium paratungstate. Moreover, the rate of capacity utilization and the profits of the sole remaining complainant Community producer improved during the investigation period. Both facts seem to have induced the Commission to conclude that the dumping did not cause injury to the Community industry, which comprises only the sole remaining complainant Community producer¹³⁷¹.

The fact that this Community producer is doing better than before, however, does not necessarily mean that the dumping did not harm him. Indeed, it is quite possible that without the dumping he would even do better than he is actually doing. Moreover, the Commission failed to investigate why this remaining Community producer, as well as the two other Community producers started to import and use dumped ammonium paratungstate. For those reasons, the comparative analysis is applied to the dumping of ammonium paratungstate by China and Korea. The investigation is

¹³⁷¹ Commission Decision 90/154/EEC of 26 March 1990 terminating the anti-dumping proceeding concerning imports of ammonium paratungstate originating in the People's Republic of China and the Republic of Korea, *O.J.*, 30 March 1990, No L 83/117.

confined to the sole remaining complainant Community producer merely because only for this producer data are set forth in the Commission Decision.

- (i) *the actual share of the dumping exporter's sales made at home with regard to his combined Community and home sales (quantity basis)*

According to the Commission Decision, no ammonium paratungstate is sold on the Korean market by the Korean exporter ; therefore, $a'_K = 0$.

With regard to China no data are given about the sales on the Chinese market. Therefore, neither a'_C , nor a' for total dumped imports can be determined.

From a certain level of a' onwards, the estimated $\langle a \rangle$ will equal one, i.e., the dumping exporter will choose not to export if he cannot dump. In such a case the probability of distorted estimates is quite high. Indeed, the cross-price elasticities of demand are estimated on the basis of the initial market shares. However, the cross-price elasticities will change, given a constant elasticity of substitution, if the exporter ceases to practise dumping. The consequent distortion will be negligible unless the dumping exporter's market share sharply decreases¹³⁷².

In the anti-dumping case concerning ammonium paratungstate from China and Korea, the dumping exporters' market share of 93 % (quantity basis) would drop to zero if a' would be assumed to equal to 16 % because at that level $\langle a \rangle$ would be estimated to equal one. As the injury increases with a' , a' is set as high as possible. In this case, a' is assumed to equal 15 %.

- (ii) *the quantity sold by the dumping exporters on the Community market (quantity basis)*

According to the Commission Decision : $D_c = 3\,559$ tonnes, of which $D_c^C = 3\,402$ tonnes and $D_c^K = 157$ tonnes.

- (iii) *the market share of the sales of the Community industry on the Community market of the like product (value basis)*

According to the Commission Decision, $D_c = 3\,559$ tonnes and $V_c = 93$ % (quantity basis) ; therefore, total consumption on the Community market equals 3 827 tonnes ($= 3\,559 \text{ tonnes}/0.93$). The prices of the dumped Chinese imports undercut Community producers' prices by 41.96 %, whereas the prices of the dumped Korean imports undercut Community producer's prices by 26.37 %. As no precise information is available, assume that the prices of imported non-dumped ammonium paratungstate originating in third countries amount to the prices charged by the Community producers. Moreover, assume that the prices of the Community producer and, thus, the non-dumped imported ammonium paratungstate equal unity. In view of the price undercutting of respectively 41.96 % and 26.37 %, the prices of the dumped Chinese product equal 0.5804 [$= 1 - 41.96$ %] and those of the dumped Korean product equal 0.7363 [$= 1 - 26.37$ %]. As a consequence, total consumption (value basis) amounts to :

$$0.5804 * 3\,402 + 0.7363 * 157 + (3\,827 - 3\,559) = 2\,358$$

Therefore and in view of V_d (quantity basis) which equals 2 % and, consequently, D_d amounting to 77 tonnes, V_d (value basis) equals :

$$V_d = 77/2\,358 = 3.25 \%$$

- (iv) *the market share of the sales of the dumping exporters on the Community market of the like product (value basis)*

On the basis of the same assumptions made in (iii), V_c^C and V_c^K (value basis) equal :

$$V_c^C = 0.5804 * 3\,402/2\,367 = 83.80 \%$$

$$V_c^K = 0.7363 * 157/2\,367 = 4.88 \%$$

Thus, V_c (value basis) equals :

$$V_c = V_c^C + V_c^K = 88.68 \%$$

¹³⁷² *The Cadic Bulletin*, BOLTUCK, R.D. (ed.), s.l., (presented at the EIASM International Workshop on Policy Implications of Anti-Dumping Measures, Brussels, October 19-20, 1989), 15 February 1989, 4.

(v) *the dumping margin*

According to the Commission Decision, the weighted average dumping margin M^C on Chinese imports amounts to 75.74 %, whereas the dumping margin M^K on Korean imports amounts to 62.16 %. The weighted average dumping margin M on both Chinese and Korean imports equals :

$$M = (3\,402 * 75.74 \% + 157 * 62.16 \%) / 3\,559 = 75.14 \%$$

(vi) *the own-price elasticity of the Community industry's supply of the like product in the Community market*

The Commission Decision does not provide direct information on E_d . It does give information about Community producers' prices, production volume and rate of capacity utilization. However, these changes are always intertemporal changes whereas E_d is not.

According to the Commission Decision, the volume of production and the rate of capacity utilization have so rapidly risen during the investigation period which covers only 9 months, that the decline in both factors during the two previous years were more than neutralized. Therefore, a rather high E_d is assumed : $E_d = 5$.

(vii) *the own-price elasticity of demand in the Community market for the aggregate product category*

The own-price elasticity of demand in the Community market for the aggregate product category is not investigated in the Commission Decision. However, intertemporal changes in the prices and the sales volumes of the dumped product, the non-dumped imported like product and the Community producer's like product are given in or may be calculated on the basis of the Commission Decision.

If the price of the Community producer's like product during the investigation period is assumed to equal unity, then, as indicated above, the prices of the Chinese and Korean dumped imports during the same period are :

$$P_c^C = 1 - 0.4196 = 0.5804$$

$$P_c^K = 1 - 0.2637 = 0.7363$$

Over the period 1984-investigation period, the prices of the Community producer's like product, the Chinese dumped product and the Korean dumped product decreased respectively by 45 %, 55 % and 29 %. This yields the following prices in 1983 :

$$P_d = 1 / (1 - 0.45) = 1.82$$

$$P_c^C = 0.5804 / (1 - 0.55) = 1.29$$

$$P_c^K = 0.7363 / (1 - 0.29) = 1.04$$

In 1984, 167 tonnes of Chinese ammonium paratungstate were imported on the Community market, corresponding to a market share of 12 % (quantity basis). In the same year, 587 tonnes of the like product originating in third countries other than China and Korea, were imported into the Community market, representing 43 % of the total Community market. As a consequence, total consumption on the Community market equals 1 371 tonnes [= (167 + 587)tonnes/(0.12 + 0.43)]. Because Korean imports and Community producer's sales on the Community market represent respectively a market share of 20 % and 24 % (quantity basis), their absolute volume is :

$$D_c^K = 20 \% * 1\,371 \text{ tonnes} = 274 \text{ tonnes}$$

$$D_d = 24 \% * 1\,371 \text{ tonnes} = 329 \text{ tonnes}$$

If the prices of the non-dumped products are assumed to equal the Community producer's price, the weighted average price level in 1984 equals :

$$[167 * 1.29 + 274 * 1.04 + (329 + 587) * 1.82] / 1\,371 = 1.58$$

Under the same assumption, the weighted average price level in the investigation period, is :

$$[3\,402 * 0.5804 + 157 * 0.7363 + (3\,872 - 3\,559)] / 3\,872 = 0.62$$

As a consequence, the change in price level between 1984 and the investigation period is :

$$\Delta P/P = 0.62/1.58 - 1 = -60.76 \%$$

The change in sales volume over the same period is :

$$\Delta Q/Q = 3\,872/1\,371 - 1 = +182.42 \%$$

As a result :

$$(\Delta Q/Q) / (\Delta P/P) = -3.00$$

Because :

$$N_A = \frac{\frac{\delta Q}{Q}}{\frac{\delta P}{P}}$$

N_A is assumed to equal -3.

(viii) *the elasticity of substitution of the Community producer's like product with respect to the price of the dumped product on the Community market*

In order to estimate N_I (i.e., the own-price elasticity of demand in the Community market for the aggregate imported product category (dumped product + imported non-dumped like product) it should be pointed out that in the economic model :

$$N_I = (1 - V_d) * N_A - V_d * S_{dc}$$

In this equation only N_I and S_{dc} are unknown. Thus, it is sufficient to determine either N_I or S_{dc} . N_I can be estimated in the same way as N_A . Under the same assumptions, the weighted average price level for the dumped product and the non-dumped imported like product in 1984 is :

$$[167 * 1.29 + 274 * 1.04 + 587 * 1.82] / 1\,028 = 1.53$$

Under the same assumption and because the imports of the non-dumped like product represent a market share of 5 % (quantity basis) on the Community market, the weighted average price level in the investigation period, on the other hand, is :

$$[3\,402 * 0.5804 + 157 * 0.7363 + 3\,872 * 0.05] / [3\,402 + 157 + 3\,872 * 0.05] = 0.61$$

As a consequence, the change in price level between 1984 and the investigation period is :

$$\Delta P/P = 0.61/1.53 - 1 = -60.13 \%$$

and the change in sales volume over the same period is :

$$\Delta Q/Q = [3\,402 + 157 + 3\,872 * 0.05] / 1\,028 - 1 = +265.04 \%$$

resulting in :

$$(\Delta Q/Q) / (\Delta P/P) = -4.41$$

Because :

$$N_I = \frac{\frac{\delta Q}{Q}}{\frac{\delta P}{P}}$$

N_I is assumed to equal -4.41.

As a consequence, S_{dc} can be estimated :

$$N_I = (1 - V_d) * N_A - V_d * S_{dc}$$

or :

$$S_{dc} = [(1 - V_d) * N_A - N_I] / V_d$$

Thus,

$$S_{dc} = [(1 - 0.0325) * (-3) - (-4.41)] / 0.0325 = 46.38$$

(ix) *Herfindhal index*

Because $V_c^C = 83.80 \%$ and $V_c^K = 4.88 \%$, the Herfindhal index is :

$$H = [83.80^2 + 4.88^2] / [83.80 + 4.88]^2 = 0.8960$$

The introduction of these parameters into the economic model, yields :

$$d \ln P_d = -17.41 \%$$

$$d \ln Q_d = -87.06 \%$$

A drop in the sole remaining complainant Community producer's price and sales volume by respectively 17.41 % and 87.06 % must undoubtedly be considered as material injury caused by the dumping to this Community producer. However, it might easily be challenge tha the estimated parameters of E_d , N_A and S_{dc} are very high. But even if they are estimated lower, the dumping will still be found to cause material injury to the Community producer. Indeed, if $E_d = 2.5$, $N_A = -0.75$ and $S_{dc} = 11.6$, then :

$$d\ln P_d = -10.90 \%$$

$$d\ln Q_d = -27.25 \%$$

Or, if $E_d = 1$, $N_A = -0.3$ and $S_{dc} = 4.6$, then :

$$d\ln P_d = -9.20 \%$$

$$d\ln Q_d = -9.20 \%$$

Therefore, the comparative analysis clearly proves that, without the dumping, the Community producer would even be doing better than in the prevailing situation with dumping in which his volume of production, rate of capacity utilization and profits are already improving.

4.3.2.2.3. Printers from Japan : about like products

In March 1987 the Committee of European Printer Manufacturers (Europrint) lodged an anti-dumping complaint against imports of Japanese printers. Europrint considered the category of like products to contain serial-impact dot-matrix printers (SIDM-printers) as well as serial impact fully formed printers (SIFF-printers). The Commission, backed up by the Council, did not agree and restricted the original anti-dumping complaint to SIDM-printers¹³⁷³. Because Europrint maintained its complaint against the dumping of Japanese SIFF-printers, the Commission initiated a separate anti-dumping proceeding with regard to SIFF-printers based on the same complaint of Europrint of March 1987¹³⁷⁴. In both cases the dumping was found to cause material injury to the Community industry.

It is sometimes argued that a too restrictive definition of the like product category makes it easier to find injury inflicted to the Community industry, whereas, conversely, a too extensive definition

¹³⁷³ Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12 ; Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 24 November 1988, No L 317/33.

¹³⁷⁴ Commission Regulation (EEC) No 2005/88 of 5 July 1988 imposing a provisional anti-dumping duty on imports of serial impact fully formed character printers originating in Japan, *O.J.*, 8 July 1988, No L 177/1 ; Council Regulation (EEC) No 34/89 of 5 January 1989 imposing a definitive anti-dumping duty on imports of serial impact fully formed (SIFF) character printers originating in Japan, *O.J.*, 7 January 1989, No L 5/23.

would make it very difficult to find injurious dumping¹³⁷⁵. It has also been alleged that the Community industry has an incentive to adopt the broadest possible definition of the product in order to get more complete protection¹³⁷⁶. It seems worthwhile to examine these contentions by means of the comparative analysis for both the anti-dumping proceedings concerning SIDM- and SIFF-printers. Indeed, in both anti-dumping proceedings, the European anti-dumping authorities had grave difficulties in delineating the like product category, because of the enormous variety of the features and specifications of the different printers. Therefore, it may be questioned why the printing element (needles versus «daisy wheels») was so decisive for dividing the general category of printers into two like product categories.

In order to investigate the impact of the definition of the like product category under the comparative analysis, the effects of the dumping of SIDM-printers and SIFF-printers are first investigated separately. The consequent results are then compared to the results of the comparative analysis of the dumping of the general category of printers.

SIDM-printers

- (i) *the actual share of the dumping exporters' sales made at home with regard to their combined Community and home sales (quantity basis)*

No data are given about the sales of SIDM-printers on the Japanese market. Therefore, a' cannot be determined.

As the probability of distortions in the estimates is high, when the market share of the dumping exporters drops considerably, a' is determined on a level below which the probability of distortions decreases¹³⁷⁷. It is determined on the highest possible level because the injury increases with a' .

In the anti-dumping case concerning SIFF-printers, the dumping exporters' market share of 73.91 % (quantity basis) would drop to zero if a' would equal 18 % because at that level the parameter « a » would be estimated to equal one. For the sake of aggregation, a' is assumed to equal 17 % for both SIDM- and SIFF-printers.

- (ii) *the quantity sold by the dumping exporters on the Community market (quantity basis)*

According to the Commission and the Council Regulations : $D_c = 1\,522\,000$ units.

- (iii) *the market share of the sales of the Community industry on the Community market of the like product (value basis)*

According to the Commission and the Council Regulations, overall consumption on the Community market amounts to 2 093 000 units. The prices of the dumped Japanese imports undercut Community producers' prices by 3.93 to 43.42 %, i.e., by 23.68 % on average. As no precise information is available, assume that the prices of the imported non-dumped SIDM-printers originating in third countries equal the prices charged by the Community producers. Moreover, assume that the prices of the Community producers and, thus, the non-dumped imported SIDM-printers equal unity. In view of the price undercutting of 23.68 %,

¹³⁷⁵ BESELER, J.-F., *Die Abwehr von Dumping und Subventionen durch die Europäische Gemeinschaften*, Baden-Baden, Nomos, 1980, 104; BESELER, J.F., and WILLIAMS, A.N., *Anti-Dumping and Anti-Subsidy Law. The European Communities*, London, Sweet & Maxwell, 1986, 150.

¹³⁷⁶ MESSERLIN, P., «Anti-Dumping Regulations or Pro-Cartel Law ? The EC Chemical Cases», *World Economy*, 1990, (465), 478.

¹³⁷⁷ *Supra*, 576.

the prices of the dumped Japanese printers equal 0.7632 [= 1 - 23.68 %]. As a consequence, overall consumption (value basis) amounts to :

$$0.7632 * 1\,522\,000 + (2\,093\,000 - 1\,522\,000) = 1\,732\,590$$

Because D_d amounts to 258 000 units, V_d (value basis) equals :

$$V_d = 258\,000 / 1\,732\,590 = 14.89 \%$$

- (iv) *the market share of the sales of the dumping exporters on the Community market of the like product (value basis)*

On the basis of the same assumptions made in (iii), V_c (value basis) equals :

$$V_c = 0.7632 * 1\,522\,000 / 1\,732\,590 = 67.04 \%$$

- (v) *the dumping margin*

According to the Commission and the Council Regulations, the weighted average dumping margin differs from exporter to exporter. The arithmetical average of the different dumping margins, M , equals 37.51 %.

- (vi) *the own-price elasticity of the Community industry's supply of the like product in the Community market*

The Commission and the Council Regulations do not provide direct information on E_d . They do give information about Community producers' prices, production volume, capacity, rate of capacity utilization, investments. However, those changes are always intertemporal changes whereas E_d is not.

According to these Regulations, the volume of production increased from 175 000 units to 390 000 units between 1983 and 1986, which represents a growth rate of 30.62 % on a yearly basis. Notwithstanding this considerable increase in the volume of production, the Community industry is faced with excess capacity. Indeed, in recent years, considerable investments were made to extend production capacity. However, as the printer market is characterized by continuous technological developments, new types of printers which incorporate the new technology, have to be introduced on the market, which requires considerable and continuous investments in research & development and marketing. Therefore, a modest but not too low E_d seems plausible, for example a value of 3.

- (vii) *the own-price elasticity of demand in the Community market for the aggregate product category*

The own-price elasticity of demand in the Community market for the aggregate product category is not investigated in the Commission and the Council Regulations. However, intertemporal changes in the prices and the sales volumes of the dumped product, the non-dumped imported like product and the Community producers' like product are given in or may be calculated on the basis of the Commission and the Council Regulations.

Between 1985 and March 1987, the weighted average prices of a representative Community producer, whose products are represented in all three market segments, decreased in the various Member States in the low segments by between 25 and 38 %, in the medium segment by between 6 and 23 % and in the high segment by between 4 and 14 %. Thus, the arithmetical average decline of his prices is 14.96 % on a yearly basis. If that decline is representative for the whole Community industry and if the price of the Community industry's like product on the Community market equals unity in March 1987, then :

$$\text{in 1986 : } P_d = 1 / (1 - 0.1496)^{3/12} = 1.04$$

$$\text{in 1985 : } P_d = 1 / (1 - 0.1496)^{(1+3/12)} = 1.22$$

In 1986 the price of the Japanese printers undercut the price of the Community producers' like product with 23.68 %. Consequently, the price of the Japanese printers during the same year equals 0.7937 [= 1.04 * (1 - 0.2368)].

Between 1983 and 1986, the weighted average prices of the Japanese exporters decreased in the low and the high segment by 35 % and in the medium segment by 21 %. Consequently, the arithmetical average decline of the Japanese prices is 11.35 % on a yearly basis. This yields for 1985 :

$$P_c = 0.7937 / (1 - 0.1135) = 0.8953$$

In 1983 and 1986, 390 000 and, respectively, 1 522 000 Japanese printers were imported on the Community market. Japanese imports of printers increased during this period by 57.44 % on a yearly basis. Therefore, the imports of Japanese printers in 1985 are estimated at 996 714 units [= 1 522 000 / (1 + 0.5744)].

During 1983 and 1986, the Japanese market share on the Community market increased from 48.75 % to 72.72 % ; on a one-year basis the Japanese market share increased with 14.26 %. Therefore, the Japanese market share in 1985 is estimated at 63.64 % [= 72.72 %/(1 + 0.1426)]. As a consequence, total consumption on the Community market in 1985 is estimated at 1 566 175 units [= 996 714 units/0.6364]. If the prices of the non-dumped products are assumed to equal the Community producers' price, the weighted average price level for the aggregate product category of SIDM-printers in 1985 equals :

$$[996\,714 * 0.8953 + (1\,566\,175 - 996\,714) * 1.22]/1\,566\,175 = 1.04$$

Under the same assumption, the weighted average price level in 1986, is :

$$[1\,522\,000 * 0.7937 + (2\,093\,000 - 1\,522\,000) * 1.04]/2\,093\,000 = 0.86$$

As a consequence, the change in price level between 1985 and 1986 is :

$$\Delta P/P = 0.86/1.04 - 1 = -17.31 \%$$

The change in sales volume over the same period is :

$$\Delta Q/Q = 2\,093\,000/1\,566\,175 - 1 = +33.64 \%$$

As a result :

$$(\Delta Q/Q)/(\Delta P/P) = -1.94$$

Because :

$$N_I = \frac{\frac{\delta Q}{Q}}{\frac{\delta P}{P}}$$

N_A is assumed to equal -2.

(viii) *the elasticity of substitution of the Community producers' like product with respect to the price of the dumped product on the Community market*

In order to estimate N_I (i.e., the own-price elasticity of demand in the Community market for the aggregate imported product category (dumped product + imported non-dumped like product)) it should be pointed out that in the economic model :

$$N_I = (1 - V_d) * N_A - V_d * S_{dc}$$

In this equation only N_I and S_{dc} are unknown. Thus, it is sufficient to determine either N_I or S_{dc} . N_I can be estimated in the same way as N_A .

According to the Commission and the Council Regulations, the market share of the Community industry dropped from 33 % in 1983 to 18 % in 1986. Thus, it has decreased by 18.29 % on a yearly basis. The 1985 market share of the Community industry can, thus, be estimated at 22.03 %. In view of overall consumption being estimated above at 1 566 175 units in 1985, the volume of sales of the Community industry in absolute terms can be estimated at 345 015 units in 1985 [= 22.03 % * 1 566 175 units]. Therefore, non-dumped imports account for 224 446 units [= 1 566 175 - 345 015 - 996 714] in 1985. According to the Commission and the Council Regulations, they account for 313 000 units [= 2 093 000 - 258 000 - 1 522 000] in 1986.

Under the same assumptions, the weighted average price level for the dumped product and the non-dumped imported like product in 1985 is :

$$[996\,714 * 0.8953 + 224\,446 * 1.22]/[996\,714 + 224\,446] = 0.95$$

whereas it in 1986 it equals :

$$[1\,522\,000 * 0.7937 + 313\,000 * 1.04]/[1\,522\,000 + 313\,000] = 0.84$$

As a consequence, the change in price level between 1985 and 1986 is :

$$\Delta P/P = 0.84/0.95 - 1 = -11.58 \%$$

The change in sales volume over the same period is :

$$\begin{aligned} \Delta Q/Q &= [1\,522\,000 + 313\,000]/[996\,714 + 224\,446] - 1 \\ &= + 50.27 \% \end{aligned}$$

As a result :

$$(\Delta Q/Q)/(\Delta P/P) = -4.34$$

Because :

$$N_I = \frac{\frac{\delta Q}{Q}}{\frac{\delta P}{P}}$$

N_I is assumed to equal -4.34.

As a consequence, S_{dc} can be estimated :

$$N_I = (1 - V_d) * N_A - V_d * S_{dc}$$

or :

$$S_{dc} = [(1 - V_d) * N_A - N_I] / V_d$$

Thus,

$$S_{dc} = [(1 - 0.1489) * (-2) - (-4.34)] / 0.1489 = 17.72$$

SIFF-printers

- (i) *the actual share of the dumping exporters' sales made at home with regard to their combined Community and home sales (quantity basis)*

No data are given about the sales of SIFF-printers on the Japanese market. Therefore, a' cannot be determined.

As noted above, a' is assumed to equal 17 % because it is the highest possible a' for SIFF-printers for which the market share of the dumped imports on the Community market does not drop to zero.

- (ii) *the quantity sold by the dumping exporters on the Community market (quantity basis)*

According to the Commission and the Council Regulations, $D_c = 195\,000$ units.

- (iii) *the market share of the sales of the Community industry on the Community market of the like product (value basis)*

According to the Commission and the Council Regulations, overall consumption on the Community market equals 263 840 units. Two Japanese exporters with a market share of 6 % did not undercut Community producers' prices ; the other Japanese exporters, however, undercut Community producers' prices by 15 %. With a market share of 6 %, the two Japanese exporters import 15 830 units [= 6 % * 263 840 units] ; thus, their share in overall Japanese dumped imports equals 8.12 %. Therefore, the weighted average margin of price undercutting is :

$$15 \% * (1 - 0.0812) + 0 \% * 0.0812 = 13.78 \%$$

As no precise information is available, assume that the prices of the imported non-dumped SIFF-printers originating in third countries equal the prices charged by the Community producers. Moreover, assume that the prices of the Community producers and, thus, the non-dumped imported SIFF-printers equal unity. In view of the price undercutting of 13.78 %, the prices of the dumped Japanese printers equal 0.8622 [= 1 - 13.78 %]. As a consequence, total consumption (value basis) amounts to :

$$0.8622 * 195\,000 + (263\,840 - 195\,000) = 236\,969$$

Because V_d (quantity basis) equals 9 %, D_d amounts to 23 746 units [= 9 % * 263 840]. Therefore, V_d (value basis) equals :

$$V_d = 23\,746 / 236\,969 = 10.02 \%$$

- (iv) *the market share of the sales of the dumping exporters on the Community market of the like product (value basis)*

On the basis of the same assumptions made in (iii), V_c (value basis) equals :

$$V_c = 0.8622 * 195\,000 / 236\,969 = 70.95 \%$$

- (v) *the dumping margin*

According to the Commission and the Council Regulations the dumping margin for the two Japanese exporters with a market share of 6 % on the Community market, which corresponds to a share of 8.12 %

in total Japanese dumped imports, equals 21.05 % and 22.01 %, the arithmical average of which is 21.53 %. The Commission and the Council assume that the dumping margin for the other Japanese exporters, which represents (1 - 8.12 %) of total Japanese dumped imports, equals 58 %. Therefore, the average weighed dumping margin M is :

$$0.0812 * 21.53 \% + (1 - 0.0812) * 58 \% = 55.04 \%$$

(vi) *the own-price elasticity of the Community industry's supply of the like product in the Community market*

The Commission and the Council Regulations do not provide direct information on E_d . They do give information about Community producers' prices, production volume, capacity, rate of capacity utilization and investment. However, these changes are always intertemporal changes whereas E_d is not.

According to these Regulations, the volume of production increased from 16 238 units to 28 555 units between 1983 and March 1987, which represents a growth rate of 18.97 % on a yearly basis. Though this yearly increase is smaller than for SIDM-printers, the same value for E_d may be assumed for SIFF-printers as for SIDM-printers. As in the SIDM-printer market, the Community industry is faced with serious excess capacity ; in recent years considerable investments were made to extend production capacity ; the printer market is characterized by continuous technological developments ; therefore, new types of printers which incorporate the new technology have to be introduced on the market which requires considerable and continuous investments in research & development and marketing. Therefore, E_d is here also assumed to equal 3.

(vii) *the own-price elasticity of demand in the Community market for the aggregate product category*

The own-price elasticity of demand in the Community market for the aggregate product category is not investigated in the Commission and the Council Regulations. Moreover, it is not possible to deduce some indications concerning the own-price elasticity of demand in the Community market from these Regulations. However, because of the fact that SIFF-printers and SIDM-printers have common features, as well as for the sake of aggregating those parameters, N_A is assumed to be equal to the N_A used for SIDM-printers. Therefore, $N_A = -2$.

(viii) *the elasticity of substitution of the Community producers' like product with respect to the price of the dumped product on the Community market*

For the same reason as given in (vii), S_{dc} is assumed to be equal to S_{dc} for SIDM-printers, i.e., $S_{dc} = 17.72$.

SIDM- and SIFF-printers aggregated

(i) *the actual share of the dumping exporters' sales made at home with regard to their combined Community and home sales (quantity basis)*

No data are given about the sales of SIDM- and SIFF-printers on the Japanese market. Therefore, a' cannot be determined.

It has been assumed that a' equals 17 % both for SIDM- and SIFF printers. Therefore, a' also equals 17 % when both printer types are aggregated.

(ii) *the quantity sold by the dumping exporters on the Community market (quantity basis)*

According to the Commission and the Council Regulations, $D_c = 1\,522\,000$ SIDM-printers + $195\,000$ SIFF-printers = $1\,717\,000$ printers.

(iii) *the market share of the sales of the Community industry on the Community market of the like product (value basis)*

According to the Commission and the Council Regulations, total consumption on the Community printer market equals :

$$2\,093\,000 \text{ SIDM-printers} + 263\,840 \text{ SIFF-printers} = 2\,356\,840 \text{ printers}$$

The arithmetical average margin of price undercutting for SIDM-printers is 23.68 %, and the weighted average margin of price undercutting for SIFF-printers is 13.78 %. The weighted average margin of price undercutting on the Community printer market is :

$$[23.68 \% * 2\,093\,000 + 13.78 \% * 263\,840] / 2\,356\,840 = 22.57 \%$$

As no precise information is available, assume that the prices of the imported non-dumped SIDM- and SIFF-printers originating in third countries are equal to the prices charged by the Community producers. Moreover, assume that the prices of the Community producers and, thus, the non-dumped imported SIDM- and SIFF-printers equal unity. In view of the price undercutting of 22.57 %, the prices of the dumped Japanese printers equal 0.7743 [= 1 - 22.57 %]. As a consequence, total consumption (value basis) amounts to :

$$0.7743 * 1\,717\,000 + (2\,356\,840 - 1\,717\,000) = 1\,969\,313$$

Because D_d amounts to 281 746 units [= 258 000 units + 23 746 units] V_d (value basis) equals :

$$V_d = 281\,746 / 1\,969\,313 = 14.31 \%$$

- (iv) *the market share of the sales of the dumping exporters on the Community market of the like product (value basis)*

On the basis of the same assumptions made in (iii), V_c (value basis) equals :

$$V_c = 0.7743 * 1\,717\,000 / 1\,969\,313 = 67.51 \%$$

- (v) *the dumping margin*

In view of the dumping margin of 37.51 % for SIDM-printers and of 55.04 % for SIFF-printers, the weighted average dumping margin for printers is :

$$[37.51 \% * 1\,522\,000 + 55.04 \% * 195\,000] / 1\,717\,000 = 39.50 \%$$

- (vi) *the own-price elasticity of the Community industry's supply of the like product in the Community market*

With respect to SIDM- and SIFF-printers, E_d is assumed to equal 3. Therefore, E_d is also assumed to equal 3 with regard to the aggregated category of printers.

- (vii) *the own-price elasticity of demand in the Community market for the aggregate product category*

With respect to SIDM- and SIFF-printers, N_A is assumed to equal -2. Therefore, N_A is also assumed to equal -2 with regard to the aggregated category of printers.

- (viii) *the elasticity of substitution of the Community producers' like product with respect to the price of the dumped product on the Community market*

With respect to SIDM- and SIFF-printers, S_{dc} is assumed to equal 17.72. Therefore, S_{dc} is also assumed to equal 17.72 with regard to the aggregated category of printers.

The introduction of these parameters into the economic model, yields :

$d \ln P_d = -6.57 \%$	for SIDM-printers
$d \ln P_d = -10.88 \%$	for SIFF-printers
$d \ln P_d = -7.01 \%$	for aggregated SIDM- and SIFF-printers
$d \ln Q_d = -19.70 \%$	for SIDM-printers
$d \ln Q_d = -32.64 \%$	for SIFF-printers
$d \ln Q_d = -21.02 \%$	for aggregated SIDM- and SIFF-printers

Thus, by dividing the general category of printers into two categories, a result is obtained for one of the categories, i.e., SIDM-printers, which approaches the result of the aggregated product

category, whereas the result for the other product category, *i.e.*, SIFF-printers, indicates even greater injury.

In the anti-dumping cases concerning Japanese printers, the division of the general category of printers over two distinct categories does not have real consequences. In both cases, material injury caused by the dumping is found under the trends analysis applied by the European anti-dumping authorities, as well as under the comparative analysis. However, in other cases it may have far-reaching consequences. In order to show this, it should be pointed out that the results of the comparative analysis for the aggregated SIDM- and SIFF-printers are in fact the weighted average sum of the results for the two separated categories of SIDM- and SIFF-printers. Indeed, the weighted average sum of those individual results are :

$$\begin{aligned} \text{dln } P_d &= [1\,522\,000 * (-6.57 \%) + 195\,000 * (-10.88 \%)] / [1\,522\,000 + 195\,000] \\ &= -7.06 \% \end{aligned}$$

$$\begin{aligned} \text{dln } Q_d &= [1\,522\,000 * (-19.70 \%) + 195\,000 * (-32.64 \%)] \\ &\quad / [1\,522\,000 + 195\,000] \\ &= -21.17 \% \end{aligned}$$

which is practically equal to the results obtained for the aggregated SIDM- and SIFF-printers. The small differences are undoubtedly due to errors as a result of rounding off.

In order to show the importance of the determination of the like product category, take an hypothetical case. Assume that there are two products A and B, which closely resemble to each other so that they could be said to be like products in the sense of Article 1(4) basic EC Regulation and of Article 2(9) basic ECSC Decision. A quantity of 200 000 units of product A and a quantity of 9 800 000 units of product B are dumped into the Community. Assume that the results of the comparative analysis for product A are :

$$\text{dln } P_d = -25 \%$$

$$\text{dln } Q_d = -50 \%$$

and for product B :

$$\text{dln } P_d = -0.25 \%$$

$$\text{dln } Q_d = -0.50 \%$$

The results of the comparative analysis for the aggregated category of products A and B, which may be assumed to be equal to the weighted average sum of the individual results, therefore, are :

$$\begin{aligned} \text{dln } P_d &= [200\,000 * (-25 \%) + 9\,800\,000 * (-0.25 \%)] / [200\,000 + 9\,800\,000] \\ &= -0.745 \% \end{aligned}$$

$$\begin{aligned} \text{dln } Q_d &= [200\,000 * (-50 \%) + 9\,800\,000 * (-0.50 \%)] / [200\,000 + 9\,800\,000] \\ &= -1.490 \% \end{aligned}$$

In this example, it can hardly be argued that the dumping has caused material injury to product B nor to the aggregated product A and B. Only if product A is considered separately, material

injury is found and anti-dumping relief may be granted. Thus, the definition of the like product category is important for the application of European anti-dumping law.

However, it would be wrong to conclude, on the basis of this example, that it is always profitable for the Community industry to uphold a narrow like product definition. Indeed, take the same example, but assume that a quantity of 9 800 000 units of product A and a quantity of 200 000 units of product B are dumped into the Community. Assuming that the separate results for products A and B are the same, the results for the aggregated product category are :

$$\text{dln } P_d = [9\,800\,000 * (-25\%) + 200\,000 * (-0.25\%)]/[200\,000 + 9\,800\,000] \\ = -24.505\%$$

$$\text{dln } Q_d = [9\,800\,000 * (-50\%) + 200\,000 * (-0.50\%)]/[200\,000 + 9\,800\,000] \\ = -49.010\%$$

In this case, it would be possible to grant anti-dumping relief against the dumping of both products A and B, if these two products are aggregated, whereas it would be difficult to conclude that the dumping of product B considered separately is causing material injury.

Thus, the success of an anti-dumping complaint largely depends on the definition of the like product category. However, the link between the amplitude of the like product category and the results of the injury determination is not straightforward. Nonetheless, it can be put that, if one is sure that, for a certain type of product, the Community industry suffers injury from dumping, it is safe to restrict the complaint to this product type ; by extending the complaint to other product types, one incurs the risk of watering down the results for the first product type by the results of the other product type, especially if the imported volume of the other product is larger than the imported volume of the first product type.

4.3.2.2.4. Urea from all-over-the-world : the question of cumulation

The comparative analysis is made with regard to the anti-dumping complaint concerning urea from (the former) Czechoslovakia, the (former) German Democratic Republic, Kuwait, Libya, Saudi Arabia, the (former) USSR, Trinidad and Tobago and (the former) Yugoslavia¹³⁷⁸, in order to prove the contention that it is profitable to lodge an anti-dumping complaint against as many exporting countries as possible. It is proved that the cumulation with other countries may make an anti-dumping complaint against a certain exporting country successful, even if the dumping

¹³⁷⁸ Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia, *O.J.*, 9 May 1987, No L 121/11 ; Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1.

from this country does not cause (material) injury to the Community industry. It is also shown that the new GATT and EC rules on cumulation will not prevent such a result.

Therefore, the following parameters are introduced into the economic model :

(i) *the actual share of the dumping exporters' sales made at home with regard to their combined Community and home sales (quantity basis)*

With regard to Kuwait and Trinidad and Tobago, the constructed value was used as normal value standard because there were no significant sales on their domestic market. Consequently, in view of the 5 % threshold¹³⁷⁹, their domestic sales must be less than 5 % of their exports to the Community. Therefore, it is assumed that they reach this threshold of 5 %, which implies a' equal to 4.76 %.

With regard to the other exporting countries, the Commission and the Council Regulations do not provide any indication concerning a' .

In view of the high probability of distortions in the estimates when the market share of the dumping exporter drops considerably, a' is determined on a the highest possible level below which the probability of distortions decreases¹³⁸⁰. It is set on the highest possible level since the injury increases with a' .

In this anti-dumping case, the dumping exporters' market share for Czechoslovakia, the German Democratic Republic, Saudi Arabia and Yugoslavia would drop to zero if a' would equal 13 % because at that level « a » would be estimated to equal one. Therefore, for these exporting countries, a' is assumed to equal 12 %. Similarly, for Libya and the USSR, « a » would be estimated at one if a' equals 12 %. Consequently, for Libya and the USSR, a' is assumed to equal 11 %. This yields the following figures :

Exporting country	D_c (tonnes)	a' (%)	D_h (tonnes)
Czechoslovakia	42 631	12.00	5 813
G.D.R.	89 739	12.00	12 237
Kuwait	46 710	4.76	2 336
Libya	284 303	11.00	35 139
Saudi Arabia	110 475	12.00	15 065
USSR	270 849	11.00	33 476
Trinidad and Tobago	147 936	4.76	7 397
Yugoslavia	41 408	12.00	5 647
All countries	1 034 051	10.17	117 108

(ii) *the quantity sold by the dumping exporters on the Community market (quantity basis)*

The table above contains the different values of D_c for each country.

(iii) *the market share of the sales of the Community industry on the Community market of the like product (value basis)*

The Commission and the Council Regulations do not provide a general margin of price undercutting for total dumped imports of urea on the Community market. Instead some disparate data are given for the national market of some Member States and these data concern only a sub-market of the total market of urea in these Member States. Indeed, the Commission and the Council Regulations provide the following information on price undercutting :

¹³⁷⁹ *Supra*, 139-143.

¹³⁸⁰ *Supra*, 576.

- *Italy* : a) the agricultural urea market :
 - weighted average margin of price undercutting = between 15 and 21 % ;
 - 52 % of total Community consumption of agricultural urea, i.e., 1 000 000 tonnes ;
- b) the technical urea market :
 - weighted average margin of price undercutting = between 5 and 17 % ;
 - 24 % of total Community consumption of technical urea ;
- *France* : a) the agricultural urea market :
 - weighted average margin of price undercutting = between 27 and 35 % ;
 - 20 % of total Community consumption of agricultural urea, i.e., 375 000 tonnes ;
- *United Kingdom* : a) the agricultural urea market :
 - weighted average margin of price undercutting = 4.8 % ;
 - 6.4 % of total Community consumption of agricultural urea ;
- *Ireland* : a) agricultural market :
 - weighted average margin of price undercutting = between 18 and 23 % ;
 - 4 % of total Community consumption of agricultural urea.

Assume that the margin of price undercutting for the Community equals the weighted average of the margins of price undercutting in these four Member States :

- *the agricultural urea market* :

Total Community consumption of agricultural urea is :

$$[1\,000\,000\text{ tonnes} + 375\,000\text{ tonnes}]/[0.52 + 0.20] = 1\,909\,722\text{ tonnes}$$

Therefore, consumption of agricultural urea in the United Kingdom is :

$$6.4\% \times 1\,909\,722\text{ tonnes} = 122\,222\text{ tonnes}$$

and in Ireland :

$$4\% \times 1\,909\,722\text{ tonnes} = 76\,389\text{ tonnes}$$

Total consumption of agricultural urea in Italy, France, the United Kingdom and Ireland, thus, equals 1 573 611 tonnes [= 1 000 000 + 375 000 + 122 222 + 76 389].

As a consequence, the weighted average of the margins of price undercutting in the four Member States is :

$$\begin{aligned} & [1\,000\,000 \times (15\% + 21\%)/2 + 375\,000 \times (27\% + 35\%)/2 \\ & + 122\,222 \times 4.8\% + 76\,389 \times (18\% + 23\%)/2] / 1\,573\,611 \\ & = 20.19\% \end{aligned}$$

- *the technical urea market* :

The Commission and the Council Regulations only mention the margins of price undercutting on the Italian technical urea market. Therefore, the average margin of price undercutting for the total technical urea market of the Community is assumed to equal the arithmetical average of these margins, i.e., 11 % [= (5 % + 17 %)/2].

- *total urea market* :

The Commission and the Council Regulations assume that 90 % of the dumped imports are sold in the agricultural sector. Therefore, the weighted average margin of price undercutting for the total urea market is :

$$20.19\% \times 0.9 + 11\% \times 0.1 = 19.27\%$$

As no precise information is available, assume that the prices of the imported non-dumped urea originating in third countries equal the prices charged by the Community producers. Moreover, assume that the prices of the Community producers and, thus, the non-dumped imported urea equal unity. In view of the price undercutting of 19.27 %, the prices of the dumped Japanese printers equal 0.8073 [= 1 - 19.27 %].

In view of the fact that the volume of the dumped imports amounts to 1 034 051 tonnes, which represents a market share of 20.28 %, total consumption (quantity basis) on the Community market is :

$$1\,034\,051\text{ tonnes}/0.2028 = 5\,098\,871\text{ tonnes}$$

Therefore, total Community consumption (value basis) is :

$$0.8073 \times 1\,034\,051 + [5\,098\,871 - 1\,034\,051] = 4\,899\,609$$

Because D_d amounts to 3 461 000 tonnes, V_d (value basis) equals :

$$V_d = 3\,461\,000/4\,899\,609 = 69.72\%$$

- (iv) *the market share of the sales of the dumping exporters on the Community market of the like product (value basis)*

On the basis of the same assumptions made in (iii), V_c (value basis) equals :

Exporting country	D_c (tonnes)	V_c (%)
Czechoslovakia	42 631	0.70
G.D.R.	89 739	1.48
Kuwait	46 710	0.77
Libya	284 303	4.68
Saudi Arabia	110 475	1.82
USSR	270 849	4.46
Trinidad and Tobago	147 936	2.44
Yugoslavia	41 408	0.68
All countries	1 034 051	17.04

- (v) *the dumping margin*

According to the Commission Regulation the weighed average dumping margin M amounts to :

Exporting country	M (%)
Czechoslovakia	36.00
G.D.R.	51.00
Kuwait	36.00
Libya	58.00
Saudi Arabia	55.00
USSR	60.00
Trinidad and Tobago	37.00
Yugoslavia	78.00
All countries	53.49

- (vi) *the own-price elasticity of the Community industry's supply of the like product in the Community market*

The Commission and the Council Regulations do not provide direct information on E_d . They do give information about Community producers' prices, production volume, capacity, rate of capacity utilization and employment. However, these changes are always intertemporal changes whereas E_d is not.

According to the Commission and the Council Regulations, Community production has declined by 12.5 % between 1984 and 1985 and by 11.4 % between 1985 and 1986. Also the Community producers' prices dropped significantly, namely up to 40 %. As the rate of capacity utilization equals 66 % in 1986, whereas it reached 77 % in 1985 and 85 % in 1984, Community production may increase smoothly if prices would rise. Moreover, it is possible to close down a plant during several months and to re-activate it on an even shorter period.

Therefore, E_d is assumed to equal 10.

In this respect it should be pointed out that the value of E_d as well as the value of N_A and S_{dc} are not important for the purpose of the application of the comparative analysis to the anti-dumping case in question. Indeed, the purpose of this exercise is to investigate the effects of cumulation rather than to ascertain whether the European anti-dumping authorities have incorrectly found injurious dumping.

(vii) *the own-price elasticity of demand in the Community market for the aggregate product category*

According to the Commission and the Council Regulations, urea is a very price-sensitive product. In other words, the own-price elasticity of urea must be high, for example -10.

For the sake of cumulation, the same value of N_A is taken for all dumping countries. Moreover, in view of the relatively low market share of the separate imports, it may be argued that they would only marginally affect the value of N_A .

(viii) *the elasticity of substitution of the Community producers' like product with respect to the price of the dumped product on the Community market*

A rather high S_{dc} seems to be appropriate. Indeed, there were no great difficulties in the determination of the like product category ; only marginal differences in physical characteristics existed, which did not affect the interchangeability of the different forms of urea. Therefore, S_{dc} is assumed to be equal to 50.

The introduction of these parameters into the economic model, yields the following results :

Exporting country	$d \ln P_d$	$d \ln Q_d$
	(%)	(%)
Czechoslovakia	-0.09	-0.87
G.D.R.	-0.27	-2.69
Kuwait	-0.03	-0.33
Libya	-0.82	-8.19
Saudi Arabia	-0.36	-3.60
USSR	-0.80	-8.05
Trinidad and Tobago	-0.11	-1.06
Yugoslavia	-0.19	-1.88
All countries	-2.63	-26.25

With the exception of Libya and the USSR, the results for the exporting countries, taken separately, can hardly be considered to indicate material injury caused by the dumping. However, if the dumping from all those countries is cumulated, the dumping of each country will be found to be causing injury. Moreover, the new GATT and EC rules on cumulation (Article 3.3. GATT Anti-dumping Code ; Article 3(4) basic EC Regulation) will not prevent those countries from being cumulated. Indeed, the cumulative market share of those countries was well above 3 % of Community consumption (no information is available on their share in total Community imports) and their dumping margins laid markedly above 1 %.

It has been argued that country-cumulation should be possible only if the dumped imports have a collective injurious effect, *i.e.*, if the the sum of the injuries caused by the individual dumped

imports is smaller than the injury caused by the dumped imports taken as a whole¹³⁸¹. In this anti-dumping case concerning urea, country-cumulation does not seem to be justified. Indeed, the sum of the injury caused by the individual imports is :

$$\Sigma \text{dln } P_d = -2.67 \%$$

$$\Sigma \text{dln } Q_d = -26.67 \%$$

which is marginally higher than the results for the cumulated dumped imports. The marginal difference is undoubtedly the result of errors of rounding off. Consequently, there is no ground for country-cumulation. However, it is possible that, after rectification of these errors, the sum of the individual results will come to less than the results of the dumped imports taken as a whole, in which case country-cumulation would have been appropriate.

The results obtained for the dumped imports as a whole, are based on the assumption that all dumping exporters located in different countries behave as a cartel on the Community market. However, the Commission and the Council Regulations do not contain evidence of a cartel between these dumping exporters. It, thus, is quite possible that there is no cartel. In this case, the Herfindhal index cannot be assumed to equal one, but it must equal :

$$H = \frac{[0.70^2 + 1.48^2 + 0.77^2 + 4.68^2 + 1.82^2 + 4.46^2 + 2.44^2 + 0.68^2]}{[0.70 + 1.48 + 0.77 + 4.68 + 1.82 + 4.46 + 2.44 + 0.68]^2}$$

$$= 0.1889$$

The introduction of this Herfindahl index, which implies the assumption of Cournot oligopoly, yields :

$$\text{dln } P_d = -1.98 \%$$

$$\text{dln } Q_d = -19.75 \%$$

In the case of Cournot oligopoly, the conclusion alters entirely : the sum of the results for the individual dumped imports is considerably higher than the results for the dumped imports as a whole. Thus, country-cumulation must not have been made. This conclusion has far-reaching consequences : anti-dumping relief should have been granted only in respect of the dumping from Libya and the Soviet Union because the dumping from the six other countries had not been causing material injury to the Community industry.

¹³⁸¹ *Supra*, 533-534.

5. CONCLUSION

Merely by exporting to the Community, all exporters, broadly spoken, cause injury to the Community producers. Indeed, either they forestall the Community producers to sell or they stiffen competition and, thus, exert a decreasing effect on prices. They can even deprive the Community producers from monopoly positions and high monopoly prices on the Community market. Clearly, since such kind of injury is only the result of normal competition, it should not be sanctioned.

The issue in European anti-dumping law is whether such kind of injury should be sanctioned when it is caused by dumping exporters. At first glance, European anti-dumping law seems to require more : the injury must be *material* ; it must be *caused* by the *dumping*, and it must be inflicted upon a *Community industry*. However, an examination of European anti-dumping law shows that all injury caused by dumping exporters may be sanctioned (so-called «one-way flexibility»). Indeed, the injury has not necessarily to be caused by the dumping exporters as they may be sanctioned merely because their exports and the injury coincide in time. Since the dumping exporters cannot have foreknowledge of such coincidence, they are unable to know in advance whether they injure the Community industry in terms of European anti-dumping law (lack of legal certainty). This Chapter is concluded by a recapitulation of those remarkable results of the analysis of the injury requirement.

5.1. COMMUNITY INDUSTRY

The requirement for the injury to have been suffered *by a Community industry* should limit the scope of European anti-dumping law. Indeed, if there is no Community industry, injury cannot be found. However, the concept «Community industry» is implemented in such a «one-way flexible» way that there will practically always be a Community industry.

A Community industry encompasses Community producers manufacturing a product like the dumped product. A like product is strictly defined as a product with identical or, at least, closely resembling physical characteristics. Elements of substitutability are taken into account, in order to determine the close resemblance of physical characteristics. As the dumped products and the Community products will seldom be entirely identical, the degree of substitutability may play a crucial role. In order to measure the degree of substitutability, the European anti-dumping authorities do not use the cross elasticity of demand and supply. Instead they only use general terms such as the application and the perception of the product by the customer. Such general terms allow a like product definition made to fit the Community producers. Thus, Community

industries may be and indeed already have been found to be injured by the dumping of products, though they do not (yet) produce such products.

A Community industry does not necessarily have to include all Community producers of the like product. It may refer to some Community producers whose collective output constitutes a major proportion of the total Community production of the like product. Since a minority may constitute a major proportion (25 % constitutes a major proportion), anti-dumping relief can be granted when the majority of the Community producers does not suffer injury from the dumping. Clearly, the requirement of only a major proportion makes the injury requirement easier to be met and anti-dumping relief more readily.

In order to determine a Community industry, producers who are related to the dumping exporters or who import the dumped product, may be disregarded, though not necessarily. Interestingly, the European anti-dumping authorities use this possibility in such a way as to make sure that the complainant Community producers represent a major proportion of the total Community production. Indeed, they practically never disregard complainant producers who are related to the dumping exporters or who import the dumped product, whereas, in the few instances in which the question of non-complainant producers related to the dumping exporters or importing the dumped product, was treated, all these non-complainant producers were disregarded. The difference in treatment is meaningful. Overall Community production does not include disregarded producers and disregarded complaining producers also disappear as complainants. By disregarding non-complainant producers, overall Community production drops, but the share of the complainant Community producers in overall Community production and, thus, the probability that they represent a major proportion increase. Conversely, by disregarding a complainant producer, both total Community production and the production of the category of complainant producers drop, but since the latter proportionally decreases to a greater extent than the first, the probability that the remaining complainant producers represent a major proportion decreases.

When the Community can be divided in regional markets, a Community industry is not held to represent a major proportion of total Community production. In such a case, it must represent almost all of the production within such a regional market. Regional markets are only exceptionally used. Nevertheless, they clearly make the injury requirement easier to fulfil. Moreover, the criteria which determine a regional market, are not adequate. They only pertain to there not being intra-Community trade between the regional markets. However, there being no intra-Community trade is not adequate : it does not measure the substitutability between the products sold in the regional markets but after a sufficiently long period of time. Since European anti-dumping law does not guarantee that a sufficiently long period of time is allowed for, the Community may be divided erroneously into regional markets and, consequently, a Community

industry may be found to exist even though it does not represent a major proportion of total Community production.

5.2. *INJURY STANDARDS*

The requirement that the Community industry must suffer injury being rather vague, it may be applied arbitrarily, which, of course, does not guarantee legal certainty. As a consequence, European anti-dumping law makes it possible to find injury even if there are strong indications that the Community industry does not suffer injury («one-way flexibility»).

There are three instances of injury : actual injury, threat of injury and material retardation of the establishment of a Community industry. Thus, if the Community industry does not suffer actual injury, one can always rely on either threat of injury or even the retardation of the establishment of the Community industry. European anti-dumping case law, however, has seldom relied on threat of injury and material retardation. It may be difficult to prove threat of injury and material retardation since they must be based on hard facts and not on mere allegations or potentialities. The true reason, however, is that there is little need to rely on them as actual injury can practically always be demonstrated.

Indeed, GATT and European anti-dumping law contain a non-exhaustive list of economic factors on the basis of which actual injury may be established. None of these factors is conclusive. Thus, injury may be assessed on any factor which evidences that the Community industry is not doing well. As in practically each case the factors analysed allow divergent conclusions, it has to be decided which factors are conclusive. However, hardly ever an explanation is provided, indicating why some factors are decisive, whereas others are not. The European anti-dumping authorities only provide an overview of the factors analysed, frequently followed by a recapitulation of the decisive factors. Sometimes, when factors truly hinder the finding of injury, it is explained why injury is nevertheless found. That explanation is seldom convincing, since it usually stated that the negative factors outweigh the positive factors. Moreover, as in each case different factors are decisive, no general guidelines can be deduced from European anti-dumping law as to know from which threshold on injury is found.

5.3. CAUSALITY

Because of its vagueness, the requirement that the injury must be caused by the dumping has little impact on the result of an anti-dumping proceeding. Indeed, a causal relationship between the dumping and the deterioration in the state of the Community industry may be found in cases where the dumping did not cause (material) injury to the Community industry.

The injury caused by other factors than the dumping must not be attributed to the dumping. This requirement triggers the question whether dumped imports coming from another country are also such «other factors» or whether all dumped imports coming from various countries should be considered together, *i.e.*, cumulated. In pursuance of GATT and European anti-dumping law, dumped imports are cumulated when their cumulation is appropriate in the light of the conditions of competition between them and between them and the Community products. As the notion «conditions of competition» probably encompasses an unrestrained variety of factors, there will always be some ground for cumulating the dumped imports, even if several other factors speak against cumulation. Moreover, most factors are irrelevant for the question of cumulation. For instance, if the dumping exporters offer comparable products, their imports may be cumulated. The comparability of the dumped products, however, does not limit the possibility of cumulation and cannot explain why imports should be cumulated since each anti-dumping proceeding applies only to like and, therefore, comparable products. The use of such irrelevant factors contributes to finding dumping exporters to cause (material) injury in cases where they do not. Indeed, the fact that a dumping exporter himself does not cause (material) injury, has explicitly been rejected as a reason for preventing cumulation and the new GATT and EC rules on *de minimis* dumping margins and negligible import volumes will only marginally prevent the cumulation of non-injurious dumped imports. Moreover, it is not investigated whether the injury results from a collective action taken by several dumping exporters, though dumping exporters should be held liable only for the injury they inflict. They may inflict injury by themselves or by means of a collective action with other exporters. If the injury is the result of a collective action on behalf of the dumping exporters, only then their exports should be cumulated.

Once the issue of cumulation is solved, it will be clear what is to be understood by «other factors». The examination of the «other factors» is usually restricted to an overview of the «other factors» analysed, together with a short account explaining why they do not prevent the finding of a causal relationship between the dumping and the injury. That finding is always based on a coincidence in time of the dumping and the deterioration in the state of the Community industry (trends analysis). However, a coincidence in time does not prove a causal relationship. The deterioration of the condition of the Community industry may be caused by another factor which may even not be detected and analysed.

European anti-dumping law does not detect all cases of injurious dumping either. It only detects injurious dumping when the state of the Community industry has deteriorated. It does not find injurious dumping which prevents the condition of the Community industry to improve.

Those drawbacks may be undone through replacing the trends analysis by the comparative analysis which compares the factual state of the Community industry, *i.e.*, in the presence of dumping, with a counterfactual state without dumping. Since the counterfactual state is identical to the factual state but for the dumping, the dumping will be the cause of the injury if the factual state of the Community industry is worse than its counterfactual state. However, the counterfactual world does not exist, but must be calculated on the basis of certain assumptions which are not always in accordance with reality. Therefore, the comparative analysis should not be automatically applied : the results of the comparative analysis should not be used, if it can be demonstrated that the assumptions are not in accordance with reality.

APPENDIX

COMPARATIVE ANALYSIS
ECONOMIC MODEL OF R.D. BOLTUCK
ON LOTUS 1-2-3

A		B
1.	ANTI-DUMPING CASE CONCERNING	:
2.	=====	
3.	a'	:
4.	D _c	:
5.	D _h	: +B3*B4/(1-B3)
6.	V _d	:
7.	V _c	:
8.	S _{dc}	:
9.	S _{df}	:
10.	S _{fc}	:
11.	NA	:
12.	E _d	:
13.	M	:
14.	H	:
15.	-----	
16.	NI	: (1-B6)*B11-B6*B8
17.	N _f	: -(B6*B9+B7*B10-(1-B6-B7)*B11)
18.	N _d	: -((1-B6-B7)*B9+B7*B8-B6*B11)
19.	N _c	: -((1-B6-B7)*B10+B6*B8-B7*B11)
20.	N _{df}	: (1-B6-B7)*(B9+B11)
21.	N _{fd}	: +B6*(B9+B11)
22.	N _{cf}	: (1-B6-B7)*(B10+B11)
23.	N _{fc}	: +B7*(B10+B11)
24.	N _{dc}	: +B7*(B8+B11)
25.	N _{cd}	: +B6*(B8+B11)
26.	N' _c	: (B19+(B25*B24)/(B12-B18))/B14
27.	N _h	: (B26*(1+B13))/(1-B26*B13)
28.	-----	
29.	P _i	: 1/(1+1/(B3*B27+(1-B3)*B26))
30.	P _h	: 1/(1+1/B27)
31.	P _c	: 1/(1+1/B26)
32.	ΔD _h	: +B27*B5*(B29-B30)/B30
33.	ΔD _c	: +B19*B4*(B29-B31)/B31
34.	a''	: (B5+B32)/((B5+B32)+(B4+B33))
35.	P _i	: 1/(1+1/(B34*B27+(1-B34)*B26))
36.	ΔD _h	: +B27*B5*(B35-B30)/B30
37.	ΔD _c	: +B19*B4*(B35-B31)/B31
38.	a''	: (B5+B36)/((B5+B36)+(B4+B37))
39.	P _i	: 1/(1+1/(B38*B27+(1-B38)*B26))
40.	ΔD _h	: +B27*B5*(B39-B30)/B30
41.	ΔD _c	: +B19*B4*(B39-B31)/B31
42.	a''	: (B5+B40)/((B5+B40)+(B4+B41))

	A	B
43.	P_i	$: 1/(1 + 1/(B42*B27 + (1-B42)*B26))$
44.	ΔD_h	$: + B27*B5*(B43-B30)/B30$
45.	ΔD_c	$: + B19*B4*(B43-B31)/B31$
46.	a^*	$: (B5 + B44)/((B5 + B44) + (B4 + B45))$
47.	P_i	$: 1/(1 + 1/(B46*B27 + (1-B46)*B26))$
48.	ΔD_h	$: + B27*B5*(B47-B30)/B30$
49.	ΔD_c	$: + B19*B4*(B47-B31)/B31$
50.	a^*	$: (B5 + B48)/((B5 + B48) + (B4 + B49))$
51.	P_i	$: 1/(1 + 1/(B50*B27 + (1-B50)*B26))$
52.	ΔD_h	$: + B27*B5*(B51-B30)/B30$
53.	ΔD_c	$: + B19*B4*(B51-B31)/B31$
54.	a^*	$: (B5 + B52)/((B5 + B52) + (B4 + B53))$
55.	P_i	$: 1/(1 + 1/(B54*B27 + (1-B54)*B26))$
56.	ΔD_h	$: + B27*B5*(B55-B30)/B30$
57.	ΔD_c	$: + B19*B4*(B55-B31)/B31$
58.	a^*	$: (B5 + B56)/((B5 + B56) + (B4 + B57))$
59.	P_i	$: 1/(1 + 1/(B58*B27 + (1-B58)*B26))$
60.	ΔD_h	$: + B27*B5*(B59-B30)/B30$
61.	ΔD_c	$: + B19*B4*(B59-B31)/B31$
62.	a^*	$: (B5 + B60)/((B5 + B60) + (B4 + B61))$
63.	P_i	$: 1/(1 + 1/(B62*B27 + (1-B62)*B26))$
64.	ΔD_h	$: + B27*B5*(B63-B30)/B30$
65.	ΔD_c	$: + B19*B4*(B63-B31)/B31$
66.	a^*	$: (B5 + B64)/((B5 + B64) + (B4 + B65))$
67.	P_i	$: 1/(1 + 1/(B66*B27 + (1-B66)*B26))$
68.	ΔD_h	$: + B27*B5*(B67-B30)/B30$
69.	ΔD_c	$: + B19*B4*(B67-B31)/B31$
70.	a	$: (B5 + B68)/((B5 + B68) + (B4 + B69))$
71.	$ a^* - a $	$: ((B66 - B70)^2)^{(0.5)}$
72.	<hr/>	
73.	$d \ln P_c$	$: -(B70*B13)/((B70*B13) + 1)$
74.	<hr/>	
75.	$d \ln P_d$	$: (B24/(B12 - B18))*B73$
76.	$d \ln Q_d$	$: + B75*B12$
77.	<hr/>	

Whereby :

- a^* = the actual share of the dumping exporter's sales made at home with regard to his combined Community and home sales (quantity basis)
 D_c = the quantity sold by the dumping exporter on the Community market (quantity basis)
 D_h = the quantity sold by the dumping exporter on his home market
 V_d = the market share of the sales of the Community industry on the Community market of the like product (value basis)
 V_c = the market share of the sales of the dumping exporter on the Community market of the like product (value basis)

- S_{dc} = the elasticity of substitution of the Community producers' like product with respect to the price of the dumped product on the Community market
 S_{df} = the elasticity of substitution of the Community producer's like product with respect to the price of the foreign non-dumping producers' like product on the Community market
 S_{fc} = the elasticity of substitution of the foreign non-dumping producers' like product on the Community market with respect to the price of the dumped product on the Community market
 N_A = the own-price elasticity of demand on the Community market for the aggregate product category (Community industry's like product + dumped product + imported non-dumped like product)
 E_d = the own-price elasticity of the Community industry's supply of the like product to the Community market
 M = the dumping margin
 H = Herfindhal index
 N_I = the own-price elasticity of demand on the Community market for the aggregate imported product category (dumped product + imported non-dumped like product)
 N_f = the own-price elasticity of demand in the Community market for the foreign non-dumping producers' like product
 N_d = the own-price elasticity of demand in the Community market for the Community producers' like product
 N_c = the own-price elasticity of demand in the Community market for the dumped product
 N_{df} = the cross-price elasticity of demand in the Community for the Community producers' like product with respect to the price of the foreign non-dumping producers' like product
 N_{fd} = the cross-price elasticity of demand in the Community for the foreign non-dumping producers' like product with respect to the price of the Community producers' like product
 N_{cf} = the cross-price elasticity of demand in the Community for the dumped product with respect to the price of the foreign non-dumping producers' like product
 N_{fc} = the cross-price elasticity of demand in the Community for the foreign non-dumping producers' like product with respect to the price of the dumped product
 N_{dc} = the cross-price elasticity of demand in the Community for the Community producers' like product with respect to the price of the dumped product on the Community market
 N_{cd} = the cross-price elasticity of demand in the Community for the dumped product with respect to the price of the Community producers' like product
 N_h = the own-price elasticity of demand in the home market for the dumped product
 P_i = the price charged by the dumping exporter on his home market and the Community market if he does not practise dumping
 P_h = the price charged by the dumping exporter on his home market
 P_c = the price charged by the dumping exporter on the Community market
 ΔD_h = the change in the quantity sold by the dumping exporter on his home market
 ΔD_c = the change in the quantity sold by the dumping exporter on the Community market

- a'' = the calculated share of the dumping exporter's sales made at home with regard to his combined Community and home sales, whereby dumping is still being practised (quantity basis)
- a = the share of the dumping exporter's sales made at home with regard to his combined Community and home sales if he does not practise dumping (quantity basis)
- P_d = the price charged by the Community producers on the Community market
- Q_d = the quantity sold by the Community producers on the Community market
- $d\ln P_c$ = the percentage change of P_c as a result of the dumping
- $d\ln P_d$ = the percentage change of P_d as a result of the dumping
- $d\ln Q_d$ = the percentage change of Q_d as a result of the dumping

CHAPTER VI

COMMUNITY INTERESTS

Chapter VI

1. INTRODUCTION

Under GATT anti-dumping law, it is thought it ¹³«desirable» «that the imposition (of anti-dumping measures) be permissive» in cases where dumping is proved to injure the Community industry (Article 9.1. GATT Anti-dumping Code). European anti-dumping law translates that idea by means of the concept «Community interests», which plays a crucial role in European anti-dumping law. If the Community interests so require,

- where an undertaking is withdrawn or violated, provisional anti-dumping duties may be applied forthwith on the basis of the facts established before the acceptance of the undertaking (Article 8(9) and (10) basic EC Regulation ; Article 10(6) basic ECSC Decision) ;
- provisional and definitive anti-dumping duties against injurious dumping must be imposed (Articles 7(1) and 9(4) basic EC Regulation ; Articles 11(1) and 12(1) basic ECSC Decision) ;
- the anti-dumping measures imposed may be suspended for a limited period under EC anti-dumping law (Article 14(4) basic EC Regulation) ;
- anti-dumping proceedings must be continued, under ECSC anti-dumping law, even after the withdrawal of the complaint (Article 5(4) basic ECSC Decision).

EC anti-dumping law stipulates that «a determination as to whether the Community interest calls for intervention shall be based on an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers» ; it goes further by providing that «(i)n such an examination, the need to eliminate the trade distorting effects of injurious dumping and to restore effective competition shall be given special consideration» (Article 21(1) basic EC Regulation). Thus, the Community interests encompass, *inter alia*, the interests of the Community industry¹³⁸², the users and consumers of the dumped product and competition (or antitrust) policy. However, other elements may also be taken into account. Thus, in application of former EC and present ECSC anti-dumping law, which do not define the concept «Community interests», European anti-dumping authorities have considered the interests of the employees in the Community industry and the processing industries, as well as the interests of the

¹³⁸² The concept «Community industry» is used here in its specific meaning under European anti-dumping law, i.e., it refers to the Community producers as a whole of the like product or to those whose collective output of the products constitutes a major proportion of the total Community production of those products (Article 4(1) basic EC Regulation ; Article 4(5) basic ECSC Decision). See : *supra*, 376-434.

Community authorities in pursuing other policies than antitrust policy, such as trade policy and national security. It, thus, seems that the concept «Community interests» involves all the Community components having an interest in the dumped imports.

In the wording of EC anti-dumping law, the investigation of the Community interests involves an appreciation of its various components. Also here, EC anti-dumping law seems to have codified European anti-dumping case law where the different components of the Community interests are weighted against each other. Notwithstanding the definition provided by EC anti-dumping law, the European anti-dumping authorities enjoy broad discretionary powers¹³⁸³ since the concept «Community interests» involves an appraisal of complex economic situations¹³⁸⁴. Hence, the question is whether the different components of the concept «Community interests» are correctly valued, especially in view of the fact that this concept is an instrument for weighing conflicting interests¹³⁸⁵.

2. COMPONENTS OF THE COMMUNITY INTERESTS

2.1. COMMUNITY INDUSTRY

It might seem peculiar that the concept «Community interests» covers the Community industry (see : Article 21(1) basic EC Regulation). The concept «Community interests» offers a second opportunity to underscore how much the Community industry suffers from the dumping. Indeed, the concept «injury» already takes into account the Community industry's interests. The question, therefore, is why special attention should be paid to the Community industry's interests by means

¹³⁸³ BOUDANT, J., *L'anti-dumping communautaire*, Paris, Economica, 1991, 152.

¹³⁸⁴ C.J.E.C., case 156/87, 14 March 1990, *Gestetner Holdings plc v Council and Commission*, E.C.R., 1990, I, (781), 843 ; C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, E.C.R., 1992, I, (1335), 1404 ; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, E.C.R., 1992, I, (1409), 1487 ; C.J.E.C., case C-176/87, 10 March 1992, *Konishiroku Photo Industry Co. Ltd v Council*, E.C.R., 1992, I, (1493), 1531 ; C.J.E.C., case C-177/87, 10 March 1992, *Sanyo Electric Co. Ltd v Council*, E.C.R., 1992, I, (1535), 1573 ; C.J.E.C., case C-179/87, 10 March 1992, *Sharp Corporation v Council*, E.C.R., 1992, I, (1635), 1685 ; C.J.E.C., case C-358/89, 11 June 1992, *Extramet Industrie SA v Council*, E.C.R., 1992, I, (3813), 3840 (Opinion of Advocate General JACOBS).

¹³⁸⁵ BOURGEOIS, J.H.J., «EC Anti-dumping Enforcement - Selected Second Generations Issues», in *Antitrust and Trade Policy in the United States and the European Community*, HAWK, B.E. (ed.), New York, Bender, 1986, (563), 590.

of the concept «injury»¹³⁸⁶. A first answer lies with the GATT origins of European anti-dumping law. GATT anti-dumping law only allows anti-dumping relief if the producers of the like product in the importing country suffer material injury from the dumping. In order to comply with GATT anti-dumping law, European anti-dumping law pays special attention to the Community industry by imposing the injury test. The requirement, under European anti-dumping law, that anti-dumping relief must be in the Community interests, did not affect the injury test. A second answer is the «one-way flexibility» of European anti-dumping law. Since dumped imports practically always injure the Community industry and, therefore, go against the Community industry's interests, the concept «Community interests» doubles the apparent size of the injury and the strength of the argument that the injury should be repaired.

Many anti-dumping cases exclusively refer to the injury inflicted by the dumping on the Community industry under the heading «Community interests»¹³⁸⁷. Consequently, the Community interests are reduced to the Community industry's interests. If the Community should only consist of Community producers manufacturing the like product, the interpretation of the concept «Community interests» as referring only to the Community industry's interests might be accepted. Otherwise, the term «Community interests» must take a different meaning from the concept «injury», for, if not, its interpretation would be contrary to European anti-dumping case law which describes the concept «Community interests» as «various interests taken as a whole, including the interests of the domestic industry and users and consumers» (Article 21(1) basic EC Regulation)¹³⁸⁸. Moreover, under such an interpretation, the use of the concept «Community interests» would be superfluous. However, the concept «Community interests» is introduced into European anti-dumping law in order to make anti-dumping relief against injurious dumping permissive instead of mandatory, but without assigning unlimited discretionary powers to the anti-dumping authorities. Consequently, the interpretation of the Community interests as exclusively referring to the Community industry's interests when there are still other interested parties, is contrary to European anti-dumping law because it either renders the imposition of anti-dumping measures automatic or grants the anti-dumping authorities unlimited discretionary powers.

¹³⁸⁶ As Advocate-General TESAURIO rightly argues, an incorrect assessment of the Community interest will be made if no assessment is made of the injury suffered by the Community industry (C.J.E.C., case 121/86, 28 November 1989, *Anonymos Etaireia Epicheiriseon Metalleftikon Viomichanikon kai Nafiliakon AE a.o. v Council*, E.C.R., 1989, (3919), 3936). Thus, he implicitly asserts that the Community industry's interests are part of the Community interests.

¹³⁸⁷ See e.g. : Commission Decision 91/392/EEC of 21 June 1991 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain asbestos cement pipes originating in Turkey, and terminating the investigation, O.J., 31 July 1991, No L 209/37. See also : BOURGEOIS, J.H.J., «EC Anti-dumping Enforcement - Selected Second Generations Issues», in *Antitrust and Trade Policy in the United States and the European Community*, HAWK, B.E. (ed.), New York, Bender, 1986, (563), 589.

¹³⁸⁸ Under former EC and prevailing ECSC anti-dumping law, the Court of Justice has held that the European anti-dumping authorities «must take into account the interests of the Community including amongst others those of consumers» (C.J.E.C., case C-170/89, 28 November 1991, *Bureau Européen des Unions de Consommateurs v Commission*, E.C.R., 1991, I, (5709), 5743) (emphasis added). See also : BOURGEOIS, J.H.J., «EC Anti-dumping Enforcement - Selected Second Generations Issues», in *Antitrust and Trade Policy in the United States and the European Community*, HAWK, B.E. (ed.), New York, Bender, 1986, (563), 589.

Indeed, in case the Community interests are equated with the Community industry's interests, the Community interests should always call for anti-dumping relief, if the Community industry suffers injury from the dumping, and, when no relief is granted in such a case, no objective criterion can be invoked explaining why no anti-dumping action is taken.

Only in a few cases, the reference to the Community industry under the heading of Community interests could have a surplus value in that it seems to take account, though implicitly, of the total welfare of the Community. In those cases, anti-dumping relief was found to be in the Community interests because it would allow the Community industry to attain a reasonable rate of capacity utilization necessary to depress production costs¹³⁸⁹. These cases seem to comply with economic theory since they impose anti-dumping relief in order to enable the Community industry to attain external economies of scale. As has been explained in Chapter III¹³⁹⁰, anti-dumping relief can, indeed, increase the welfare of the Community in case of such economies of scale. For this to be the case, certain other conditions must be fulfilled, though (namely whether there is only competition between the Community industry and the dumping exporters on the Community market, or whether only the Community enforces anti-dumping law). However, European anti-dumping law does not investigate whether those other necessary conditions are fulfilled. It takes account of the mere interests of the Community industry rather than the overall welfare of the Community. Consequently, the anti-dumping relief it grants, might well go against the Community interests¹³⁹¹.

1389 Commission Decision No 891/92/ECSC of 30 March 1992 imposing a provisional anti-dumping duty on imports of certain semi-finished products of alloy steel, originating in Turkey and Brazil, *O.J.*, 9 April 1992, No L 95/26 ; Commission Regulation (EEC) No 3296/92 of 12 November 1992 imposing a provisional anti-dumping duty on imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in Czechoslovakia, Hungary, Poland and the Republic of Croatia and terminating the anti-dumping proceeding with regard to the Republics of Serbia and of Montenegro, the former Yugoslav Republic of Macedonia, the Republic of Bosnia-Herzegovina and the Republic of Slovenia, *O.J.*, 14 November 1992, No L 328/15.

1390 *Supra*, 349-355.

1391 In the cases in question, it was argued that the maintenance of the production of the lower-grade mass like products was necessary to prevent a significant deterioration of the cost structure within the coupled production of specialized products and to prevent significant price increases for the downstream consumers of these specialized products. The effect of attaining external economies of scale on the prices of other, specialized products is irrelevant to the question of whether the Community interests call for anti-dumping relief. The argument on which these cases rely, only admits that anti-dumping relief may cause a redistribution of consumer surplus between the consumers of lower-grade mass products and the consumers of specialized products. It does not show that there is no net cost of anti-dumping protection or rather a lower net cost. The redistribution of consumer surplus only involves that the Community producers transfer (a part of) the gain in their surplus caused by the anti-dumping protection to the consumers of specialized products.

2.2. COMMUNITY INDUSTRY VERSUS CONSUMERS AND PROCESSING INDUSTRY

Although the Community interests include the interests of consumers¹³⁹², the final consumers and processing industries using the like product in many cases do not react against the imposition anti-dumping measures¹³⁹³. Notwithstanding the negative effect anti-dumping measures have on them¹³⁹⁴, the absence of any reaction on their behalf should not come as a surprise. It may be caused by so-called «cascading protection»: the processing industry does not oppose the Community industry's request for anti-dumping protection because it expects that the protection of the Community industry will deteriorate its position and, thus, increases the probability of the processing industry gaining protection in turn¹³⁹⁵.

A more general reason may be that processing industries, as well as consumers ignore that an anti-dumping proceeding has been initiated. It is true that the initiation of an anti-dumping proceeding and the consequent decisions of the European anti-dumping authorities must be published in the Official Journal of the European Communities (Articles 5(9), 11(2)(c), 11(5) and 14(2) basic EC Regulation ; Articles 7(1), 9(2), 10(1), 13(1), 15(2) up to (5) basic ECSC Decision) and that a table of contents of the Official Journal of the European Communities is published in the official gazettes of the Member States. However, only a slight minority of the citizens actually reads them. Moreover, the European anti-dumping authorities will probably never advise consumers and processing industries of the initiating of an anti-dumping proceeding.

¹³⁹² C.J.E.C., case C-170/89, 28 November 1991, *Bureau Européen des Unions de Consommateurs v Commission*, E.C.R., 1991, I, (5709), 5743.

E. A. VERMULST and J.J. HOOIJER, however, hold that consumer organizations have no interest in anti-dumping proceedings, since they «cannot substantially contribute or add elements concerning the key elements of the case (such as ex-factory prices, the composition of production costs of a product, export prices, etc.)» («Annotation on Case C-170/89, *Bureau Européen des Unions de Consommateurs v. Commission*, Judgment of 28 November 1991 ; Case C-105/90, *Goldstar Co. Ltd. v. Council*, Judgment of 13 February 1992 ; Case C-188/88, *NMB (Deutschland) GmbH, NMB Italia Srl, NMB (UK) Ltd. v. Commission of the European Communities*, Judgment of 10 March 1992 ; Case 171/87, *Canon Inc. v. Council* ; Case 172/87, *Mita Industrial Co. Ltd. v. Council* ; Case 174/87, *Ricoh Company Ltd. v. Council* ; Case 175/87, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd. v. Council* ; Case 176/87, *Konishiroky Photo Industry Co. Ltd. v. Council* ; Case 177/87, *Sanyo Electric Co. Ltd. v. Council* ; Case 178/87, *Minolta Camera Co. Ltd. v. Council* ; Case 179/87, *Sharp Corporation v. Council*, Judgments of 10 March 1992 ; Case C-358/89, *Extramet Industrie SA v. Council*, Judgment of 11 June 1992», *Common Market Law Review*, 1993, (115), 160-161). They disregard, though, the notion of «Community interests», which includes the consumer interests.

¹³⁹³ Several anti-dumping cases underscore the absence of such a reaction (Answer of the Commission to written question No 75/90, O.J., 17 September 1990, No C 233/12. See e.g. : Commission Regulation (EC) No 1076/94 of 6 May 1994 imposing a provisional anti-dumping duty on imports of certain watch movements originating in Malaysia and Thailand, O.J., 11 May 1994, No L 120/3 ; Council Regulation (EC) No 2199/94 of 9 September 1994 imposing a definitive anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, and collecting definitively the provisional duty imposed, O.J., 10 September 1994, No L 236/2).

¹³⁹⁴ *Supra*, 347-349.

Contra : C.J.E.C., case C-170/89, 28 November 1991, *Bureau Européen des Unions de Consommateurs v Commission*, E.C.R., 1991, I, (5709), 5727 and 5730 (Opinion of Advocate General MISCHO), and 5641.

¹³⁹⁵ HOEKMAN, B.M., and LEIDY, M.P., «Cascading contingent protection», *European Economic Review*, 1992, (883), 883-892.

Indeed, under EC anti-dumping law, they must only advise the exporters, importers and representative associations of exporters and importers known to them, as well as representatives of the exporting country and the complainants (Article 5(11) basic EC Regulation). Moreover, they inform only the economic operators identified in the request for initiation of an anti-dumping proceeding¹³⁹⁶. Since requests mention only exporters and importers, this administrative practice, without there being a legal obligation, though, to advise consumers and processing industries of the opening of an anti-dumping proceeding, actually disfavours them¹³⁹⁷. This contrasts sharply with the right to a fair hearing of the complainant Community producers, exporters and importers which entails that the European anti-dumping authorities «must act with all due diligence by seeking (...) to provide the undertakings concerned (...) with information relevant to the defence of their interests, choosing, if necessary on their own initiative, the appropriate means of providing such information»¹³⁹⁸. Though it would be highly exaggerated to require the European anti-dumping authorities to advise the various millions of consumers individually and to identify all producers who process the imported product, this different treatment still seems to infringe upon the principle of equality of treatment¹³⁹⁹. A solution might consist in advising organizations of consumers and processing industries of the initiation of anti-dumping proceedings which affect them. Indeed, prevailing EC anti-dumping law already provides that consumer organizations and processing industries, which have made themselves known, are, upon their request, allowed access to all non-confidential information available to the European anti-dumping authorities, which is relevant to the defence of their interests (Article 6(7) basic EC Regulation) and have a right to a fair hearing (Article 21(2) up to (5) basic EC Regulation). In order to know, from the early start of an anti-dumping proceeding, which consumer organizations and processing industries have an interest in the proceeding, the European anti-dumping authorities should, in view of the relatively low number of consumer organizations, register the consumer organizations, upon their request, and indicate in respect of which products those organizations stand up for the interests of consumers, whereas the complainant Community

¹³⁹⁶ C.J.E.C., joined cases C-305/86 and C-160/87, 11 July 1990, *Neotype Techmashexport GmbH v Commission and Council*, E.C.R., 1990, I, (2945), 2955-2956 (Report for the Hearing : conclusions of the Commission).

¹³⁹⁷ See : C.J.E.C., case C-49/88, 27 June 1991, *Al-Jubail Fertilizer Company and Saudi Arabian Fertilizer Company v Council*, E.C.R., 1991, I, (3187), 3229-3230 (Opinion of Advocate General DARMON), where Advocate General DARMON stresses in respect of complainant Community producers, exporters and importers how essential the knowledge of information is to defend their interests.

¹³⁹⁸ C.J.E.C., case 264/82, 20 March 1985, *Timex Corporation v Council and Commission*, E.C.R., 1985, (849), 868-870 ; C.J.E.C., case C-49/88, 27 June 1991, *Al-Jubail Fertilizer Company and Saudi Arabian Fertilizer Company v Council*, E.C.R., 1991, I, (3187), 3241. See also : C.J.E.C., case C-49/88, 27 June 1991, *Al-Jubail Fertilizer Company and Saudi Arabian Fertilizer Company v Council*, E.C.R., 1991, I, (3187), 3243-3243, where the European anti-dumping authorities are assumed not to have discharged their duty to inform the exporters properly, unless they provide sufficient and convincing counterproof.

¹³⁹⁹ With respect to complainant Community producers, exporters and importers, Advocate General DARMON stated that «the anti-dumping proceeding, although conducted by an administrative authority, must meet the needs of a "fair hearing", which implies that an "equality of arms" must prevail between the parties» (C.J.E.C., case C-49/88, 27 June 1991, *Al-Jubail Fertilizer Company and Saudi Arabian Fertilizer Company v Council*, E.C.R., 1991, I, (3187), 3231 (Opinion of Advocate General DARMON)). Since consumers also have an interest in anti-dumping proceedings, this «equality of arms» should also prevail with regard to them.

producers should be required to mention in their request the companies processing the dumped product, or their organizations.

There is, however, a more fundamental problem : organizations of consumers and processing industries must really exist. Compared with the Community industry, consumers and processing industries have no great incentive to get organized and to react against anti-dumping relief ; therefore, the chances for a well-functioning lobby liable to influence the decision-making of the European anti-dumping authorities are much slighter. As a consequence, the European anti-dumping authorities will be better informed about the interests of the Community industry than about the interests of the users of the like product¹⁴⁰⁰.

The absence of a well-functioning lobby also explains why the efforts of consumers and processing industries, if they react against the imposition of anti-dumping measures, are so unsuccessful in convincing the European anti-dumping authorities that anti-dumping relief is not in the Community interests¹⁴⁰¹. Exceptionally, only processing industries seem to be able to organize a well-functioning lobby. Indeed, in the only three cases in which no anti-dumping relief was granted because of its negative effects on the processing industry, the processing industry appears to have had a well-functioning lobby.

In *acrylonitrile from the United States of America*¹⁴⁰² the Council held that the Community interests did not call for anti-dumping protection because :

«acrylonitrile is the feedstock for the acrylic fibre industry, accounting for 40 % of its production costs (...) [and], given the harsh competition on the Community and world acrylic fibre markets, protective measures would not be in the Community's interests at present».

The outcome of this anti-dumping case, however, should not come as a surprise. There probably was a well-organized processing industry manufacturing acrylic fibres which is rather successful in anti-dumping proceedings against third countries. Indeed, when the Council reached its conclusion concerning *acrylonitrile from the United*

¹⁴⁰⁰ *Supra*, 71-72.

¹⁴⁰¹ See, however : *cotton yarn from Brazil, Egypt and Turkey* and *polyester yarns from Taiwan, Indonesia, India, the People's Republic of China and Turkey*, where the complainant organization representing the Community industry also represents the processing industry. The Commission considered this «as clear evidence that, in balancing the interests of both categories, priority should be given to the protection of the (Community industry)» (Commission Regulation (EEC) No 2818/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports of cotton yarn originating in Brazil, Egypt and Turkey and terminating the anti-dumping proceeding in respect of cotton yarn originating in India and Thailand, *O.J.*, 27 September 1991, No L 271/17 ; Council Regulation (EEC) No 738/92 of 23 March 1992 imposing a definitive anti-dumping duty on imports of cotton yarn originating in Brazil and Turkey, *O.J.*, 27 March 1992, No L 82/1 ; Council Regulation (EEC) No 830/92 of 30 March 1992 imposing a definitive anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and collecting definitively the provisional duty, *O.J.*, 3 April 1992, No L 88/1 (corrigendum, *O.J.*, 5 June 1992, No L 153/16)). However, it can also be interpreted as evidence that the processing industry did not realize the impact of anti-dumping relief on its situation.

¹⁴⁰² Council Decision 83/162/EEC of 18 April 1983 terminating the anti-dumping proceeding in respect of imports of acrylonitrile originating in the United States of America, *O.J.*, 20 April 1983, No L 101/29.

States of America, anti-dumping measures were in force against imports of acrylic fibres from Japan¹⁴⁰³, Spain¹⁴⁰⁴ and the United States of America¹⁴⁰⁵.

In *furfural from Spain and the People's Republic of China*¹⁴⁰⁶, furfural being a raw material used in the production of furfuryl alcohol, the Commission did not grant anti-dumping relief on the basis of the following considerations :

«Whereas the Commission had to take account of the fact that before and during the period of investigation prices of Dominican exports, which were exclusively sold to the two producers of furfuryl alcohol and which generally accounted for over 60 % of the Community market, have been as low or lower than prices of Chinese exports ; whereas the quantity of Spanish exports compared to the volume of imports from the Dominican Republic and China was negligible ; whereas, moreover, another increase of the price of Chinese imports is not likely to improve the situation of the Community producers, given the relatively small margin between present prices of the Chinese product and the selling price of furfuryl alcohol, which is hardly sufficient to cover present manufacturing costs of alcohol producers accounting for approximately 75 % of Community consumption of furfural ; whereas an eventual increase in the selling price of furfuryl alcohol to cover higher costs for furfural would be likely to lead to a reduction in consumption of alcohol and its partial substitution by other, less expensive products, and therefore inevitably lead to a fall in Community consumption of furfural.»

Probably the two producers of furfuryl alcohol to whom the Dominican exports of furfural are exclusively sold, are the same producers of furfuryl alcohol accounting for 75 % of the Community consumption of furfural. If that is the case, it should, in view of the small number of processing producers, be not all that difficult to organize a well-functioning lobby. Indeed, the price increasing effect of anti-dumping measures would be clearly felt by these two producers.

In *gum rosin from the People's Republic of China*¹⁴⁰⁷, no anti-dumping relief was granted because it would have resulted in a substantial increase of the costs of production of numerous processing industries. On the other hand, as the Commission stated, anti-dumping relief would not have been adequate. Indeed, the Community industry made use of a limited natural resource and, therefore, was able to meet only a minority share of overall Community demand. As a consequence, anti-dumping relief would only have resulted in a quick penetration of the Community market by substitute products which, at that time, were not a viable alternative because of their high prices.

The availability of limited natural resources, which put a limit to the expansion of production capacity, may seem to be quite convincing. Anti-dumping relief would only push prices up without causing the dumped products to be substituted by the Community products. However, the Commission seems to ignore that the Community industry applies its production capacity at a rate of only 48 %. The Commission has equally disregarded the competition of American manufacturers of gum rosin on the Community market¹⁴⁰⁸. Moreover, this case contrasts with other

1403 Commission Decision 80/488/EEC of 6 May 1980 accepting an undertaking given in connection with the anti-dumping proceeding concerning certain acrylic fibres originating in Japan and terminating this proceeding, *O.J.*, 9 May 1980, No L 118/60.

1404 *O.J.*, 4 January 1980, No. C 2/6.

1405 *O.J.*, 29 December 1979, No. C 325/21 ; Council Regulation (EEC) No 1100/80 of 30 April 1980 imposing a definitive anti-dumping duty on certain acrylic fibres originating in the United States of America, *O.J.*, 3 May 1980, No L 114/37 ; Council Regulation (EEC) No 486/83 of 28 February 1983 amending Regulation (EEC) No 1100/80 imposing a definitive anti-dumping duty on certain acrylic fibres originating in the United States of America, *O.J.*, 2 March 1983, No L 55/1.

1406 Commission Decision 81/493/EEC of 6 July 1981 terminating the anti-dumping procedure concerning imports of furfural originating in the Dominican Republic, Spain and the People's Republic of China, *O.J.*, 11 July 1981, No L 189/57.

1407 Commission Decision 94/82/EC of 10 January 1994 terminating the anti-dumping proceeding concerning imports of gum rosin originating in the People's Republic of China, *O.J.*, 12 February 1994, No L 41/50.

1408 Answer of the Commission to written question No 2868/92, *O.J.*, 3 March 1993, No C 61/40 ; Answer of the Commission to written question No 2867/92, *O.J.*, 22 March 1993, No C 81/17 ; Answer of the Commission to written question No 2866/92, *O.J.*, 15 May 1993, No C 137/11.

cases, in which the Community industry was also unable to substitute the dumped products¹⁴⁰⁹. It seems that the Member States had conflicting interests in this case. Indeed, the Community industry was established only in one Member State, whereas most Member States defended the interests of the processing industries. Undoubtedly, the processing industries were established in the other Member States. The governments of those Member States were probably well aware of the interests of the processing industries (e.g., tyres, paper manufacturing, painting, adhesive and varnish) as the latter have the necessary characteristics for organising a well-functioning lobby. For example, there is only limited number of large-scale producers of tyres in the Community.

In all other cases, consumers and processing industries could not prevent the imposition of anti-dumping measures, though identical arguments were invoked as in the three abovementioned cases¹⁴¹⁰. Their arguments were turned down, merely because of lack of evidence¹⁴¹¹. This lack of evidence may be due to the fact that consumers and processing industries do not have a well-functioning lobby or because their lobby, contrary to those of the complainants, the exporters and the importers and the exporting country, was refused access to the non-confidential file of the European anti-dumping authorities¹⁴¹²: for both those reasons, their views will be put less effectively and their claims will be less substantiated. Indeed, in contrast, lack of

¹⁴⁰⁹ *Infra*, 633-637.

¹⁴¹⁰ There may have been a third anti-dumping case in which the interests of the users of the like product played a decisive role against the granting of anti-dumping relief. Indeed, in aluminium from Norway, Surinam, the Soviet Union and Yugoslavia, anti-dumping relief was considered not to be in the Community interests because prices both worldwide and on the Community market had increased considerably and enquiries made into the likely price trend for the future indicated that no significant reduction in market prices was foreseen (Commission Decision 84/103/EEC of 23 February 1984 terminating the anti-dumping proceeding concerning imports of non-alloyed unwrought aluminium originating in Norway, Surinam, the Soviet Union and Yugoslavia, O.J., 28 February 1984, No L 57/19). Perhaps the European anti-dumping authorities were concerned for the consumers and processing industries, namely that they did not want to burden them with a price increase induced by the anti-dumping relief additional to the worldwide trend of price increases. However, they could also have pursued the macro-economic goal of fighting inflation. This is rather probable because the anti-dumping case dates from 1984, a period in which anti-inflationary policies were actively pursued. In 1990 anti-inflationary policies were not so actively pursued as in 1984. Perhaps therefore the fact that prices were increasing did not prevent that full anti-dumping relief (i.e., anti-dumping duties equal to the dumping margins) was granted against the dumping of DRAMs from Japan (Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, O.J., 25 January 1990, No L 20/5 (corrigendum, O.J., 27 January 1990, No L 22/79; corrigendum, O.J., 10 February 1990, No L 38/44)).

In another anti-dumping case, the processing industries were first gaining ground in preventing the imposition of anti-dumping measures, but finally failed in doing so. Indeed, in *synthetic fibres of polyesters from Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia*, the processing industries of fiberfill, at the start, obtained the suspension of the definitive anti-dumping duty for a period of five months pending an investigation of their allegations about the existence of recent shortages of fiberfill (Council Regulation (EEC) No 3946/88 of 16 December 1988 imposing a definitive anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, O.J., 17 December 1988, No L 348/49). However, after that period the suspension was lifted, as the allegations about the existence of shortages proved to be without foundation (Notice concerning the anti-dumping proceeding in respect of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America and Yugoslavia, O.J., 13 May 1989, No C 119/15).

¹⁴¹¹ C.J.E.C., case C-323/88, 11 July 1990, *SA Sermes v Directeur des services des douanes de Strasbourg*, E.C.R., 1990, I, (3027), 3043-3044 (Opinion of Advocate General VAN GERVEN) and 3054). See e.g.: Council Regulation (EEC) No 1115/91 of 29 April 1991 imposing definitive anti-dumping duties in connection with the review of anti-dumping measures concerning imports of ferro-silicon originating in Brazil, O.J., 3 May 1991, No L 111/1; Commission Decision 91/240/EEC of 29 April 1991 accepting undertakings offered by certain exporters in connection with the review of anti-dumping measures concerning imports of ferro-silicon originating in Brazil and terminating the investigation as regards those exporters, O.J., 3 May 1991, No L 111/47.

¹⁴¹² C.J.E.C., case C-170/89, 28 November 1991, *Bureau Européen des Unions de Consommateurs v Commission*, E.C.R., 1991, I, (5709), 5729-5730 (Opinion of Advocate General MISCHO) and 5740-5743.

evidence of injury suffered by the Community industry has not yet been invoked¹⁴¹³. The rejection of the consumers' and processing industries' arguments for lack of evidence implies that the burden of proof lies with them. Thus, in fact, the concept «Community interests» favours the Community industry because it is based on the rebuttable assumption that anti-dumping relief does have a negative effect on consumers and processing industries¹⁴¹⁴ and, consequently, is in the Community interests¹⁴¹⁵. From an economic point of view, however, the assumption should be reversed because, as shown in figure 15 in Chapter IV¹⁴¹⁶, anti-dumping relief reduces the welfare of the Community precisely, for the very fact that it affects the welfare of the consumers negatively¹⁴¹⁷.

Moreover, in several other cases the consumers' and processing industries' arguments have been rejected for reasons which, from an economic point of view, are either irrelevant or even plainly wrong.

¹⁴¹³ Only the lack of cooperation of the Community industry is a reason for not finding injury (see : *supra*, 544). Though the lack of cooperation may have as consequence that there is no sufficient evidence of injury, it must not be confused with a situation in which a party cooperates, but is not able to provide sufficient evidence.

¹⁴¹⁴ C.J.E.C., case C-170/89, 28 November 1991, *Bureau Européen des Unions de Consommateurs v Commission*, E.C.R., 1991, I, (5709), 5741, where the Court of Justice takes the pure legalistic point of view that an anti-dumping proceeding and anti-dumping relief do not adversely affect consumers since they are directed against imports of certain products and no allegation is made against consumers (see also ; C.J.E.C., case C-170/89, 28 November 1991, *Bureau Européen des Unions de Consommateurs v Commission*, E.C.R., 1991, I, (5709), 5727 and 5730 (Opinion of Advocate General MISCHO)).

¹⁴¹⁵ BOURGEOIS, J.H.J., «EC Anti-dumping Enforcement - Selected Second Generation Issues», in *Antitrust and Trade Policy in the United States and the European Community*, HAWK, B.E. (ed.), New York, Bender, 1986, (563), 589.

¹⁴¹⁶ *Supra*, 347-349.

¹⁴¹⁷ J.H.J. BOURGEOIS fears that obliging the European anti-dumping authorities to make a «consumer-impact» assessment would considerably delay the anti-dumping proceedings and that such an assessment would tend to be rather speculative (BOURGEOIS, J.H.J., «EC Anti-dumping Enforcement - Selected Second Generation Issues», in *Antitrust and Trade Policy in the United States and the European Community*, HAWK, B.E. (ed.), New York, Bender, 1986, (563), 585, note 47). Reversing the assumption has the practical advantage of not delaying the anti-dumping proceedings, nor make them more speculative. For it is the mirror image of the present situation - a mirror image which has the advantage to correspond to economic reality.

- The fact that anti-dumping relief has but a minor impact¹⁴¹⁸ on the prices of the like product to final consumers¹⁴¹⁹ or on the total production costs of the processing industries¹⁴²⁰ does not alter the conclusion that anti-dumping relief usually reduces total welfare of the Community. Immaterial price increases may imply only a smaller net cost of anti-dumping protection. They do not turn the net cost of anti-dumping protection into a net gain¹⁴²¹.

1418 In order to minimize the price-increasing effects of anti-dumping relief, the European anti-dumping authorities have even held, in one and the same case, that any increase in price should be limited and that the argument that anti-dumping relief would result in higher retail prices had no foundation (Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50).

1419 See e.g.: Council Regulation (EC) No 3359/93 of 2 December 1993 imposing amended anti-dumping measures on imports of ferro-silicon originating in Russia, Kazakhstan, Ukraine, Iceland, Norway, Sweden, Venezuela and Brazil, *O.J.*, 9 December 1993, No L 302/1.

In *large electrolytic aluminium capacitors from Japan* the Commission found the impact on final consumers negligible in view of the low proportional cost of capacitors in the total cost of the end product (namely 1 %) (Commission Regulation (EEC) No 1451/92 of 2 June 1992 imposing a provisional anti-dumping duty on imports into the Community of certain large electrolytic aluminium capacitors originating in Japan, *O.J.*, 4 June 1992, No L 152/22 (corrigendum, *O.J.*, 17 June 1992, No L 163/27); Council Regulation (EEC) No 3482/92 of 30 November 1992 imposing a definitive anti-dumping duty on imports of certain large electrolytic aluminium capacitors originating in Japan and collecting definitively the provisional anti-dumping duty, *O.J.*, 3 December 1992, No L 353/1 (corrigendum, *O.J.*, 28 January 1993, No L 19/34)). This point of view sharply contrasts with the opinion it expressed in the same case as to the imports of dumped products by a processing company which is part of the same industrial group of a complainant Community producer of the like product. In that respect, the Commission was of the opinion that this processing company had to import the dumped products in order to enjoy the same competitive advantages as its competitors and that, accordingly, the complainant Community producer could remain part of the Community industry. However, if it is true that capacitors represent a low proportional cost in the total production costs of the finished products, it was not necessary for the processing company to import the dumped product and, accordingly, the Community producer had to be excluded from the Community industry.

1420 See e.g.: Commission Regulation (EC) No 3119/94 of 19 December 1994 imposing a provisional anti-dumping duty on imports of ferro-silico-manganese originating in Russia, Ukraine, Brazil and South Africa, *O.J.*, 21 December 1994, No L 330/15.

1421 The same holds if, due to the anti-dumping relief, prices stabilize (as invoked in Commission Decision 91/256/EEC of 14 May 1991 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of welded wire-mesh originating in Yugoslavia and terminating the investigation, *O.J.*, 18 May 1991, No L 123/54). The net cost of anti-dumping protection then equals the benefits which would have resulted from the price decrease precluded by the granting of anti-dumping relief.

- The minor effect of the price increase caused by anti-dumping relief on the volume bought by consumers¹⁴²², in other words, the low price elasticity of consumer demand¹⁴²³ (*i.e.*, a steeper demand curve D in terms of figure 16 in Chapter IV¹⁴²⁴), does not alter the conclusion that anti-dumping relief generally has a negative impact on the welfare of the Community.
- The argument that anti-dumping relief will not have negative effects on the user interests in view of the fact that prices in the Community have continued to decline, is irrelevant notwithstanding the competition that exists on both the world and the Community market¹⁴²⁵. Indeed, this argument does not refute the fact that anti-dumping relief causes a price increase, but in fact implies that this price increase will be counterbalanced by the general fall in price. The reference to existing competition, on the other hand, will not preclude the price increasing effects of anti-dumping relief, unless the dumped products are replaced by as cheap imports coming from third countries. But then, anti-dumping relief will not improve the welfare of the Community¹⁴²⁶.
- The argument that anti-dumping relief will not negatively affect the production costs of the processing industry and will have no negative effect on the end users since the price increase of the dumped product was caused by an increasing demand for it¹⁴²⁷, is not conclusive as it merely implies that the price increases will be further enhanced by anti-dumping relief.
- The argument that the negative impact of anti-dumping relief on the competitiveness of the processing industry is mitigated by the comparative advantages in terms of marketing of this industry *vis-à-vis* producers of the same product in third countries¹⁴²⁸, recognizes that anti-dumping relief has a negative effect on the processing industry and that comparative advantages do not entirely compensate, but merely mitigate this negative effect.

¹⁴²² See *e.g.* : Commission Regulation (EEC) No 3617/90 of 11 December 1990 imposing a provisional anti-dumping duty on imports of certain welded tubes of iron or non-alloy steel, originating in Turkey or in Venezuela and accepting undertakings offered in connection with such imports, *O.J.*, 15 December 1990, No L 351/17.

¹⁴²³ Council Regulation (EEC) No 2370/83 of 19 August 1983 imposing a definitive anti-dumping duty on imports of barium chloride originating in the People's Republic of China and in the German Democratic Republic, *O.J.*, 20 August 1983, No L 228/28. See also : Commission Decision 86/497/EEC of 7 October 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of silicon carbide originating in the People's Republic of China, Norway, Poland and the USSR, and terminating the investigation regarding imports of that product originating in the People's Republic of China, Norway, Poland, Czechoslovakia, the USSR and Yugoslavia, *O.J.*, 10 October 1986, No L 287/25.

See also : *video cassettes and video tape reels from the Republic of Korea and Hong Kong*, where the fact that the like product is a low-value complement to other high-value products was invoked to prove the low price elasticity of consumer demand (Commission Regulation (EEC) No 4062/88 of 23 December 1988 imposing a provisional anti-dumping duty on imports of video cassettes and video tape reels originating in the Republic of Korea and Hong Kong, *O.J.*, 24 December 1988, No L 356/47 ; Commission Regulation (EEC) No 1034/91 of 23 April 1991 imposing a provisional anti-dumping duty on imports of video tapes in cassettes originating in the People's Republic of China, *O.J.*, 26 April 1991, No L 106/15).

As the price elasticity of consumer demand is assumed to be low because of lack of evidence of a high price elasticity of consumer demand, the burden of proof of a high price elasticity of consumer demand lies with the consumers and processing industries (Council Regulation (EEC) No 2370/83 of 19 August 1983 imposing a definitive anti-dumping duty on imports of barium chloride originating in the People's Republic of China and in the German Democratic Republic, *O.J.*, 20 August 1983, No L 228/28).

¹⁴²⁴ *Supra*, 347-349.

¹⁴²⁵ Council Regulation (EC) No 2199/94 of 9 September 1994 imposing a definitive anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, and collecting definitively the provisional duty imposed, *O.J.*, 10 September 1994, No L 236/2.

¹⁴²⁶ *Infra*, 633-637.

¹⁴²⁷ Commission Decision No 1751/94/ECSC of 15 July 1994 imposing a definitive anti-dumping duty on imports into the Community of hematite pig-iron, originating in Brazil, Poland, Russia and Ukraine, *O.J.*, 16 July 1994, No L 182/37.

¹⁴²⁸ Council Regulation (EEC) No 830/92 of 30 March 1992 imposing a definitive anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and collecting definitively the provisional duty, *O.J.*, 3 April 1992, No L 88/1 (corrigendum, *O.J.*, 5 June 1992, No L 153/16).

- The argument that the alleged increase in production costs would not cause a competitive disadvantage to the processing industry in the Community because another importing country had recently imposed substantial anti-dumping duties on the same dumped imports¹⁴²⁹, does not refute the fact that the processing industry will be less competitive when faced with competition by processing industries established in other countries which have not enacted anti-dumping protection. Moreover, even if it were true that the Community processing industry would not be put at a competitive disadvantage, this argument still disregards the loss in consumer surplus of the final consumers to whom a higher price will be charged for the finished product.
- The argument that the processing industry will not incur a competitive disadvantage because the processed product will also be subject to the anti-dumping duty¹⁴³⁰, does not take away the competitive disadvantage which the processing industry will have *vis-à-vis* the processed product originating in third countries. Moreover, this argument disregards the loss in consumer surplus of the final consumers who will have to pay a higher price for the processed product, unless they can obtain it from third countries.
- The argument that the processing industry will not be put at a competitive disadvantage outside the Community market as they could continue to derive their inputs from the dumping country under the inward processing arrangements without paying the anti-dumping duty¹⁴³¹, is correct, but does not cover processed products sold in the Community.
- The fact that the price increase caused by the anti-dumping action cannot be passed on by the processing industries to their customers through higher selling prices without bringing about a loss in sales volume¹⁴³², does not mean that anti-dumping relief will increase, or, at least, will not affect the welfare of the Community. The net cost of anti-dumping protection remains unchanged. Only the burden of anti-dumping protection will be distributed differently over processing industries and their customers.
- The argument that the processing industries are enabled to pass on the price increase of the raw materials to their customers because the Community industry, which also manufactures the final product, must increase the prices of its final product in order to re-establish profitability¹⁴³³, does neither hold. It only recognizes the possibility of a redistribution of the burden of anti-dumping relief. It does not refute the usual negative effect of anti-dumping relief on the welfare of the Community.

¹⁴²⁹ Council Regulation (EEC) No 611/93 of 15 March 1993 imposing a definitive anti-dumping duty on imports into the Community of certain electronic microcircuits known as DRAMs originating in the Republic of Korea and exported by companies not exempted from this duty, and collecting definitively the provisional anti-dumping duty, *O.J.*, 18 March 1993, No L 66/1.

¹⁴³⁰ Commission Regulation (EC) No 892/94 of 21 April 1994 imposing a provisional anti-dumping duty on imports of calcium metal originating in the People's Republic of China and Russia, *O.J.*, 23 April 1994, No L 104/5.

¹⁴³¹ Commission Regulation (EC) No 892/94 of 21 April 1994 imposing a provisional anti-dumping duty on imports of calcium metal originating in the People's Republic of China and Russia, *O.J.*, 23 April 1994, No L 104/5; Council Regulation (EC) No 2557/94 of 19 October 1994 imposing a definitive anti-dumping duty on imports of calcium metal originating in the People's Republic of China and Russia, *O.J.*, 21 October 1994, No L 270/27.

¹⁴³² Anti-dumping relief is considered not to injure the interests of the users of the like product when there is no evidence that the price increase caused by the anti-dumping action could not be passed on by the processing industries to their customers through higher selling prices without loss of sales volume, see e.g. : Council Regulation (EEC) No 450/89 of 20 February 1989 imposing a definitive anti-dumping duty on imports of urea originating in the United States of America or Venezuela and adjusting the definitive anti-dumping duty for Saudi Arabia laid down by Regulation (EEC) No 3339/87, *O.J.*, 24 February 1989, No L 52/1.

Compare with United States' antitrust law, where the United States' Supreme Court rejected the argument that a processing industry could not have suffered from the price increases because of its ability to pass on its losses to its customers. The Supreme Court noted that if the passing-on defense was accepted, the ultimate customer to whom the passing-on defense could not be applied, would have only a tiny stake in a lawsuit under Section 4 of the Clayton Act and little interest in attempting a class action (*RIESENFELD, S.A., «Consumer Protection and Antitrust Laws», Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 1976, (579), 582-583. The Supreme Court puts thereby the finger on the spot. Indeed, applied to anti-dumping action, it says that the greater the distance between the producer and the user of the like product, the less each individual user of the like product will be aware of the negative effects of anti-dumping action, and the greater the number of users will be, the consequence being that it will be become even more difficult to set up a well-functioning lobby.

¹⁴³³ Commission Regulation (EEC) No 4062/88 of 23 December 1988 imposing a provisional anti-dumping duty on imports of video cassettes and video tape reels originating in the Republic of Korea and Hong Kong, *O.J.*, 24 December 1988, No L 356/47.

- The fact that anti-dumping relief does not prevent the Community industry from lowering its prices on the occasion of a drop in the price of the main raw material¹⁴³⁴ does not alter the fact that anti-dumping protection causes the price of the like product to increase or, at least, prevents that price from decreasing as much as the reduction in the price of the main raw material would allow.
 - The fact that consumers will not substitute the like product by other non-like products¹⁴³⁵ does not prove that there is no loss in consumer surplus or that the loss in consumer surplus is fully compensated by the gain in producer surplus and the revenue gained by the Community authority from the anti-dumping relief. It may only show that no substitutes exist for the like product.
 - The fact that the supply of the like product is guaranteed to the processing industries because of the substitutability between the dumped product and the Community producers' like product¹⁴³⁶ or because the Community industry is able to meet Community demand¹⁴³⁷ only proves that the dumped products and the Community producers' like products are substitutes. It does mean that anti-dumping relief enhances the welfare of the Community. On the contrary, it implies that the more efficiently produced foreign products are substituted by less efficiently produced Community products, thereby inflicting a net cost of anti-dumping protection on the Community (area *ced* in figure 16(c) in Chapter IV¹⁴³⁸). Moreover, it does not compensate the cost of anti-dumping protection due to the fall in Community consumption (area *fhg* in figure 16(c) in Chapter IV).
- When the dumped product can be substituted by foreign supplies¹⁴³⁹, anti-dumping relief will not cause any net cost to the Community only if the prices of the foreign substitute products are the same as the ones of the

1434 Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia, *O.J.*, 9 May 1987, No L 121/11; Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1.

1435 Anti-dumping relief is considered not to injure the interests of the users of the like product when there is no evidence that the price increase caused by the anti-dumping action would lead to the use of substitutes, see: Commission Regulation (EEC) No 997/85 of 18 April 1985 imposing a provisional anti-dumping duty on imports of glycine originating in Japan, *O.J.*, 19 April 1985, No L 107/8.

1436 Commission Regulation (EEC) No 699/88 of 15 March 1988 imposing a provisional anti-dumping duty on imports of oxalic acid originating in Taiwan and South Korea, *O.J.*, 18 March 1988, No L 72/12; Council Regulation (EEC) No 2808/89 of 18 September 1989 imposing a definitive anti-dumping duty on imports of calcium metal originating in the People's Republic of China and the Soviet Union and definitively collecting the provisional anti-dumping duty imposed on such imports, *O.J.*, 20 September 1989, No L 271/1; Commission Regulation (EEC) No 1034/91 of 23 April 1991 imposing a provisional anti-dumping duty on imports of video tapes in cassettes originating in the People's Republic of China, *O.J.*, 26 April 1991, No L 106/15; Commission Regulation (EEC) No 2799/92 of 25 September 1992 imposing a provisional anti-dumping duty on imports of deadburned (sintered) magnesias originating in the People's Republic of China, *O.J.*, 26 September 1992, No L 282/15; Commission Regulation (EEC) No 2800/92 of 25 September 1992 imposing a provisional anti-dumping duty on imports of magnesium oxide originating in the People's Republic of China, *O.J.*, 26 September 1992, No L 282/23.

1437 Commission Regulation (EEC) No 1031/92 of 23 April 1992 imposing a provisional anti-dumping duty on imports of potassium chloride (potash) originating in Belarus, Russia or Ukraine, *O.J.*, 28 April 1992, No L 110/5; Council Regulation (EEC) No 3642/92 of 14 December 1992 imposing a definitive anti-dumping duty on imports of ferrosilicon originating in Poland and Egypt and authorizing the definitive collection of the provisional anti-dumping duty, *O.J.*, 18 December 1992, No L 369/1; Council Regulation (EEC) No 54/93 of 8 January 1993 imposing a definitive duty on imports of synthetic fibres of polyesters originating in India and the Republic of Korea, *O.J.*, 15 January 1993, No L 9/2; Council Regulation (EEC) No 1473/93 of 14 June 1993 imposing a definitive anti-dumping duty on imports of magnesium oxide originating in the People's Republic of China, *O.J.*, 17 June 1993, No L 145/1; Council Regulation (EC) No 2199/94 of 9 September 1994 imposing a definitive anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, and collecting definitively the provisional duty imposed, *O.J.*, 10 September 1994, No L 236/2.

1438 *Supra*, 349-351.

1439 Council Regulation (EEC) No 2305/92 of 4 August 1992 imposing a definitive anti-dumping duty on imports of silicon metal originating in Brazil and definitively collecting the amounts secured by way of the provisional anti-dumping duty, *O.J.*, 7 August 1992, No L 222/1; Council Regulation (EC) No 2557/94 of 19 October 1994 imposing a definitive anti-dumping duty on imports of calcium metal originating in the People's Republic of China and Russia, *O.J.*, 21 October 1994, No L 270/27.

dumped products. In all other possible cases, anti-dumping relief will negatively affect the welfare of the Community¹⁴⁴⁰.

- The argument that, in view of the rapid decline in the production capacity of the product involved in the dumping countries, the disappearance of the Community industry would result in a shortage of supply and, accordingly, in higher prices¹⁴⁴¹, is not conclusive. Indeed, the Community industry, like the European anti-dumping authorities, should have this information about the rapidly diminishing production capacity in the dumping countries. On the basis of that information, the Community industry should be able to ascertain that the dumping is only temporary and should, accordingly, stay in the market, even if no anti-dumping relief is being granted. Thus, anti-dumping relief is superfluous and does not have the claimed advantage which might offset the net cost of protection it would impose on the Community.
- The fact that the absence of effective substitution of the dumped product by the Community producers' like product is caused exclusively by long-term contracts between the distributors and the dumping exporters¹⁴⁴² is no reason for granting anti-dumping relief. The absence of substitution causes anti-dumping relief to entail a cost to the Community in addition to its usual welfare-decreasing effect. Indeed, as there will be no substitution between the dumped products and the Community producers' like product, there will be no increase in the Community producers' surplus, so that the loss in consumer surplus will be even less compensated (the loss in consumer surplus represented by the area P_1cdP_2 in figure 16(c) in Chapter IV¹⁴⁴³ will not be compensated). If anti-dumping relief would result in the cancellation of long-term contracts, it would not be the first-best solution of remedying the possible market imperfection caused by such contracts. Indeed, it will always have a negative impact on the welfare of the Community and there is no evidence that the cost of anti-dumping protection is lower than the cost of the market imperfection caused by long-term contracts. Moreover, if a more market-conform measure which remedies directly the market imperfection caused by long-term contracts, is adopted, the welfare of the Community will be higher. Indeed, as a market-conform measure will not have the negative impact of anti-dumping relief on the welfare of the Community, the Community will enjoy the full benefit of the disappearance of the market imperfection caused by long-term contracts.
- The argument that low dumped prices cannot be justified nor considered as a permanent right because they are the result of unfair competition¹⁴⁴⁴ is not conclusive. The characterisation of dumping as unfair competition is wrong in most cases : dumping is usually the result of the normal business objective of profit maximization, regardless of whether dumping is interpreted as price discrimination or as selling below production costs¹⁴⁴⁵.

1440 The substitution of the dumped products by other, foreign products is called «trade diversion», which is studied hereinafter (*infra*, p. ...).

1441 Commission Decision No 67/94/ECSC of 12 January 1994 imposing a provisional anti-dumping duty on imports into the Community of hematite pig iron, originating in Brazil, Poland, Russia and Ukraine, *O.J.*, 15 January 1994, No L 12/5.

1442 Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5.

1443 *Supra*, 349-351.

1444 See e.g. : Council Regulation (EC) No 2556/94 of 19 October 1994 amending Regulation (EEC) No 2552/93 imposing a definitive anti-dumping duty on imports of artificial corundum originating in the People's Republic of China, the Russian Federation and Ukraine, with the exception of those imports sold for export to the Community by companies whose undertakings have been accepted, and definitively collecting the amounts secured by way of the provisional anti-dumping duty imposed by Commission Regulation (EC) No 1418/94, *O.J.*, 21 October 1994, No L 270/24.

The European anti-dumping authorities consider it irrelevant that European anti-dumping action renders the Community processing industries less competitive than processing industries established in third countries, in which dumping also takes place but where no anti-dumping action is undertaken (Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79 ; corrigendum, *O.J.*, 10 February 1990, No L 38/44)).

1445 *Supra*, 23-52.

Only in the case of predatory pricing, dumping may be considered as unfair competition¹⁴⁴⁶; but, in this very case, the low dumping prices are not permanent, for the predatory dumper will increase his prices from the moment on that his Community competitors are driven out of the Community market. However, the European anti-dumping authorities never investigate whether the dumping is the result of predation; to them, dumping, by definition, is unfair competition.

- The argument that the short-term disadvantages of anti-dumping relief for the Community consumers and processing industries are outweighed by its medium- and long-term advantages¹⁴⁴⁷ is only valid if the dumping is predatory, *i.e.*, if it has an anti-competitive effect on the Community market. However, the European anti-dumping authorities never examine whether the dumping is predatory.

2.3. ANTITRUST POLICY

As to the European anti-dumping authorities, to stop distortion of competition arising from unfair commercial practices and thus to re-establish open and fair competition on the Community market, is the very purpose of anti-dumping measures and is, moreover, in the general interest of the Community as Article 3(f) of the EC Treaty provides that the Community must guarantee undistorted competition on its domestic market¹⁴⁴⁸. This is completely in line with the new EC anti-dumping legislation which requires that the need to eliminate the trade distorting effects of injurious dumping and to restore effective competition must be given special consideration (Article 21(1) basic EC Regulation). The aim to maintain undistorted competition on the Community market is, from an economic point of view, justified insofar as anti-dumping relief is only granted against predatory dumping¹⁴⁴⁹. However, the European anti-dumping authorities consider all instances of dumping as unfair commercial practices¹⁴⁵⁰ and, accordingly, never

¹⁴⁴⁶ *Supra*, 23-52.

¹⁴⁴⁷ C.J.E.C., case 156/87, 14 March 1990, *Gestetner Holdings plc v Council and Commission*, E.C.R., 1990, I, (781), 843; C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, E.C.R., 1992, I, (1335), 1405; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, E.C.R., 1992, I, (1409), 1488; C.J.E.C., case C-176/87, 10 March 1992, *Konishiroku Photo Industry Co. Ltd v Council*, E.C.R., 1992, I, (1493), 1532; C.J.E.C., case C-177/87, 10 March 1992, *Sanyo Electric Co. Ltd v Council*, E.C.R., 1992, I, (1535), 1573; C.J.E.C., case C-179/87, 10 March 1992, *Sharp Corporation v Council*, E.C.R., 1992, I, (1635), 1685. See *e.g.*: Commission Regulation (EC) No 1648/94 of 6 July 1994 imposing a provisional anti-dumping duty on imports of furazolidone originating in the People's Republic of China, O.J., 8 July 1994, No L 174/4.

¹⁴⁴⁸ See *e.g.*: Commission Regulation (EEC) No 797/93 of 30 March 1993 imposing a provisional anti-dumping duty on imports of ferro-chrome with a carbon content by weight of max. 0,5 % (low carbon ferro-chrome) originating in Kazakhstan, Russia and Ukraine, O.J., 2 April 1993, No L 80/8.

¹⁴⁴⁹ For the definition of predatory dumping, see: *supra*, 24-25.

¹⁴⁵⁰ See *e.g.*: Answer of the Commission to written question No 3276/91, O.J., 4 July 1992, No C 168/37; Answer of the Commission to written question No 3270/91, O.J., 10 August 1992, No C 202/36; Answer of the Commission to written question No 3/92, O.J., 14 September 1992, No C 235/28.

investigate whether the dumping is predatory¹⁴⁵¹. They only make a distinction between short-run disadvantages and medium- and long-run advantages of anti-dumping relief for Community consumers, in order to point out that, without anti-dumping relief, the immediate price-decreasing effects of the dumping may result in the monopolization of the Community market by the dumping exporters which eventually would allow them to charge high monopoly prices¹⁴⁵². However, such a potentiality does not show that the dumping is predatory, since a

1451 There is but one case in which the dumping exporters were said to practise predatory pricing : in *large electrolytic aluminium capacitors from Japan*, the Commission held that «(i)he price sensitivity of this product and the transparency of the market, together with the widespread predatory pricing of some of the cooperating Japanese producers, clearly had a depressive effect on the prices of the Community industry and inevitably caused injury as customers chose to be supplied at the lower prices of the dumped product» (Commission Regulation (EEC) No 1451/92 of 2 June 1992 imposing a provisional anti-dumping duty on imports into the Community of certain large electrolytic aluminium capacitors originating in Japan, *O.J.*, 4 June 1992, No L 152/22 (corrigendum, *O.J.*, 17 June 1992, No L 163/27)) (emphasis added). In this case, the Commission seems to have advanced predatory pricing as an aggravating circumstance («together with») in order to explain why the Community industry suffers injury, rather than as an essential condition for finding anti-dumping relief to be in the Community interests. Indeed, the existence of predatory pricing was only mentioned in the injury investigation, but was not recalled in the assessment of the Community interests. Moreover, only some dumping exporters were said to have engaged in predatory pricing, though anti-dumping duties were imposed on all exports coming from the dumping country.

Also, in *television camera systems from Japan*, some proof may be found of predatory dumping. In this case, the dumping exporters were found to «have sold their camera systems in the Community at substantial losses, while in general substantial profits have been made on sales in Japan». As to the European anti-dumping authorities, «the behaviour of the Japanese exporters (could) only be interpreted as a strategy to drive their competitors out of the market». The European antidumping authorities further held that «(i)n the absence of any comparative advantage for the Japanese exporters, this strategy has been facilitated by the fact that they have been able to charge prices up to 100 % higher on the Japanese domestic market, where only Japanese companies are present» (Commission Regulation (EEC) No 3029/93 of 29 October 1993 imposing provisional antidumping duties on imports of television camera systems originating in Japan, *O.J.*, 30 October 1993, No L 271/1). In this case, the fact that the dumping exporters did not enjoy comparative advantages, in combination with their sales at a loss, points into the direction of predatory dumping. The cross-subsidization between national markets, however, is not conclusive evidence of predatory dumping, as demonstrated in Chapter I.

In *ferro-chrome from Kazakhstan, Russia and Ukraine*, the Community industry was considered to be unable to compete with the low prices charged by the dumping exporters, because the dumping exporters' prices did not bear a relationship to their costs of production (Commission Regulation (EEC) No 797/93 of 30 March 1993 imposing a provisional anti-dumping duty on imports of ferro-chrome with a carbon content by weight of max. 0,5 % (low carbon ferro-chrome) originating in Kazakhstan, Russia and Ukraine, *O.J.*, 2 April 1993, No L 80/8). Probably, the European anti-dumping authorities referred to the fact that the dumped products were sold at a loss in the Community in order to underscore the unfairness of the dumping. However, they did not investigate whether the dumping exporters actually practise predatory dumping. Indeed, as demonstrated in Chapter I, the mere reference to sales at a loss is no proof of predatory dumping, whereas predatory pricing does not imply sales at a loss.

See also : BOUDANT, J., *L'anti-dumping communautaire*, Paris, Economica, 1991, 151.

1452 For instance, in *ethanolamine from the United States of America* and *television camera systems from Japan*, the Commission distinguished the short-run advantages and the medium- and long-run disadvantages of the dumping. In this connection, it referred to the reduction of competition on the Community market in case of disappearance of the Community industry, as well as to the fact that prices on the domestic market of the exporting country on which only domestic suppliers (in *ethanolamine from the United States of America* limited to three suppliers) were active, tended to be much higher than on the Community market (Commission Regulation (EEC) No 2172/93 of 30 July 1993 imposing provisional anti-dumping duties on imports of ethanolamine originating in the United States of America, *O.J.*, 4 August 1993, No L 195/5 ; Commission Regulation (EEC) No 3029/93 of 29 October 1993 imposing provisional antidumping duties on imports of television camera systems originating in Japan, *O.J.*, 30 October 1993, No L 271/1).

See also : Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1 ; Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5 ; Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12 ; Council Regulation (EEC) No 725/89 of 20 March 1989 imposing a definitive anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty on such imports, *O.J.*, 22 March 1989, No L 79/24 ; Council Regulation (EEC) No 1768/89 of 19 June 1989 imposing a definitive anti-dumping duty on imports of video cassettes originating in the Republic of Korea and Hong Kong, collecting definitively the provisional duty and terminating the anti-dumping proceeding with regard to the imports of video tape reels originating in the Republic of Korea, *O.J.*, 22 June 1989, No L 174/1 ; Commission Regulation (EEC) No 2402/89 of 31 July 1989 imposing a provisional anti-dumping duty on imports of

producer may obtain a dominant position on the market merely because he is the most efficient one. Hence, anti-dumping relief, in terms of antitrust policy, is presumed to be in the Community interests, since, in the European anti-dumping authorities' view, all instances of dumping are unfair commercial practices. This idea, indeed, is incorporated in the new EC anti-dumping legislation which treats of the trade distorting effects of injurious dumping of the restoration of effective competition (Article 21(1) basic EC Regulation). This codification of the assumption about the trade-distorting and anti-competitive effects of dumping is even worse than the assumption created in European anti-dumping case law : it is a far more rigid assumption as it leaves no doubt anymore as to the legal view of the effects of dumping on competition and, because of its particularly straightforward wording, it even seems to have made the assumption on the unfairness of dumping un rebuttable. Moreover, it is more difficult to repeal this assumption for such a repeal requires a legislative action. Hence, the mere existence of injurious dumping is, especially since the enactment of the new EC anti-dumping legislation, clearly sufficient to find the Community interests to call for anti-dumping relief. However, as the new EC anti-dumping legislation describes the examination of the Community interests as being based on an appreciation of all the various interests taken as a whole (Article 21(1) basic EC Regulation), the only

barium chloride originating in the People's Republic of China or the German Democratic Republic, *O.J.*, 4 August 1989, No L 227/24 ; Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1 ; Commission Regulation (EEC) No 761/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten ores and concentrates originating in the People's Republic of China, and terminating the proceeding concerning imports originating in Hong Kong, *O.J.*, 30 March 1990, No L 83/23 ; Commission Regulation (EEC) No 762/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungstic oxide and tungstic acid originating in the People's Republic of China, *O.J.*, 30 March 1990, No L 83/29 ; Commission Regulation (EEC) No 763/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten carbide and fused tungsten carbide originating in the People's Republic of China and terminating the anti-dumping proceeding concerning imports of those products from the Republic of Korea, *O.J.*, 30 March 1990, No L 83/36 ; Commission Regulation (EEC) No 1613/90 of 13 June 1990 imposing a provisional anti-dumping duty on imports of ball bearings with a greatest external diameter not exceeding 30 mm originating in Thailand, *O.J.*, 16 June 1990, No L 152/24 ; Commission Regulation (EEC) No 2064/90 of 17 July 1990 imposing a provisional anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 20 July 1990, No L 188/10 (corrigendum, *O.J.*, 21 November 1990, No L 321/19 ; Commission Regulation (EEC) No 1472/91 of 29 May 1991 imposing a provisional anti-dumping duty on imports of oxalic acid originating in India or China and terminating the anti-dumping proceeding in respect of imports of oxalic acid originating in Czechoslovakia, *O.J.*, 1 June 1991, No L 138/62 ; Commission Regulation (EEC) No 2054/91 of 11 July 1991 imposing a provisional anti-dumping duty on imports of dihydrostreptomycin originating in the People's Republic of China, *O.J.*, 13 July 1991, No L 187/23 ; Commission Regulation (EEC) No 313/92 of 4 February 1992 imposing a provisional anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in South Korea, *O.J.*, 11 February 1992, No L 34/8 ; Commission Regulation (EEC) No 1451/92 of 2 June 1992 imposing a provisional anti-dumping duty on imports into the Community of certain large electrolytic aluminium capacitors originating in Japan, *O.J.*, 4 June 1992, No L 152/22 (corrigendum, *O.J.*, 17 June 1992, No L 163/27) ; Commission Regulation (EEC) No 1956/92 of 7 July 1992 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in India and the Republic of Korea, *O.J.*, 16 July 1992, No L 197/25 ; Commission Regulation (EEC) No 2799/92 of 25 September 1992 imposing a provisional anti-dumping duty on imports of deadburned (sintered) magnesia originating in the People's Republic of China, *O.J.*, 26 September 1992, No L 282/15 ; Commission Regulation (EEC) No 2800/92 of 25 September 1992 imposing a provisional anti-dumping duty on imports of magnesium oxide originating in the People's Republic of China, *O.J.*, 26 September 1992, No L 282/23 ; Commission Regulation (EEC) No 550/93 of 5 March 1993 imposing a provisional anti-dumping duty on imports of bicycles originating in the People's Republic of China, *O.J.*, 11 March 1993, No L 58/12 ; Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5 ; Council Regulation (EEC) No 1473/93 of 14 June 1993 imposing a definitive anti-dumping duty on imports of magnesium oxide originating in the People's Republic of China, *O.J.*, 17 June 1993, No L 145/1 ; Commission Regulation (EEC) No 2463/93 of 1 September 1993 imposing a provisional anti-dumping duty on imports of fluorspar originating in the People's Republic of China, *O.J.*, 7 September 1993, No L 226/3 ; Council Regulation (EC) No 3386/93 of 6 December 1993 imposing a definitive anti-dumping duty on imports of dead-burned (sintered) magnesia originating in the People's Republic of China, *O.J.*, 11 December 1993, No L 306/16 ; Council Regulation (EC) No 2557/94 of 19 October 1994 imposing a definitive anti-dumping duty on imports of calcium metal originating in the People's Republic of China and Russia, *O.J.*, 21 October 1994, No L 270/27.

possibility that anti-dumping relief, in the face of injurious dumping, will not be found to be in the Community interests, is that there is another reason which offsets the need to stop the allegedly unfair competition by the dumping.

In the field of antitrust policy, such other reason might be the monopolization of the Community market by the Community producers after the granting of anti-dumping relief. Indeed, anti-dumping relief may isolate the Community market from competition by the dumping exporters, thereby enabling the Community producers to monopolize the Community market¹⁴⁵³. These monopolizing effects should be balanced against the need to protect the Community producers against dumping¹⁴⁵⁴. However, the European anti-dumping authorities do not have the same concern as to the monopolization of the Community market by Community producers and the monopolization by dumping exporters. They value competition between Community producers higher than competition from the dumping exporters. Indeed, they interpret «open and fair competition»¹⁴⁵⁵ on the Community market as competition between Community producers,

1453 C.J.E.C., case C-16/90, 22 October 1991, *Eugen Nölle v Hauptzollamt Bremen-Freihafen*, E.C.R., 1991, I, (5163), 5177-5178 (Opinion of Advocate General VAN GERVEN); C.J.E.C., case C-358/89, 11 June 1992, *Extramet Industrie SA v Council*, E.C.R., 1992, I, (3813), 3840-3841; BOURGEOIS, J.H.J., «EC Anti-dumping Enforcement - Selected Second Generations Issues», in *Antitrust and Trade Policy in the United States and the European Community*, HAWK, B.E. (ed.), New York, Bender, 1986, (563), 569-571.

See also: MESSERLIN, P., «Anti-Dumping Regulations or Pro-Cartel Law? The EC Chemical Cases», *World Economy*, 1990, (465), 465-492, who provides empirical evidence that in the two anti-dumping cases he has investigated, the Community industry has used anti-dumping law in order to monopolize the Community market.

1454 C.J.E.C., case C-16/90, 22 October 1991, *Eugen Nölle v Hauptzollamt Bremen-Freihafen*, E.C.R., 1991, I, (5163), 5177 (Opinion of Advocate General VAN GERVEN); C.J.E.C., case C-358/89, 11 June 1992, *Extramet Industrie SA v Council*, E.C.R., 1992, I, (3813), 3837 and 3840-3842 (Opinion of Advocate General JACOBS).

1455 The European anti-dumping authorities sometimes use the concept «workable competition», which seems to have the same meaning as the concept «open and fair competition». See: Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1; Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5; Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12; Council Regulation (EEC) No 725/89 of 20 March 1989 imposing a definitive anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty on such imports, *O.J.*, 22 March 1989, No L 79/24; Council Regulation (EEC) No 1768/89 of 19 June 1989 imposing a definitive anti-dumping duty on imports of video cassettes originating in the Republic of Korea and Hong Kong, collecting definitively the provisional duty and terminating the anti-dumping proceeding with regard to the imports of video tape reels originating in the Republic of Korea, *O.J.*, 22 June 1989, No L 174/1; Commission Regulation (EEC) No 2402/89 of 31 July 1989 imposing a provisional anti-dumping duty on imports of barium chloride originating in the People's Republic of China or the German Democratic Republic, *O.J.*, 4 August 1989, No L 227/24; Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1; Commission Regulation (EEC) No 761/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten ores and concentrates originating in the People's Republic of China, and terminating the proceeding concerning imports originating in Hong Kong, *O.J.*, 30 March 1990, No L 83/23; Commission Regulation (EEC) No 762/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungstic oxide and tungstic acid originating in the People's Republic of China, *O.J.*, 30 March 1990, No L 83/29; Commission Regulation (EEC) No 763/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten carbide and fused tungsten carbide originating in the People's Republic of China and terminating the anti-dumping proceeding concerning imports of those products from the Republic of Korea, *O.J.*, 30 March 1990, No L 83/36; Commission Regulation (EEC) No 1613/90 of 13 June 1990 imposing a provisional anti-dumping duty on imports of ball bearings with a greatest external diameter not exceeding 30 mm originating in Thailand, *O.J.*, 16 June 1990, No L 152/24; Commission Regulation (EEC) No 2064/90 of 17 July 1990 imposing a provisional anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 20 July 1990, No L 188/10 (corrigendum, *O.J.*, 21 November 1990, No L 321/19; Commission Regulation (EEC) No 1472/91 of 29 May 1991 imposing a provisional anti-dumping duty on

with or without competition from foreign producers¹⁴⁵⁶. Open and fair competition does not

imports of oxalic acid originating in India or China and terminating the anti-dumping proceeding in respect of imports of oxalic acid originating in Czechoslovakia, *O.J.*, 1 June 1991, No L 138/62 ; Commission Regulation (EEC) No 2054/91 of 11 July 1991 imposing a provisional anti-dumping duty on imports of dihydrostreptomycin originating in the People's Republic of China, *O.J.*, 13 July 1991, No L 187/23.

1456 In several anti-dumping cases the continued existence of the Community industry is considered to guarantee workable competition :

- in *furfuraldehyde from the People's Republic of China*, the disappearance of the sole Community producer, supplying one third of the Community market, was considered to cause considerable disruption of supply, whereas the application of anti-dumping measures on the dumped imports, supplying almost half of the Community market, was not. The fact that there would always be imports coming from third countries, is irrelevant to this different treatment (Commission Regulation (EC) No 1783/94 of 18 July 1994 imposing a provisional anti-dumping duty on imports of furfuraldehyde originating in the People's Republic of China, *O.J.*, 21 July 1994, No L 186/11) ;
- in *EPROMs from Japan*, the disappearance of the Community production was considered to provide the dumping exporters with an even more dominant position on the Community market (Council Regulation (EEC) No 577/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as EPROMs (erasable programmable read only memories) originating in Japan, *O.J.*, 12 March 1991, No L 65/1). The Community industry consisted of only one producer (after from the merger of the only two Community producers). At least five dumping exporters were known to the European anti-dumping authorities. Moreover, EPROMs were also imported from the United States of America into the Community, though at a decreasing rate. During the investigation period, the dumping exporters held a market share of 54 % (coming from 71 % three years before). Thus, the Community industry and the American exporter(s) together held a market share of 46 % ;
- in *silicon carbide from the People's Republic of China, Poland, the Russian Federation and Ukraine, calcium metal from the People's Republic of China and Russia and ammonium nitrate from Lithuania and Russia*, the disappearance of the Community industry, which might occur if no anti-dumping relief would be granted, would result in reduced competition (Council Regulation (EC) No 821/94 of 12 April 1994 imposing a definitive anti-dumping duty on imports of silicon carbide, originating in the People's Republic of China, Poland, the Russian Federation and Ukraine, *O.J.*, 13 April 1994, No L 94/21 ; Commission Regulation (EC) No 892/94 of 21 April 1994 imposing a provisional anti-dumping duty on imports of calcium metal originating in the People's Republic of China and Russia, *O.J.*, 23 April 1994, No L 104/5 ; Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries ; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24 ; Council Regulation (EC) No 2557/94 of 19 October 1994 imposing a definitive anti-dumping duty on imports of calcium metal originating in the People's Republic of China and Russia, *O.J.*, 21 October 1994, No L 270/27) ;
- in *dead-burned (sintered) magnesia from the People's Republic of China*, the European anti-dumping authorities considered that to refrain from anti-dumping relief would endanger the future existence of the Community industry and would lead to less competition ; in this respect, they referred to the low amount of the anti-dumping duty in order to show that the dumping exporters would remain in the Community market ; moreover, in their view, there would not be any shortage of supply, as there were also many other non-Community suppliers on the Community market (Council Regulation (EC) No 3366/93 of 6 December 1993 imposing a definitive anti-dumping duty on imports of dead-burned (sintered) magnesia originating in the People's Republic of China, *O.J.*, 11 December 1993, No L 306/16) ;
- in *television camera systems from Japan*, anti-dumping relief which would safeguard a variety of sources of supply in the Community, was said to have positive long-term effects as regard the number of competitors (Commission Regulation (EEC) No 3029/93 of 29 October 1993 imposing provisional antidumping duties on imports of television camera systems originating in Japan, *O.J.*, 30 October 1993, No L 271/1) ; as the dumping exporters and the Community producers were the only competitors active on the market, this point of view implies either competition exclusively between Community producers, or competition between Community producers and dumping exporters ;
- in *isobutanol from the Russian Federation*, it was expected that, in view of the high number of producers in competition to supply the Community market, there will continue to be considerable price competition on the market (Council Regulation (EC) No 721/94 of 29 March 1994 imposing a definitive anti-dumping duty on isobutanol originating in the Russian Federation, *O.J.*, 31 March 1994, No L 87/3) ;
- in *watch movements from Malaysia and Thailand*, anti-dumping relief was expected to have no adverse effects on the competitive situation on the Community market, given the high availability of the product from various sources (Commission Regulation (EC) No 1076/94 of 6 May 1994 imposing a provisional anti-dumping duty on imports of certain watch movements originating in Malaysia and Thailand, *O.J.*, 11 May 1994, No L 120/3) ;
- in *potassium permanganate from the People's Republic of China*, the maintenance of the Community industry was said to ensure competition between the Community producers and imports from other non-member countries which will have a beneficiary effect on price levels (Council Regulation (EC) No 2819/94 of 17 November 1994 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in the People's Republic of China, *O.J.*, 19 November 1994, No L 298/32) ;
- in *compact disc players from Japan and South Korea, video tapes in cassettes originating in the People's Republic of China and dihydrostreptomycin from the People's Republic of China*, it was recognized that anti-dumping relief would affect price levels of the dumping exporters and consequently might have some influence on the relative competitiveness of their products ;

nevertheless, no substantial reduction in competition amongst the producers selling the like product on the Community market was expected; moreover, the preservation, under normal competitive conditions (i.e., without dumping), of a Community production of the like product was found to safeguard the Community consumer against any possible concerted action which may be undertaken by foreign producers dominant on the Community market (Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27); Commission Regulation (EEC) No 1034/91 of 23 April 1991 imposing a provisional anti-dumping duty on imports of video tapes in cassettes originating in the People's Republic of China, *O.J.*, 26 April 1991, No L 106/15; Commission Regulation (EEC) No 2054/91 of 11 July 1991 imposing a provisional anti-dumping duty on imports of dihydrostreptomycin originating in the People's Republic of China, *O.J.*, 13 July 1991, No L 187/23);

in *barium chloride from the People's Republic of China or the German Democratic Republic*, the Commission did not find anti-dumping relief to be contrary to the Community interests, though it would have guaranteed the continued existence of only three Community firms. The survival of these three Community firms, being of different sizes and having divergent resources, was considered to ensure continued competition on the Community market. The fact that the main producer's selling price is fixed by another economic operator marketing the product was seen as ensuring to some extent that there was no tendency towards a monopoly on the part of that main producer (Commission Regulation (EEC) No 2402/89 of 31 July 1989 imposing a provisional anti-dumping duty on imports of barium chloride originating in the People's Republic of China or the German Democratic Republic, *O.J.*, 4 August 1989, No L 227/24). In *barium chloride from the People's Republic of China*, the Council did not confirm the Commission's finding. Instead it considered «that ensuring the survival of the Community firms will be beneficial for competition on the Community market and that the disappearance of a major part of Community production would pose a threat to the supplies of Community consumers (Council Regulation (EEC) No 541/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of barium chloride originating in the People's Republic of China, *O.J.*, 7 March 1991, No L 60/1). Thus, the Council, in fact, weakens the Commission's finding. Whereas the Commission found the continued existence of the Community producers necessary to ensure competition on the Community market, the Council found that it would only benefit it. The Council tries to strengthen its finding by referring to the interests of the Community producers. However, its reference is not conclusive. If there is a shortage on the supply side, the price of the product will rise. Such a price rise will precisely enable the Community producers to stay in or to re-enter the Community market. As a result, the feared shortage of supply proves the opposite of what the Councils wanted to demonstrate: the continued existence of the Community producers does not depend on anti-dumping relief;

in *ferro-chrome from Kazakhstan, Russia and Ukraine*, the anti-dumping measures were said to have a positive effect on competition in the Community, as it would allow the traditionally strong competitors to re-enter the Community market and give the sole Community producer the possibility of participating in this competition (Council Regulation (EEC) No 2717/93 of 28 September 1993 imposing a definitive anti-dumping duty on imports of ferro-chrome with a carbon content by weight of maximum 0,5 % (low carbon ferro-chrome), originating in Kazakhstan, Russia and Ukraine, *O.J.*, 2 October 1993, No L 246/1);

in *audio tapes in cassettes from Japan, the Republic of Korea and Hong Kong*, the Commission, after having recognized that anti-dumping relief may have some influence on the relative competitiveness of the dumping exporters, considered that anti-dumping relief «is designed to prevent the decline of the Community industry and thus to help to maintain the availability of a wide choice of products and even to strengthen competition» (Commission Regulation (EEC) No 3262/90 of 5 November 1990 imposing a provisional anti-dumping duty on imports of audio tapes in cassettes originating in Japan, the Republic of Korea and Hong Kong, *O.J.*, 13 November 1990, No L 313/5 (corrigendum, *O.J.*, 12 January 1991, No L 9/36));

in *ferro-silico-manganese from Russia, Ukraine, Brazil and South Africa*, the Commission, after having recognized that anti-dumping relief may influence the relative competitiveness of the dumping exporters, held that «no adverse effects on the competitive situation of the Community market should be expected from the taking of measures», but that «on the contrary, removing the unfair advantages gained by the dumping practices should prevent the further deterioration of the Community industry and of those exporters which do not resort to unfair pricing and thus guarantee the availability of a wide choice of suppliers» (Commission Regulation (EC) No 3119/94 of 19 December 1994 imposing a provisional anti-dumping duty on imports of ferro-silico-manganese originating in Russia, Ukraine, Brazil and South Africa, *O.J.*, 21 December 1994, No L 330/15);

in *ethanolamine from the United States of America*, the Commission held that the disappearance of the Community industry would reduce competition and that its substitution by a lesser amount of third country suppliers should be prevented. The fact that the Community industry was not in a position to meet Community demand did not prevent anti-dumping relief from being granted, probably in view of the determination of the dumping exporters to defend their markets hares on the Community market and the possibilities for them to absorb high anti-dumping duties to a large extent (Commission Regulation (EEC) No 2172/93 of 30 July 1993 imposing provisional anti-dumping duties on imports of ethanolamine originating in the United States of America, *O.J.*, 4 August 1993, No L 195/5);

in *synthetic fibres of polyesters from India and the Republic of Korea*, the Commission referred to the low amount of the proposed anti-dumping duty in order to show that the dumping exporters would be able to remain in the Community market and that the current degree of competition would be guaranteed (Commission Regulation (EEC) No 1956/92 of 7 July 1992 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in India and the Republic of Korea, *O.J.*, 16 July 1992, No L 197/25);

in *magnetic disks (3,5" microdisks) from Japan, Taiwan and the People's Republic of China*, the disappearance of the Community industry was said to reduce supply and competition and the anti-dumping relief was expected not to prevent producers in third countries from competing in the Community market (Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5; Commission Regulation (EC) No 534/94 of 9

cover competition exclusively between foreign producers. As competition implies that less efficient producers are driven out of the market by more efficient producers, that interpretation can hardly be upheld, when the Community producers are less efficient than the dumping exporters. According to the European anti-dumping authorities, though, less efficient Community producers are even entitled to protection against the unfair competition of dumping¹⁴⁵⁷. Such

March 1994 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, *O.J.*, 11 March 1994, No L 68/5;

- in *ferro-silicon from South Africa and the People's Republic of China* and *from Russia, Kazakhstan, Ukraine, Iceland, Norway, Sweden, Venezuela and Brazil*, the Commission admitted that anti-dumping relief may have some effects on the relative competitiveness of the dumping exporters, but was nevertheless convinced that the number of competitors on the Community market would not be reduced. They were even of the opinion that anti-dumping relief would arrest the decline of the Community industry and thus help to maintain the availability of a wide choice of ferro-silicon producers (Commission Regulation (EEC) No 2581/93 of 20 September 1993 imposing provisional anti-dumping duties on imports of ferro-silicon originating in South Africa and the People's Republic of China, *O.J.*, 22 September 1993, No L 237/2; Council Regulation (EC) No 3359/93 of 2 December 1993 imposing amended anti-dumping measures on imports of ferro-silicon originating in Russia, Kazakhstan, Ukraine, Iceland, Norway, Sweden, Venezuela and Brazil, *O.J.*, 9 December 1993, No L 302/1);

- in several anti-dumping cases, the European anti-dumping authorities did not expect competition amongst companies selling the like product to be reduced by the imposition of anti-dumping duties; instead, they held that the dumping exporters would still be in a position to compete in the market and that, next to them, there were still a great number of other producers from different countries offering the like product within the Community (Commission Regulation (EEC) No 2684/88 of 26 August 1988 imposing a provisional anti-dumping duty on certain imports of video cassette recorders originating in Japan and the Republic of Korea, *O.J.*, 31 August 1988, No L 240/5; Council Regulation (EEC) No 501/89 of 27 February 1989 imposing a definitive anti-dumping duty on imports of certain video cassette recorders originating in Japan and the Republic of Korea and definitively collecting the provisional duty, *O.J.*, 28 February 1989, No L 57/55; Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1; Commission Regulation (EEC) No 761/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten ores and concentrates originating in the People's Republic of China, and terminating the proceeding concerning imports originating in Hong Kong, *O.J.*, 30 March 1990, No L 83/23; Commission Regulation (EEC) No 3421/90 of 26 November 1990 imposing a provisional anti-dumping duty on imports of aspartame originating in Japan and the United States of America, *O.J.*, 29 November 1990, No L 330/16; Commission Decision 93/479/EEC of 30 July 1993 accepting undertakings offered in connection with the review of anti-dumping measures applicable to certain imports of monosodium glutamate originating in Indonesia, the Republic of Korea, Taiwan and Thailand, *O.J.*, 4 September 1993, No L 225/35; Commission Regulation (EEC) No 2477/93 of 6 September 1993 imposing a provisional anti-dumping duty on imports of certain photo albums originating in the People's Republic of China, *O.J.*, 9 September 1993, No L 228/16; Commission Regulation (EEC) No 2720/93 of 28 September 1993 imposing a provisional anti-dumping duty on imports of isobutanol originating in the Russian Federation, *O.J.*, 2 October 1993, No L 246/12);

it should be pointed out that, in practically all these cases, there would have been competition with or without anti-dumping relief: with anti-dumping relief there would have been competition between the Community producers, the dumping exporters and exporters established in third countries; without anti-dumping relief, there would have been competition between the dumping exporters and exporters established in third countries; there is only one exception in which it was noted that, without anti-dumping relief, competition on the Community market would wane as the Community would become dependent on the dumping exporters which exported towards the Community through a the same joint venture company (Commission Regulation (EEC) No 3421/90 of 26 November 1990 imposing a provisional anti-dumping duty on imports of aspartame originating in Japan and the United States of America, *O.J.*, 29 November 1990, No L 330/16).

In this respect, it should be noted that recent economic research has shown that Community industries with high concentration and cohesion are quite successful in obtaining injury finding. This connection between findings of injury and the degree of concentration and cohesion in the Community industry is a matter of concern, since anti-dumping relief may favour collusion among the Community producers (THARAKAN, P.K.M., and WAELBROECK, J., «Antidumping and countervailing duty decisions in the E.C. and in the U.S. An experiment in comparative political economy», *European Economic Review*, 1994, (171), 183 and 187).

¹⁴⁵⁷ C.J.E.C., case 250/85, 5 October 1988, *Brother Industries Ltd v Council*, *E.C.R.*, 1988, (5683), 5728; C.J.E.C., joined cases 277 and 300/85, 5 October 1988, *Canon Inc. a.o. v Council*, *E.C.R.*, 1988, (5731), 5809; C.J.E.C., case C-16/90, 22 October 1991, *Eugen Nölle v Hauptzollamt Bremen-Freihafen*, *E.C.R.*, 1991, I, (5163), 5177 (Opinion of Advocate General VAN GERVEN); Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 24 November 1988, No L 317/33.

See, however, *paraformaldehyde from Spain*, where it is underscored that anti-dumping relief is not aimed at protecting Community producers against more efficient producers in third countries (Commission Decision 84/512/EEC of 23 October 1984 accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of paraformaldehyde originating in Spain and terminating the investigation, *O.J.*, 26 October 1984, No L 282/58).

an interpretation of the concept «competition» disregards, however, the very essence of competition and decreases welfare. Indeed, competition enhances welfare because it increases the efficiency in production which allows lower prices to be charged.

As to the evaluation of their monopolizing power on the Community market, the Community producers and the dumping exporters are also treated unequally. The European anti-dumping authorities have not yet refused anti-dumping relief because of the monopolizing effects which the anti-dumping relief may have¹⁴⁵⁸. Sometimes, their rejection seems to be well-founded¹⁴⁵⁹. But, in several cases, they merely invoke lack of evidence of the fact that the

¹⁴⁵⁸ There is one, but only partial exception, i.e., the anti-dumping case concerning *glycine from Japan*, in which the Commission noted that :

«Some users argued that the adoption of protective measures is not in the interest of the Community because they would become totally dependent on supplies from Tessenderlo Chemie [i.e., the main Community producer whose output of glycine constitutes practically all Community production of glycine].

However, it has not been established that if protective measures are taken the users will become dependent on Tessenderlo Chemie and will have no possibility of benefiting from different sources of supply. It is not inconceivable that the other Community producer (Rexim) would increase its production or expand its production capacity taking into account the fact that the consumption of this product is expected to increase significantly because of new applications. Furthermore, the absence of measures may possibly lead to the closure of the plant of Tessenderlo Chemie, the effect of which would be that Community users would depend almost exclusively on the Japanese exporters, whose price behaviour on the EEC market could very well change in order to raise prices to world levels. Finally, the imposition of protective measures is not aimed at the elimination of the imported product from the Community market, but at taking away the negative effects of the unfair pricing practised by exporters from non-member countries»

(Commission Regulation (EEC) No 997/85 of 18 April 1985 imposing a provisional anti-dumping duty on imports of glycine originating in Japan, *O.J.*, 19 April 1985, No L 107/8).

In the definitive assessment concerning *glycine from Japan*, the Council argued furthermore :

«In view of the probable effect on the competitive situation and structure in the Community market characterized by the presence of essentially one Community producer and two non-Community firms, it is considered in the Community's interest to take protective measures without fully eliminating the injury determined to have been suffered by the main Community producer during the period of investigation, but considered adequate to enable the said producer to operate economically the plant at which regular production of the product concerned started only at the beginning of 1984»

(Council Regulation (EEC) No 2322/85 of 12 August 1985 imposing a definitive anti-dumping duty on imports of glycine originating in Japan, *O.J.*, 15 August 1985, No L 218/1).

The Council and the Commission, thus, aimed at preserving competition on the Community market between the main Community producer and the two dumping Japanese exporters. Therefore, an anti-dumping duty was imposed in order to prevent monopolization by the dumping exporters ; but, in order to prevent monopolization by the main Community producer, the rate of the anti-dumping duty was set lower than the dumping margin and, therefore, was not prohibitive for Japanese exports.

¹⁴⁵⁹ In *oxalic acid from India*, the European anti-dumping authorities held that the argument according to which the Community producer would acquire a monopoly, had but little ground in view of the Community producer's market share, the presence of other Community producers and the rate of market penetration in the Community of imports from other countries (Council Regulation (EEC) No 3434/91 of 25 November 1991 imposing a definitive anti-dumping duty on imports of oxalic acid originating in India or the People's Republic of China, *O.J.*, 28 November 1991, No L 326/6).

In *calcium metal from the People's Republic of China and Russia*, the Council concluded that competition on the Community market was endangered in view of the fact that supplies were available from third countries (Council Regulation (EC) No 2557/94 of 19 October 1994 imposing a definitive anti-dumping duty on imports of calcium metal originating in the People's Republic of China and Russia, *O.J.*, 21 October 1994, No L 270/27).

In *magnetic disks (3,5" microdisks) from Japan, Taiwan and the People's Republic of China* and *magnesium oxide from the People's Republic of China* and *dead-burned (sintered) magnesia from the People's Republic of China*, the European anti-dumping authorities held that the dumping exporters would not experience diminished access to the Community market because the amount of the proposed anti-dumping duty was lower than the amount required to undo the injury fully (Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5 ; Council Regulation (EEC) No 1473/93 of 14 June 1993 imposing a definitive anti-dumping duty on imports of magnesium oxide originating in the People's Republic of China, *O.J.*, 17 June 1993, No L 145/1 ; Council Regulation (EC) No 3386/93 of 6 December 1993

Community producers would monopolize the Community market after the imposition of anti-dumping measures¹⁴⁶⁰ or they rely on rather inconclusive evidence which is said to show that the dumping exporters can stay in the Community market¹⁴⁶¹. In only one case, the European

imposing a definitive anti-dumping duty on imports of dead-burned (sintered) magnesia originating in the People's Republic of China, *O.J.*, 11 December 1993, No L 306/16; Commission Regulation (EC) No 534/94 of 9 March 1994 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, *O.J.*, 11 March 1994, No L 68/5. See also: Commission Regulation (EEC) No 1956/92 of 7 July 1992 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in India and the Republic of Korea, *O.J.*, 16 July 1992, No L 197/25, where the amount of the anti-dumping duty was below the margin of price undercutting. As the amount required to remove fully the injury, equals the difference between the dumping price and the price the Community producers should get in order to cover their production costs and to make a profit, such an anti-dumping duty cannot cause the dumping prices to rise above the Community producers' prices. As the dumping prices will still undercut the Community producers' prices - though to a lesser extent -, it seems reasonable to conclude that such an anti-dumping duty will not drive the dumping exporters out of the Community market.

¹⁴⁶⁰ Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12; Commission Regulation (EEC) No 1361/87 of 18 May 1987 imposing a provisional anti-dumping duty on imports of ferro-silico-calcium/calcium silicide originating in Brazil, *O.J.*, 19 May 1987, No L 129/5; Council Regulation (EEC) No 3687/87 of 8 December 1987 imposing a definitive anti-dumping duty on imports of mercury originating in the Soviet Union and definitively collecting the provisional anti-dumping duty imposed on such imports, *O.J.*, 10 December 1987, No L 346/27; Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 24 November 1988, No L 317/33; Council Regulation (EEC) No 3905/88 of 12 December 1988 imposing a definitive anti-dumping duty on imports of polyester yarn originating in Mexico, South Korea, Taiwan and Turkey, *O.J.*, 16 December 1988, No L 347/10; Council Regulation (EEC) No 3946/88 of 16 December 1988 imposing a definitive anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 December 1988, No L 348/49.

See however: *glycine from Japan*, where the Council referred to «the probable effect on the competitive situation and structure in the Community market characterized by the presence of essentially one Community producer and two non-Community firms» (emphasis added) in order to explain why no full anti-dumping relief was granted (Council Regulation (EEC) No 2322/85 of 12 August 1985 imposing a definitive anti-dumping duty on imports of glycine originating in Japan, *O.J.*, 15 August 1985, No L 218/1).

¹⁴⁶¹ See e.g.:

- *calcium metal from the People's Republic of China and Russia*, where the Commission stated that «the imports from the People's Republic of China and Russia would remain available», without providing any evidence why (Commission Regulation (EC) No 892/94 of 21 April 1994 imposing a provisional anti-dumping duty on imports of calcium metal originating in the People's Republic of China and Russia, *O.J.*, 23 April 1994, No L 104/5);
- *urea ammonium nitrate solution from Bulgaria and Poland*, where the Commission pointed out that imports from third, non-dumping countries were «potentially still available» and that there was «no reason to believe that a shortage of the product will occur, bearing in mind that the Community market will be potentially more attractive for suppliers from third countries once a fair competitive situation is re-established» (Council Regulation (EC) No 3319/94 of 22 December 1994 imposing a definitive anti-dumping duty on imports of urea ammonium nitrate solution originating in Bulgaria and Poland, exported by companies not exempted from the duty, and collecting definitively the provisional duty imposed, *O.J.*, 31 December 1994, No L 350/20);
- *colour television receivers from Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand*, where the Commission held that the expected remedial effect of anti-dumping relief would occur in terms of a change of the relative market shares held, but that anti-dumping relief would not prevent producers from third countries from competing in the Community market (Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50). The Commission, however, did not clarify why the anti-dumping measures should have precisely those effects;
- *furazolidone originating in the People's Republic of China*, where the disappearance of the sole Community producer was considered to render the Community entirely dependent on the dumped imports (Commission Regulation (EC) No 1648/94 of 6 July 1994 imposing a provisional anti-dumping duty on imports of furazolidone originating in the People's Republic of China, *O.J.*, 8 July 1994, No L 174/4). Here, the European anti-dumping authorities did not investigate whether the envisaged anti-dumping measures would not drive the dumping exporters out of the Community market. They only seemed to assume that the dumping exporters would remain in the Community market, as they considered the imports coming from third countries to be negligible. Otherwise, their decision would imply the monopolisation of the Community market by the sole Community producer;
- *dihydrostreptomycin from the People's Republic of China*, where the possible disappearance of the Chinese exporters from the Community market was not considered to result in a monopoly or dominant position of the sole Community producer. The presence of one Japanese exporter was found to maintain competition on the market (Commission Regulation (EEC) No 2054/91 of 11 July 1991 imposing a provisional anti-dumping duty on imports of dihydrostreptomycin originating in the People's Republic of China, *O.J.*, 13 July 1991, No L 187/23). With two producers on the market, a monopoly is, indeed, excluded. Instead a duopoly will exist, with a possible dominant position for either of the two producers or even a collective dominant position;

anti-dumping authorities seemed not very convinced themselves by their rejection of the monopolization by the Community producers of the Community market, as they announced that they would undertake a review of their decision after six months would have elapsed, provided that competition conditions would so require¹⁴⁶²; in the meantime, though, the dumping exporters would be subject to anti-dumping relief and the Community industry would perhaps have driven them out of the Community market.

On the other hand, the European anti-dumping authorities hardly ever insist on strict evidence when they consider the possible monopolization of the Community market by the dumping

- *furfuraldehyde from the People's Republic of China*, where the Commission held that «the purpose of trade defence measures is not to exclude from the Community market, exporters found to have dumped injuriously» and, at the same time, added that «the high number of exporters from other third countries ensure that supply will be maintained at a level sufficient to meet the demand» (Commission Regulation (EC) No 1783/94 of 18 July 1994 imposing a provisional anti-dumping duty on imports of furfuraldehyde originating in the People's Republic of China, *O.J.*, 21 July 1994, No L 186/11). There is, however, a clear difference between purpose and effect;
- *DRAMs (dynamic random access memories) from the Republic of Korea*, where the Commission referred to the fact that anti-dumping relief against imports of the same product from another dumping country had not reduced the number of exporters of that country, in order to show that the anti-dumping relief envisaged would not eliminate the dumping exporters from the Community market (Commission Regulation (EEC) No 2686/92 of 16 September 1992 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea, *O.J.*, 17 September 1992, No L 272/13). Obviously, such a precedent is not quite relevant as there is no evidence that the exporters of these two countries are identical;
- *magnetic disks (3,5" microdisks) from Japan, Taiwan and the People's Republic of China*, where the Commission held that the dumping exporters would not suffer a diminished access to the Community market because the rise in the dumping price to be caused by the anti-dumping duty, which equaled the amount necessary to remove the injury, was «limited to a level which reflects a fair competitive Community market situation permitting the Community industry to sell at economic prices» (Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5). Clearly, the fact that the dumping prices would rise to the level of the prices the Community producers must charge in order to earn a profit, does not show that the dumping exporters will stay in the Community market. On the contrary, in such a case, the dumping exporters may well be driven out of the Community market, at least if the Community producers are able to meet Community demand. In that case, their production was said to be, at the time of the anti-dumping investigation, insufficient to meet demand. However, the price increase which would be caused by the anti-dumping duty, might well have induce the Community producers to increase their production capacity. Indeed, as has been admitted by the European anti-dumping authorities, the Community industry, since the end of the investigation period, has tried to increase production capacity and new Community producers had set up production facilities in the Community (Council Regulation (EEC) No 2861/93 of 18 October 1993 imposing a definitive anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, and collecting definitively the provisional duty imposed, *O.J.*, 21 October 1993, No L 262/4);
- *ethanolamine from the United States of America*, where the Commission admitted that the Community industry did not have the capacity to fully satisfy the demand on the Community market, but considered it to be in the Community interests to maintain a viable Community industry and to prevent its substitution by a lesser number of third country suppliers. According to the Commission, the insufficient capacity of the Community industry would enable third country producers to continue to supply the Community market, which would prevent the Community industry from achieving oligopolistic profitability. Nevertheless, the Commission imposed a high anti-dumping duty, equal to the amount necessary to remove the injury. Though it did explicitly treat of the problem of the possible disappearance of the dumping exporters from the Community market, it mentioned the determination of the dumping exporters to defend their market shares on the Community market, to the possibilities for them to absorb to a large extent high anti-dumping duties and to the vulnerability of the Community industry (Commission Regulation (EEC) No 2172/93 of 30 July 1993 imposing provisional anti-dumping duties on imports of ethanolamine originating in the United States of America, *O.J.*, 4 August 1993, No L 195/5; Council Regulation (EC) No 229/94 of 1 February 1994 imposing definitive anti-dumping duties on imports into the Community of ethanolamine originating in the United States of America, and collecting definitively the provisional anti-dumping duties, *O.J.*, 2 February 1994, No L 28/40). However, none of these three elements is conclusive. First, though the dumping exporters may be determined to defend their market shares at all costs, they may still be driven out of the market. Second, if they actually absorb the anti-dumping duty, the Community may take measures necessary to remedy the effects such absorption (see: Article 12 basic EC Regulation; Article 13(11) basic ECSC Decision). Third, the anti-dumping relief granted may remedy - at least, it is intended to do so - the Community industry's vulnerability. Moreover, as the Commission has admitted, the Community industry was making continuous efforts to meet increased demand.

¹⁴⁶² Council Regulation (EC) No 2557/94 of 19 October 1994 imposing a definitive anti-dumping duty on imports of calcium metal originating in the People's Republic of China and Russia, *O.J.*, 21 October 1994, No L 270/27.

exporters as true, on the basis of potentialities and probabilities¹⁴⁶³. The unequal treatment between dumping exporters and Community producers is all the less acceptable, since the elements on which the expectation of possible monopolization by the dumping exporters is based, do not prove the anti-competitive effects of the dumping.

The application of the criteria of European antitrust law to European anti-dumping law shows that the alleged anti-competitive effects of the dumping are not based on sufficient evidence.

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A potential or probable anti-competitive effect of dumping was found sufficient in :

- *glycine from Japan*, where the Commission held that «the absence of (anti-dumping) measures *may possibly* lead to the closure of the plant of (the main Community producer), the effect of which would be that the Community users would depend almost exclusively on the Japanese exporters, whose price behaviour *could very well* change in order to raise prices to world levels» (Commission Regulation (EEC) No 997/85 of 18 April 1985 imposing a provisional anti-dumping duty on imports of glycine originating in Japan, *O.J.*, 19 April 1985, No L 107/8) (emphasis added) ;
- *linear tungsten halogen lamps from Japan*, where it was stated «(w)hile low prices may be in the consumer's interest, it cannot in the longer term be to his advantage to see supply of LTH lamps to the Community market restricted to virtually one single source of supply (i.e., the Japanese imports) which would consequently reduce competition and thus *probably* lead in the medium and long term to higher prices» (Commission Regulation (EEC) No 2064/90 of 17 July 1990 imposing a provisional anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 20 July 1990, No L 188/10 (corrigendum, *O.J.*, 21 November 1990, No L 321/19)) (emphasis added) ;
- *dihydrostreptomycin from the People's Republic of China*, where it was stated that «the halting of Community production of DHS, *which might well happen* if the present situation were to continue, (...) would reduce the number of DHS suppliers on the Community market» (Commission Regulation (EEC) No 2054/91 of 11 July 1991 imposing a provisional anti-dumping duty on imports of dihydrostreptomycin originating in the People's Republic of China, *O.J.*, 13 July 1991, No L 187/23) (emphasis added) ;
- *radio-broadcast receivers of a kind used in motor vehicles from South Korea*, where, in the view of the Commission, «it *would appear probable* that in the medium-term (Community) production would cease to exist» (Commission Regulation (EEC) No 313/92 of 4 February 1992 imposing a provisional anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in South Korea, *O.J.*, 11 February 1992, No L 34/8) (emphasis added) ;
- *cotton yarn from Brazil and Turkey*, where the European anti-dumping authorities stated that «the trend in factory closures due to dumped imports is such that, without measures, the continued existence of the industry as a whole *may be said* to be in danger» (Council Regulation (EEC) No 738/92 of 23 March 1992 imposing a definitive anti-dumping duty on imports of cotton yarn originating in Brazil and Turkey, *O.J.*, 27 March 1992, No L 82/1) (emphasis added) ;
- *potassium chloride (potash) from Belarus, Russia or Ukraine*, where the «Commission *feels* (...) that without (countermeasures) the (Community industry) will continue to register losses and face the threat of premature extinction» (Commission Regulation (EEC) No 1031/92 of 23 April 1992 imposing a provisional anti-dumping duty on imports of potassium chloride (potash) originating in Belarus, Russia or Ukraine, *O.J.*, 28 April 1992, No L 110/5).

In *plain paper photocopiers from Japan*, more substantial evidence has been invoked. In that case, it was pointed out that «without the imposition of anti-dumping measures, the number of competitors in the market will be reduced. This is particularly the case regarding certain of the complainants who *may be vulnerable* to a takeover similar to that of one of the original complainants by one of the exporters during the proceeding» (Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12. See also : C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, E.C.R., 1992, I, (1335), 1405 ; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, E.C.R., 1992, I, (1409), 1488 ; C.J.E.C., case C-176/87, 10 March 1992, *Konishiroku Photo Industry Co. Ltd v Council*, E.C.R., 1992, I, (1493), 1532 ; C.J.E.C., case C-177/87, 10 March 1992, *Sanyo Electric Co. Ltd v Council*, E.C.R., 1992, I, (1535), 1573 ; C.J.E.C., case C-179/87, 10 March 1992, *Sharp Corporation v Council*, E.C.R., 1992, I, (1635), 1685) (emphasis added). In addition, it was stated that «six of the nine exporters who could realistically be interested in manufacturing in the Community are either already doing so or have indicated that they will do so in the near future» and that «(t)here is also no indication that the number of Japanese suppliers to the Community will be reduced».

There are only two anti-dumping cases, namely concerning *glycine from Japan*¹⁴⁶⁴ and *linear tungsten halogen lamps from Japan*¹⁴⁶⁵, in which some elaborated information is given about the possible monopolization of the Community market by the dumping exporters. However, the information provided in these two anti-dumping cases is not sufficient to justify the application of European antitrust law and more specifically of Article 86 EC Treaty¹⁴⁶⁶. Under Article 86, three conditions must be fulfilled cumulatively: first, there must be a dominant position on the common market; second, the behaviour of the firm(s) having such a dominant position must imply an abuse; and, third, trade between Member States must be affected by the abuse¹⁴⁶⁷. In respect of the third condition, no information is provided in both anti-dumping cases. It will be assumed that the third condition is nevertheless fulfilled, merely because the Community market was not divided in several regional markets (see: Article 4(1)(ii) basic EC Regulation; Article 4(5) basic ECSC Decision). Therefore, the applicability of Article 86 depends on two criteria: has the dumping firm a dominant position on the Community market? And is the monopolization of the Community market through dumping an abuse of its dominant position?

(i) *Has the dumping firm a dominant position on the Community market?*

The mere practice of dumping does not prove that the dumping exporters have a dominant position on the Community market. Indeed, dumping may occur under conditions of perfect competition on the Community market - implying no dominant position - as well as under conditions of imperfect competition - which do not necessarily imply a dominant position.

- *Glycine from Japan:*

As only three firms are present on the Community market of glycine, there does not seem to be a situation of perfect competition: the main Community producer, holding an average market share of $\pm 45\%$ between 1980 and 1984, and two dumping Japanese firms, holding a collective market share of $\pm 55\%$ over the same period. Thus, it might be argued that the two Japanese firms have a collective dominant position on the Community market. However, it is not investigated whether the two Japanese firms cooperate on the Community market and, thus, whether there is a collective Japanese dominant position. In view of the fact that the two Japanese firms charge different prices, it seems reasonable to conclude that they do not cooperate and, thus, have no collective dominant position. If the two Japanese firms do not cooperate, the individual market share of the Japanese firms might both be lower than the market share of the Community producer. But even on the assumption of there being some kind of cooperation between the two Japanese exporters, the difference in market shares is not very well pronounced. Therefore, the structure of the Community market of glycine can best be qualified as an oligopolistic market structure, implying market power of the two Japanese exporters as well as of the main Community producer.

¹⁴⁶⁴ Commission Regulation (EEC) No 997/85 of 18 April 1985 imposing a provisional anti-dumping duty on imports of glycine originating in Japan, *O.J.*, 19 April 1985, No L 107/8; Council Regulation (EEC) No 2322/85 of 12 August 1985 imposing a definitive anti-dumping duty on imports of glycine originating in Japan, *O.J.*, 15 August 1985, No L 218/1.

¹⁴⁶⁵ Commission Regulation (EEC) No 2064/90 of 17 July 1990 imposing a provisional anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 20 July 1990, No L 188/10 (corrigendum, *O.J.*, 21 November 1990, No L 321/19); Council Regulation (EEC) No 117/91 of 16 January 1991 imposing a definitive anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 19 January 1991, No L 14/1.

¹⁴⁶⁶ As there is no specific information about a possible concerted action between the dumping exporters, the applicability of Article 85 EC Treaty is not examined. The only information in this respect is the same as that about the possibility of a collective dominant position held by the dumping exporters.

¹⁴⁶⁷ BELLAMY, C., and CHILD, G.D., *Common Market Law of Competition*, London, Sweet & Maxwell, 1987, 390, § 8-003.

- *Linear tungsten halogen lamps from Japan :*

On the Community LTH lamp market, the Japanese dumping exporters hold a collective market share of more 60 %, against a market share of 29 % held by the Community industry. However, at least ten Japanese exporters are known to the Commission and the Commission Regulation also mentions four Community producers. If the market shares were evenly distributed, a Japanese exporter would hold an individual market share of only 6 %, while the individual market share of a Community producer would amount to 7.25 %. In fact, everything depends on whether or not the Japanese exporters act collectively. On this point, no evidence can be found in the Commission Regulation. Thus, no proof is furnished of a dominant position of the Japanese exporters.

(ii) *Is the monopolization of the Community market through dumping an abuse of its dominant position ?*

Obtaining, preserving or extending a dominant position on the Community market by means of normal business practices based on the firm's efficiencies is not contrary to Article 86¹⁴⁶⁸. As dumping is the result of normal profit maximization, with the exception of predatory dumping, it cannot be considered as an abuse of a dominant position. Therefore, it should be investigated whether the Japanese exporters were practising predatory dumping. In other words : do the Japanese exporters intend to drive the Community producer(s) out of the Community market by means of dumping in order to obtain a monopoly position, enabling them to charge afterwards unreasonably high prices ?

- *Glycine from Japan :*

In the *Japanese glycine case* the Commission contended that «the absence of (anti-dumping) measures may possibly lead to the closure of the plant of (the main Community producer), the effect of which would be that Community users would depend almost exclusively on the Japanese exporters, whose price behaviour could very well change in order to raise prices to world levels» (emphasis added). This assertion points in the direction of predatory dumping. However, it is based on potentialities («possibly», «could very well»). Thus, no hard proof of predatory dumping is being provided.

- *Linear tungsten halogen lamps from Japan :*

In *linear tungsten halogen lamps from Japan*, the Commission noted that «(w)hile low prices may be in the consumer's interest, it cannot in the longer term be to his advantage to see the supply of LTH lamps to the Community market restricted to virtually one single source of supply (i.e., the Japanese imports) which would consequently reduce competition and thus probably lead in the medium and long term to higher prices» (emphasis added). Here too, a potentiality is upheld as proof of predatory dumping.

Antitrust considerations are welcome within the framework of anti-dumping law¹⁴⁶⁹. A general concern about competition will lead to only predatory dumping being sanctioned. Moreover, it will prevent Community producers from applying anti-dumping law to isolate the Community market from foreign competition. Only the (unrebuttable) assumption that all

¹⁴⁶⁸ C.J.E.C., case 85/76, 13 February 1979, *Hoffmann-La Roche & Co. AG v Commission*, E.C.R., 1979, (461), 541 ; BELLAMY, C.W., and CHILD, G.D., *Common Market Law of Competition*, London, Sweet & Maxwell, 1978, 185-186, § 7-48 ; BELLAMY, C., and CHILD, G.D., *Common Market Law of Competition*, London, Sweet & Maxwell, 1987, 408, § 8-038 ; VAN GERVEN, W., MARESCAU, M., en STUYCK, J., *Handels- en economisch recht. Deel 2 B - Mededingingsrecht - Kartelrecht*, in *Beginnelsen van Belgisch Privaatrecht*, DILLEMANS, R., and VAN GERVEN, W. (eds.), XIII, Gent, Story-Scientia, 1985, 330, nr. 293 ; WERTHEIMER, H.W., «Het adagium van artikel 86, EEG : 'Quod licet bovi non licet jovi'», in *Europees kartelrecht anno 1980*, Deventer, Kluwer, 1981, (143), 177 en 228.

¹⁴⁶⁹ See, however, BOURGEOIS, J.H.J., «EC Anti-dumping Enforcement - Selected Second Generation Issues», in *Antitrust and Trade Policy in the United States and the European Community*, HAWK, B.E. (ed.), New York, Bender, 1986, (673), 574, according to whom «(antitrust) allegations can only be taken into consideration once they have been established following the proper procedures of competition law or where, at the very least, proceedings were initiated under competition law». Nevertheless, the opinion of J.H.J. BOURGEOIS cannot be shared. The concept «Community interests» allows the European anti-dumping authorities to investigate whether the antitrust allegations are founded.

dumping is predatory and the selective concern about competition in European anti-dumping law, though, should be criticized. The nationality of the competitors on the Community market should be irrelevant. More generally, it should be pointed out that even a general antitrust concern in anti-dumping case law is only a second-best approach. The first-best solution is the direct application of antitrust law for detecting and sanctioning predatory pricing¹⁴⁷⁰.

2.4. THE «INFANT INDUSTRY»-ARGUMENT

According to the «infant industry»-argument, a country may not be able to realize its true comparative advantage under free trade if other countries are already established in the relevant sectors. In European anti-dumping case law, the «infant industry»-argument has implicitly been adduced for granting anti-dumping relief¹⁴⁷¹.

¹⁴⁷⁰ *Infra*, 777-786.

¹⁴⁷¹ The «infant industry»-argument is applied implicitly in :

- *serial-impact dot-matrix printers from Japan*, where the steady decline in profitability caused by reduced sales in the face of huge quantities of dumped imports, was considered to prevent the Community producers from improving their cost structure and from building more cost-efficient SIDM printers ; thus, the inefficiency of the Community producers was considered to be caused by massive dumped imports and anti-dumping relief was considered to allow the Community producers to invest in more efficient production methods (Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 24 November 1988, No L 317/33) ;
- *DRAMs from Japan*, where it was noted that «of the three complainant companies that had serious commitments to large-scale DRAM production during the period under investigation, two are already in commercial production although production plans have not yet been fully implemented. This state of affairs renders them particularly vulnerable to any renewed dumping practices» (Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79 ; corrigendum, *O.J.*, 10 February 1990, No L 38/44)) ;
- *welded wire-mesh originating in Yugoslavia*, where anti-dumping relief was granted because the viability of the new Greek investments and the deepening of the Greek domestic production facilities would be jeopardized by the dumped imports ; furthermore, the implicitly invoked «infant industry»-argument was underbuilt by the serious economic and social costs to the Greek economy of its process of integration into the Community industry ; in other words, the Greek industry of welded wire-mesh could not bear the burden of the Yugoslav dumping because of the costs it had to bear for its integration into the Community market (Commission Decision 91/256/EEC of 14 May 1991 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of welded wire-mesh originating in Yugoslavia and terminating the investigation, *O.J.*, 18 May 1991, No L 123/54) ;
- *gas-fuelled, non-refillable pocket flint lighters originating in Japan, the People's Republic of China, the Republic of Korea and Thailand*, where anti-dumping relief was considered to be necessary in order to put the Community industry in a position to regain market share in the Community, to benefit from the same economies of scale as most of the dumping exporters and consequently to become more competitive ; for the European anti-dumping authorities held that as long as the return on investment remained weak, it was unlikely that the Community industry would increase its marketing efforts or make the new investments required to reduce their manufacturing cost (Commission Regulation (EEC) No 1386/91 of 23 May 1991 imposing a provisional anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in Japan, the People's Republic of China, the Republic of Korea and Thailand, *O.J.*, 28 May 1991, No L 133/20).

See also : *plain paper photocopiers from Japan*, where the European anti-dumping authorities calculated the anti-dumping duty in order to enable the Community producers to permit them to undertake adequate research and development expenditure (Council Regulation (EEC) No 536/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12).

The «infant industry»-argument is only valid, if market distortions prevent a country from realizing its comparative advantages. It has been argued that in such a case trade-restrictive measures may allow the country to obtain its comparative advantages. Under this approach, the «infant-industry»-argument is quite attractive. Nevertheless, it should be criticized, because it does not take into account the net cost of trade protection in general and of anti-dumping protection in particular. Without the net cost of anti-dumping protection, a country may realize its comparative advantages by employing direct measures aimed at removing the market distortions.

Moreover, «infant industry»-protection raises two problems. First, «infant-industry»-protection is by definition temporary : it should be granted until the country realizes its comparative advantage. However, it appears to be very difficult to withdraw protection once it has been granted. At first sight, anti-dumping relief seems to be temporary under European anti-dumping law. Indeed, anti-dumping measures lapse five years after the date on which they entered into force or were last modified or confirmed (Article 11(1) basic EC Regulation ; Article 15(1) basic ECSC Decision). In several anti-dumping cases, however, anti-dumping measures remain in force for more than five years because they are confirmed or modified before the five-year period expires, so that a new period of five years sets in (see : Article 11(2) basic EC Regulation which codifies existing European anti-dumping case law as to the so-called expiry reviews, *i.e.*, reviews initiated at the occasion of the impending expiry of anti-dumping relief). Indeed, as the new EC anti-dumping legislation puts it, anti-dumping relief must remain in force as long as necessary to counteract the injurious dumping (Article 11(1) basic EC Regulation). As a consequence, the basically temporary nature of anti-dumping protection may practically loose its content and the drawback of the «infant industry»-argument also applies to anti-dumping relief.

Second, anti-dumping relief does not necessarily stimulate investments made by the industry necessary to realize the country's comparative advantages. On the contrary, as anti-dumping protection shelters the industry from foreign competition, it removes the incentives to invest in more efficient production methods¹⁴⁷². The European anti-dumping authorities, however,

¹⁴⁷² For example, it follows from *radio-broadcast receivers of a kind used in motor vehicles from South Korea* that the competition by the Korean exporters had incited the Community producers to make major investments and to take rationalization measures (Commission Regulation (EEC) No 313/92 of 4 February 1992 imposing a provisional anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in South Korea, *O.J.*, 11 February 1992, No L 34/8). It is an open question whether the Community producers would have taken such drastic measures without Korean competition.

assume that anti-dumping protection induces Community producers to achieve their comparative advantages¹⁴⁷³.

2.5. TRADE POLICY

2.5.1. Trade diversion

Anti-dumping relief may divert trade to a great extent. For example, between 1980 and 1985, anti-dumping relief caused a decrease in the volume of the dumped imports by 57.9 % (i.e., a yearly decline of 15.9 %), whereas the volume of non-dumped imports and intra-Community trade increased by, respectively, 22.7 % and 118.2 % (i.e., a yearly increase of respectively 4.2 % and 16.9 %)¹⁴⁷⁴. Thus, the non-dumping exporters benefited more than the Community producers from the decrease in the volume of the dumped imports.

There is no consistent European case law as to this phenomenon. In some anti-dumping cases, anti-dumping relief was not considered to be in the Community interests because it was expected

¹⁴⁷³ In *serial-impact dot-matrix printers from Japan*, «the Commission (could not) accept the argument that anti-dumping duties (imposed on printers would) retard technological development or modernization of office automation since these duties are supposed to help the Community printer industry to regain sufficient profitability under normal business conditions in order to invest in new technology» (Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12) (emphasis added). See also : Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27); Commission Regulation (EEC) No 2064/90 of 17 July 1990 imposing a provisional anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 20 July 1990, No L 188/10 (corrigendum, *O.J.*, 21 November 1990, No L 321/19).

During the initial investigation, in *binder and baler twine from Brazil and Mexico*, it was considered that the Community producers were likely to convert production to a new synthetic product for which demand was expected to increase. In the review proceeding, the Commission admitted that this forecast has turned out to be inaccurate, but pointed to ecological concerns in favour of the use of natural products in order to explain why the conversion had not taken place (Commission Decision 93/521/EEC of 3 September 1993 accepting undertakings given in connection with the anti-dumping review in respect of imports of binder and baler twine originating in Brazil, terminating the anti-subsidy review proceeding with regard to these imports and terminating the anti-dumping and anti-subsidy review in respect of imports of binder and baler twine originating in Mexico, *O.J.*, 8 October 1993, No L 251/28).

¹⁴⁷⁴ MESSERLIN, P.A., «The EC Antidumping Regulations - A First Economic Appraisal, 1980-85», *Weltwirtschaftliches Archiv*, 1989, (563), 571-576. Interestingly enough, the initiation of anti-dumping proceedings also causes trade diversion. Indeed, P.A. MESSERLIN has found that in anti-dumping cases which were terminated without anti-dumping relief the dumped imports declined by 35 % over a period of five years, while the non-dumped imports and intra-Community trade rose respectively by 26.7 and 63.4 % (*ibidem*).

to favour substitution of dumped imports by imports from third countries¹⁴⁷⁵ or substitution of the Community producer's exports to third countries by the dumping producers' product¹⁴⁷⁶. Similarly, if the Community industry is unable to substitute the dumped products, anti-dumping relief will be considered as not being in the Community interests¹⁴⁷⁷. Likewise, anti-dumping

¹⁴⁷⁵ The Community interests were considered not to call for anti-dumping relief in *tube and pipe fittings from Brazil, Yugoslavia and Japan*, because anti-dumping relief «would be likely to favour mainly other low-priced imports and increase their market share further at the expense of imports from these countries without any consequent improvement in the situation for the Community industry» (Commission Decision 86/536/EEC of 7 November 1986 terminating the anti-dumping proceeding concerning imports of certain tube and pipe fittings originating in Brazil, Taiwan, Yugoslavia and Japan, *O.J.*, 8 November 1986, No L 313/20).

Similarly, no full anti-dumping relief was granted in *nickel from the Soviet Union* and *oxalic acid from Brazil* because full anti-dumping relief could result in the substitution of the dumped imports by non-dumped imports from third countries, without there being any relief for the Community industry (Commission Regulation (EEC) No 1613/83 of 15 June 1983 imposing a provisional anti-dumping duty on imports of unwrought nickel, not alloyed, in the form of cathodes produced by electrolysis, either uncut or cut into squares, originating in the Soviet Union, *O.J.*, 17 June 1983, No L 159/43; Commission Regulation (EEC) No 2553/84 of 4 September 1984 imposing a provisional anti-dumping duty on imports of oxalic acid originating in Brazil, accepting an undertaking offered by the exporter in the German Democratic Republic of oxalic acid and terminating the proceeding regarding imports of oxalic acid from the German Democratic Republic and Spain, *O.J.*, 7 September 1984, No L 239/8).

Trade diversion between dumping exporters and Community producers not included within the Community industry may also be invoked as a reason for not granting anti-dumping relief. Indeed, in *codeine and its salts from Czechoslovakia, Hungary, Poland and Yugoslavia* the Community industry comprised only the two major German manufacturers which, at that time, accounted for a large proportion of the total Community output of codeine and its salts. Anti-dumping relief was not considered to be in the Community interests because the Community industry would not take advantage of any anti-dumping protection. For it was thought probable that the dumped imports would be replaced by low-priced imports from the rest of the Community (Council Decision 83/9/EEC of 17 January 1983 terminating the anti-dumping proceeding concerning imports of codeine and its salts originating in Czechoslovakia, Hungary, Poland and Yugoslavia, *O.J.*, 20 January 1983, No L 16/30). The motivation for not granting anti-dumping relief testifies to the impact of the definition of the concept «Community industry». Moreover, it also proves a sustained approach. Indeed, if the Community industry had not been limited to two German producers, anti-dumping relief would probably have been granted, precisely because the dumped imports would be replaced by low-priced Community products.

¹⁴⁷⁶ See : *urea from Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia*, where an exporter had argued that anti-dumping protection would have a counter-productive effect because, due to the expected reduced exports to the Community, competition on third markets would increase and therefore lead to a further loss of exports by Community producers. The Council did not reject the argument as such. It rejected it because of lack of evidence. Indeed, it considered that it was difficult, if not impossible, to predict whether or not anti-dumping protection would have negative effects on the export performance of Community producers (Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1).

¹⁴⁷⁷ See : *photo albums from South Korea and Hong Kong*, where certain types of photo albums were not subjected to the anti-dumping measures because the market supply by the Community industry was insufficient and a shortage in overall supply would have to be expected if anti-dumping protection was taken with respect to all categories of photo albums. (Commission Decision 90/241/EEC of 22 May 1990 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of photo albums originating in South Korea and Hong Kong, and terminating the investigation, *O.J.*, 31 May 1990, No L 138/48). See also : Commission Decision 94/82/EC of 10 January 1994 terminating the anti-dumping proceeding concerning imports of gum rosin originating in the People's Republic of China, *O.J.*, 12 February 1994, No L 41/50.

relief has been granted because trade diversion was not expected to occur¹⁴⁷⁸ and, if it should occur, the European anti-dumping authorities undertook to enact anti-dumping relief against those new imports¹⁴⁷⁹. They do, indeed, grant anti-dumping relief against imports coming from third countries if the latter substitute dumped imports already subject to anti-dumping relief¹⁴⁸⁰. In other anti-dumping cases, though, anti-dumping relief was granted, in spite of trade diversion¹⁴⁸¹ and the inability of the Community industry to substitute the dumped

1478 Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79; corrigendum, *O.J.*, 10 February 1990, No L 38/44); Council Regulation (EEC) No 117/91 of 16 January 1991 imposing a definitive anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 19 January 1991, No L 14/1; Council Regulation (EEC) No 577/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as EPROMs (erasable programmable read only memories) originating in Japan, *O.J.*, 12 March 1991, No L 65/1.

See also: *dicumyl peroxide from Japan*, where already imposed anti-dumping protection was found not to be contrary to the Community interests, though the Japanese exporter had argued that Japan would be excluded from the Community market in favour of its Taiwanese competitor. The Commission, however, regarded this argument as unfounded «in so far as the retention of protective measures against Japan should not have any substantial effect on the present state of competition between the two countries (*i.e.*, Japan and Taiwan)» (Commission Decision 89/573/EEC of 30 October 1989 terminating the investigation concerning imports of dicumyl peroxide originating in Taiwan and accepting an undertaking offered in the context of the review concerning imports of dicumyl peroxide originating in Japan and terminating the proceeding, *O.J.*, 31 October 1989, No L 317/49).

1479 In *deadburned (sintered) magnesia from the People's Republic of China and magnesium oxide from the People's Republic of China* it was expected that the increase in the Chinese prices resulting from the imposition of anti-dumping duties would be followed by the other exporters since the Chinese exporters were the market price leaders (Commission Regulation (EEC) No 2799/92 of 25 September 1992 imposing a provisional anti-dumping duty on imports of deadburned (sintered) magnesia originating in the People's Republic of China, *O.J.*, 26 September 1992, No L 282/15; Commission Regulation (EEC) No 2800/92 of 25 September 1992 imposing a provisional anti-dumping duty on imports of magnesium oxide originating in the People's Republic of China, *O.J.*, 26 September 1992, No L 282/23; Council Regulation (EC) No 3386/93 of 6 December 1993 imposing a definitive anti-dumping duty on imports of dead-burned (sintered) magnesia originating in the People's Republic of China, *O.J.*, 11 December 1993, No L 306/16).

1480 Commission Regulation (EEC) No 1956/92 of 7 July 1992 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in India and the Republic of Korea, *O.J.*, 16 July 1992, No L 197/25; Council Regulation (EEC) No 54/93 of 8 January 1993 imposing a definitive duty on imports of synthetic fibres of polyesters originating in India and the Republic of Korea, *O.J.*, 15 January 1993, No L 9/2; Council Regulation (EEC) No 1473/93 of 14 June 1993 imposing a definitive anti-dumping duty on imports of magnesium oxide originating in the People's Republic of China, *O.J.*, 17 June 1993, No L 145/1; Commission Regulation (EEC) No 2477/93 of 6 September 1993 imposing a provisional anti-dumping duty on imports of certain photo albums originating in the People's Republic of China, *O.J.*, 9 September 1993, No L 228/16.

1481 Council Regulation (EEC) No 1739/85 of 24 June 1985 imposing a definitive anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan, *O.J.*, 27 June 1985, No L 167/3; Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12; Council Regulation (EEC) No 2200/90 of 27 July 1990 imposing a definitive anti-dumping duty on imports of silicon metal originating in the People's Republic of China, *O.J.*, 28 July 1990, No L 198/57; Council Regulation (EEC) No 3433/91 of 25 November 1991 imposing a definitive anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in Japan, the People's Republic of China, the Republic of Korea and Thailand and definitively collecting the provisional anti-dumping duty, *O.J.*, 28 November 1991, No L 326/1; Commission Regulation (EEC) No 313/92 of 4 February 1992 imposing a provisional anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in South Korea, *O.J.*, 11 February 1992, No L 34/8; Council Regulation (EEC) No 830/92 of 30 March 1992 imposing a definitive anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and collecting definitively the provisional duty, *O.J.*, 3 April 1992, No L 88/1 (corrigendum, *O.J.*, 5 June 1992, No L 153/16); Commission Regulation (EEC) No 2477/93 of 6 September 1993 imposing a provisional anti-dumping duty on imports of certain photo albums originating in the People's Republic of China, *O.J.*, 9 September 1993, No L 228/16; Council Regulation (EEC) No 2861/93 of 18 October 1993 imposing a definitive anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, and collecting definitively the provisional duty imposed, *O.J.*, 21 October 1993, No L 262/4.

products¹⁴⁸². The Court of Justice confirmed the latter cases, for it held that «the interests of the Community are effectively guaranteed by protective measures against dumped imports, even though an anti-dumping duty does not have the effect of shielding Community manufacturers against competition from products which originate in other non-member countries but are not being dumped»¹⁴⁸³. The Court of Justice, though, did not state that anti-dumping relief will never be in the Community interests when only imports from third countries are being favoured. As a consequence, the dichotomy in European anti-dumping case law subsists : anti-dumping relief favouring imports from third countries may be found to be in the Community interests as well as to clash with it.

Since the question of trade diversion arises only in the hypothesis of anti-dumping relief, the combined effect of trade diversion and anti-dumping relief on Community welfare must be investigated. Economics shows that their combination never increases Community welfare.

Depending on the circumstances, trade diversion may only increase or reduce the net cost of anti-dumping protection¹⁴⁸⁴. First, if anti-dumping relief causes the products of the dumping exporters to replace the Community producers' products in foreign markets, the net cost of anti-dumping protection will be increased by the extra loss in the Community producers' surplus caused by the decline in their exports. Second, if the dumped products are replaced on the Community market by products from third countries, the net cost of anti-dumping protection will not always increase. If the prices of the products from third countries equal the dumping prices, the net cost of anti-dumping protection will fall to zero and anti-dumping protection will not affect the welfare of the Community. If the price of products from third countries, however, equals the price of the dumped products subjected to an anti-dumping duty or an undertaking, the net cost of anti-dumping protection equals the total loss in consumer surplus, since there is no increase in the

¹⁴⁸² In *linear tungsten halogen lamps from Japan*, the inability of the Community industry to supply whole the Community market did not prevent anti-dumping relief from being considered to be in the Community interests (Commission Regulation (EEC) No 2064/90 of 17 July 1990 imposing a provisional anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 20 July 1990, No L 188/10 (corrigendum, *O.J.*, 21 November 1990, No L 321/19)).

See also : Council Regulation (EEC) No 3946/88 of 16 December 1988 imposing a definitive anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 December 1988, No L 348/49 ; Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79 ; corrigendum, *O.J.*, 10 February 1990, No L 38/44) ; Commission Regulation (EEC) No 761/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten ores and concentrates originating in the People's Republic of China, and terminating the proceeding concerning imports originating in Hong Kong, *O.J.*, 30 March 1990, No L 83/23 ; Commission Regulation (EEC) No 3798/90 of 21 December 1990 imposing a provisional anti-dumping duty on imports of espadrilles originating in the People's Republic of China, *O.J.*, 28 December 1990, No L 365/25.

¹⁴⁸³ C.J.E.C., case 250/85, 5 October 1988, *Brother Industries Ltd v Council*, *E.C.R.*, 1988, (5683), 5728. See also : C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, *E.C.R.*, 1991, I, (2069), 2166 (Opinion of Advocate General LENZ) ; C.J.E.C., case C-6/94 R, 11 March 1994, *Descom Scales Manufacturing Co. Ltd v Council*, *E.C.R.*, 1994, I, (867), 874.

¹⁴⁸⁴ About the net cost of anti-dumping protection, see : *supra*, 343-373.

Community producers' surplus (they do not sell more) and, in case of an anti-dumping duty, the anti-dumping duty does not yield revenue to the Community authorities. If, the price of the products from third countries is somewhere between the dumping price and the price of the dumped products subjected to an anti-dumping duty, the effect of trade diversion on the net cost of anti-dumping protection is uncertain. On the one hand, anti-dumping protection will cause the price level on the Community market to rise because the price of the product from other countries is higher than the dumping price. Because of the price rise, the consumption on the Community market will drop, thereby causing a loss in consumer surplus. That loss will, however, be lower in case of trade diversion because the price of the product from third countries is lower than the price of the dumped product subjected to an anti-dumping duty. On the other hand, no anti-dumping duty will be levied on the products coming from third countries which the dumped products are substituted by. As a consequence, as the income generated from the anti-dumping duty will be lower, there will be less income for the Community authorities to compensate the loss in consumer surplus. The combination of a smaller loss in consumer surplus and the decrease in the income of the Community authorities makes it impossible to predict the effect of trade diversion on the net cost of an anti-dumping duty. If, however, an undertaking is accepted instead of an anti-dumping duty, the outcome is certain because undertakings never generate income for the Community authorities. As a result, the net cost of an undertaking must decline in case of trade diversion because the loss in consumer surplus is smaller.

Since trade diversion can, at the most, neutralize the net cost of anti-dumping relief, it can, from an economic point of view, never be raised to prove that anti-dumping relief is in the Community interests. It may only prove that less harm or no harm at all is done to the Community interests. Since economics do not provide an unequivocal answer, in case trade diversion decreases, the net cost of anti-dumping protection, the dichotomy in European anti-dumping case law cannot be criticized as such. However, it must be criticized because the effects of trade diversion on the net cost of anti-dumping protection are never investigated. However, since trade diversion affects the welfare of the Community, such an investigation is necessary.

2.5.2. Integration of anti-dumping relief into the Community's general trade policy

Various aspects and instruments of the Community's trade policy are taken into consideration to determine whether anti-dumping relief is in the Community interests. Interestingly enough, in the vast majority of anti-dumping cases, they do not prevent anti-dumping relief from being considered to be in the Community interests :

- anti-dumping relief is found to be in the Community interests because it guarantees the effectiveness of anti-dumping measures imposed on dumped imports of the like product coming from other countries¹⁴⁸⁵ ;
- the principle of non-discrimination results in anti-dumping relief being in the Community interests when anti-dumping relief is already granted against imports of the like product coming from other countries¹⁴⁸⁶ ;

¹⁴⁸⁵ Commission Regulation (EEC) No 1633/82 of 23 June 1982 imposing a provisional anti-dumping duty on imports of fibre building board (hardboard) originating in Romania, repealing Commission Decision No 80/564/EEC of 4 June 1980 and accepting undertakings in connection with the proceeding in respect of imports of fibre building board from Czechoslovakia, Finland, Hungary, Norway, Poland, Spain, Sweden and the Soviet Union and terminating the proceeding with regard to those countries and Bulgaria, *O.J.*, 25 June 1982, No L 181/19 ; Commission Decision 83/75/EEC of 15 February 1983 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain fibre building board originating in Brazil, *O.J.*, 19 February 1983, No L 47/30 ; Commission Regulation (EEC) No 2444/83 of 29 August 1983 imposing a provisional anti-dumping duty on certain imports of hardboard originating in Czechoslovakia, Poland and Sweden and re-opening the anti-dumping proceedings concerning these imports, *O.J.*, 31 August 1983, No L 241/9 ; Council Regulation (EEC) No 3648/83 of 19 December 1983 imposing a definitive anti-dumping duty on imports of hardboard originating in Czechoslovakia and Poland and definitively collecting the amounts secured by way of a provisional anti-dumping duty on certain imports of hardboard originating in Sweden, *O.J.*, 24 December 1983, No L 361/6 ; Commission Decision 83/649/EEC of 19 December 1983 accepting undertakings in connection with the anti-dumping procedure in respect of certain imports of hardboard originating in Sweden and terminating that procedure, *O.J.*, 24 December 1983, No L 361/47 ; Commission Regulation (EEC) No 558/84 of 29 February 1984 imposing a provisional anti-dumping duty on imports of hardboard originating in the Soviet Union and re-opening the anti-dumping proceeding concerning those imports, *O.J.*, 2 March 1984, No L 61/21 ; Council Regulation (EEC) No 1825/84 of 28 June 1984 imposing a definitive anti-dumping duty on imports of hardboard originating in the Soviet Union, *O.J.*, 29 June 1984, No L 170/68 ; Commission Decision 84/407/EEC of 10 August 1984 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain kraft liner paper and board originating in Spain and terminating that proceeding, *O.J.*, 21 August 1984, No L 224/30 ; Commission Decision 86/232/EEC of 9 June 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of hardboard originating in Argentina, Switzerland and Yugoslavia and terminating the investigation, *O.J.*, 12 June 1986, No L 157/61 ; Commission Regulation (EEC) No 3617/90 of 11 December 1990 imposing a provisional anti-dumping duty on imports of certain welded tubes of iron or non-alloy steel, originating in Turkey or in Venezuela and accepting undertakings offered in connection with such imports, *O.J.*, 15 December 1990, No L 351/17 ; Commission Regulation (EEC) No 1808/92 of 30 June 1992 imposing a provisional anti-dumping duty on imports of ferro-silicon originating in Poland and Egypt, *O.J.*, 3 July 1992, No L 183/8 ; Commission Regulation (EEC) No 2686/92 of 16 September 1992 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea, *O.J.*, 17 September 1992, No L 272/13 ; Council Regulation (EEC) No 611/93 of 15 March 1993 imposing a definitive anti-dumping duty on imports into the Community of certain electronic microcircuits known as DRAMs originating in the Republic of Korea and exported by companies not exempted from this duty, and collecting definitively the provisional anti-dumping duty, *O.J.*, 18 March 1993, No L 66/1 ; Commission Regulation (EEC) No 2581/93 of 20 September 1993 imposing provisional anti-dumping duties on imports of ferro-silicon originating in South Africa and the People's Republic of China, *O.J.*, 22 September 1993, No L 237/2.

¹⁴⁸⁶ Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia, *O.J.*, 9 May 1987, No L 121/11 ; Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1 ; Commission Regulation (EEC) No 2623/88 of 24 August 1988 imposing a provisional anti-dumping duty on imports of urea originating in Austria, Hungary, Malaysia, Romania, the USA and Venezuela, *O.J.*, 25 August 1988, No L 235/5 ; Commission Regulation (EEC) No 3617/90 of 11 December 1990 imposing a provisional anti-dumping duty on imports of certain welded tubes of iron or non-alloy steel, originating in Turkey or in Venezuela and accepting undertakings offered in connection with such imports, *O.J.*, 15 December 1990, No L 351/17 ; Commission Regulation (EEC) No 1034/91 of 23 April 1991 imposing a provisional anti-dumping duty on imports of video tapes in cassettes originating in the People's Republic of China, *O.J.*, 26 April 1991, No L 106/15 ; Commission Regulation (EEC) No 1808/92 of 30 June 1992 imposing a provisional anti-dumping duty on imports of ferro-silicon originating in Poland and Egypt, *O.J.*, 3 July 1992, No L 183/8 ; Commission Regulation (EEC) No 2686/92 of 16 September 1992 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea, *O.J.*, 17 September 1992, No L 272/13 ; Council Regulation (EEC) No 611/93 of 15 March 1993 imposing a definitive anti-dumping duty on imports into the Community of certain electronic microcircuits known as DRAMs originating in the Republic of Korea and exported by companies not exempted from this duty, and collecting definitively the provisional anti-dumping duty, *O.J.*, 18 March 1993, No L 66/1 ; Commission Regulation (EEC) No 2581/93 of 20 September 1993 imposing provisional anti-dumping duties on imports of ferro-silicon originating in South Africa and the People's Republic of China, *O.J.*, 22 September 1993, No L 237/2 ; Commission Regulation (EC) No 371/94 of 17 February 1994 imposing a provisional anti-dumping duty on imports into the Community of large aluminium electrolytic capacitors originating in the Republic of Korea and Taiwan, *O.J.*, 19 February

- there is no legal incompatibility between anti-dumping relief, on the one hand, and customs duties and quantitative restrictions, on the other hand¹⁴⁸⁷, though customs duties and

1994, No L 48/10 ; Commission Regulation (EC) No 534/94 of 9 March 1994 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, *O.J.*, 11 March 1994, No L 68/5.

1487 The absence of any legal incompatibility between anti-dumping relief, on the one hand, and customs duties and quantitative restrictions, on the other hand, is underscored in :

- *polyester yarn from Mexico, South Korea, Taiwan and Turkey*, where «(t)he Council (found) that (...) neither Community law nor international rules - notably the (Fourth Multifibre Arrangement) - prohibit(ed) the imposition of anti-dumping duties (...) affecting imports subject to quantitative restrictions, provided it is established that injury has been caused despite these restrictions» (Council Regulation (EEC) No 3905/88 of 12 December 1988 imposing a definitive anti-dumping duty on imports of polyester yarn originating in Mexico, South Korea, Taiwan and Turkey, *O.J.*, 16 December 1988, No L 347/10. See also : Council Regulation (EEC) No 3946/88 of 16 December 1988 imposing a definitive anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 December 1988, No L 348/49 ; Commission Decision 89/143/EEC of 21 February 1989 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of urea originating in Austria, Hungary, Malaysia or Romania, confirming the undertakings accepted pursuant to Council Regulation (EEC) No 3339/87 and terminating the investigations, *O.J.*, 24 February 1989, No L 52/37 ; Commission Regulation (EEC) No 2051/90 of 17 July 1990 imposing a temporary anti-dumping duty on imports of woven polyolefin bags originating in the People's Republic of China, *O.J.*, 19 July 1990, No L 187/36 (corrigendum, *O.J.*, 20 September 1990, No L 256/38) ; Commission Regulation (EEC) No 3798/90 of 21 December 1990 imposing a provisional anti-dumping duty on imports of espadrilles originating in the People's Republic of China, *O.J.*, 28 December 1990, No L 365/25 ; Council Regulation (EEC) No 830/92 of 30 March 1992 imposing a definitive anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and collecting definitively the provisional duty, *O.J.*, 3 April 1992, No L 88/1 (corrigendum, *O.J.*, 5 June 1992, No L 153/16) ;
- *DRAMs from Japan*, where the argument according to which injurious dumping should be tolerated, at least up to the level of any tariff, was considered to «be contrary to the general principle that injurious dumping is actionable and (...) (to) lead to a negation of decisions taken in the area of customs duties» (Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79 ; corrigendum, *O.J.*, 10 February 1990, No L 38/44) ;
- *single phase, two-speed electric motors from Bulgaria, Romania and Czechoslovakia*, where the Commission noted that «the customs duties and quantitative restrictions in question were not introduced to compensate for dumping» (Commission Decision 90/399/EEC of 26 July 1990 terminating an anti-dumping proceeding concerning imports of certain single phase, two-speed electric motors originating in Bulgaria, Romania and Czechoslovakia, *O.J.*, 31 July 1990, No L 202/47) ;
- *cotton yarn from Brazil, Egypt, Turkey, India and Thailand and polyester yarns from Taiwan, Indonesia, India, the People's Republic of China and Turkey*, where the Commission considered «that quantitative restrictions protect the Community industry from excessive volumes of imports but cannot prevent injury resulting from unfair trading practices such as dumping imports at very low prices» (Commission Regulation (EEC) No 2818/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports of cotton yarn originating in Brazil, Egypt and Turkey and terminating the anti-dumping proceeding in respect of cotton yarn originating in India and Thailand, *O.J.*, 27 September 1991, No L 271/17 ; Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7).

quantitative restrictions may make anti-dumping relief superfluous¹⁴⁸⁸, at least if they are sufficient to relieve the Community industry from the injury caused by the dumping¹⁴⁸⁹ ;

- the Community interests do not call for anti-dumping relief if a trade agreement between the Community and the dumping country is concluded with respect to trade of the dumped products¹⁴⁹⁰, insofar as that agreement is complied with¹⁴⁹¹ ;

¹⁴⁸⁸ See : Answer of the Commission to written question No 1646/81, *O.J.*, 19 April 1982, No C 98/9, where the Commission held that circumstances may make the imposition of anti-dumping relief, in addition to quantitative restrictions, not to be in the Community interests.

¹⁴⁸⁹ The insufficiency of quantitative restrictions has been based on the fact that :

- the dumped exports were concentrated on the markets of the Member States not protected by quantitative restrictions (Council Regulation (EEC) No 2236/82 of 11 August 1982 imposing a definitive anti-dumping duty on upright pianos originating in the USSR, *O.J.*, 13 August 1982, No L 238/1 (corrigendum, *O.J.*, 21 September 1982, No L 271/20) ; Commission Regulation (EEC) No 1695/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of polyester yarn originating in Mexico, South Korea, Taiwan and Turkey, *O.J.*, 17 June 1988, No L 151/39 (corrigendum, *O.J.*, 18 June 1988, No L 152/58) ; Commission Regulation (EEC) No 1696/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 June 1988, No L 151/47 ; Council Regulation (EEC) No 3946/88 of 16 December 1988 imposing a definitive anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 December 1988, No L 348/49 ; Commission Decision 89/143/EEC of 21 February 1989 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of urea originating in Austria, Hungary, Malaysia or Romania, confirming the undertakings accepted pursuant to Council Regulation (EEC) No 3339/87 and terminating the investigations, *O.J.*, 24 February 1989, No L 52/37 ; Commission Regulation (EEC) No 2051/90 of 17 July 1990 imposing a temporary anti-dumping duty on imports of woven polyolefin bags originating in the People's Republic of China, *O.J.*, 19 July 1990, No L 187/36 (corrigendum, *O.J.*, 20 September 1990, No L 256/38) ; Council Regulation (EEC) No 3308/90 of 15 November 1990 imposing a definitive anti-dumping duty on imports of woven polyolefin sacks originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty on such imports, *O.J.*, 17 November 1990, No L 318/2 ; Commission Regulation (EEC) No 3798/90 of 21 December 1990 imposing a provisional anti-dumping duty on imports of espadrilles originating in the People's Republic of China, *O.J.*, 28 December 1990, No L 365/25) ;
- the quantitative restrictions were not respected (Commission Recommendation No 2242/82/ECSC of 10 August 1982 imposing a provisional anti-dumping duty on broad-flanged beams originating in Spain, *O.J.*, 13 August 1982, No L 238/32 ; Commission Decision 89/143/EEC of 21 February 1989 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of urea originating in Austria, Hungary, Malaysia or Romania, confirming the undertakings accepted pursuant to Council Regulation (EEC) No 3339/87 and terminating the investigations, *O.J.*, 24 February 1989, No L 52/37).

The insufficiency of customs duties has been based on the fact that, despite these duties, the Community industry was materially injured (Commission Regulation (EEC) No 2686/92 of 16 September 1992 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea, *O.J.*, 17 September 1992, No L 272/13).

¹⁴⁹⁰ In *acrylic fibres from Romania*, it was considered that the Community interests made it necessary to exclude discontinuous acrylic fibre carded, combed or otherwise prepared, from any anti-dumping measure because it is among other products covered by the agreement between the Community and Romania on trade in textile products, which establishes agreed quantitative limits for this category of products (Council Decision 86/468/EEC of 22 September 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain acrylic fibres originating in Israel, Mexico, Romania and Turkey and terminating the investigation, *O.J.*, 24 September 1986, No L 272/29).

Similarly, in several anti-dumping cases the Community interests were considered to no longer call for anti-dumping relief as soon as a trade agreement between the Community and the dumping country was concluded with respect to trade of the dumped products (Commission Recommendation No 714/78/ECSC of 6 April 1978 providing for suspension of provisional anti-dumping duties established in relation to imports of steel products originating in Japan, *O.J.*, 8 April 1978, No L 94/21 ; Commission Recommendation No 859/78/ECSC of 27 April 1978 providing for the suspension of provisional anti-dumping duties established in relation to imports of steel products originating in Czechoslovakia, *O.J.*, 28 April 1978, No L 116/20 ; Commission Recommendation No 931/78/ECSC of 28 April 1978 providing for suspension of provisional anti-dumping duties established in relation to imports of steel products originating in Spain, *O.J.*, 4 May 1978, No L 120/21 ; Commission Recommendation No 1235/78/ECSC of 8 June 1978 providing for suspension of the definitive anti-dumping duty established in relation to imports of steel products originating in Romania, *O.J.*, 9 June 1978, No L 153/19 ; Commission Recommendation No 1704/78/ECSC of 19 July 1978 imposing a definitive anti-dumping duty on certain sheets and plates, of iron or steel, originating in Czechoslovakia, Japan, Poland and Spain, *O.J.*, 20 July 1978, No L 195/17 ; Commission Recommendation No 1715/78/ECSC of 20 July 1978 imposing a definitive anti-dumping duty on certain galvanized sheets and plates originating in Japan, *O.J.*, 22 July 1978, No L 198/1 ; Commission Recommendation No

- a trade agreement between the Community and the dumping country which explicitly provides the application of anti-dumping measures, does not prevent anti-dumping relief from being in the Community interests¹⁴⁹² ;
- a trade agreement between the Community and the dumping country aimed at developing and diversifying trade from that country with the Community does not prevent anti-dumping relief from being in the Community interests, if anti-dumping relief restores fair competition on the Community market without reducing the overall level of competition¹⁴⁹³ ;

1716/78/ECSC of 20 July 1978 providing for the suspension of the provisional anti-dumping duty established in relation to imports of iron or steel coils for re-rolling originating in Australia, *O.J.*, 22 July 1978, No L 198/4 ; Commission Recommendation No 1758/78/ECSC of 26 July 1978 imposing a definitive anti-dumping duty on certain angles, shapes and sections of iron or steel, originating in Spain, *O.J.*, 27 July 1978, No L 203/28 ; Commission Recommendation No 2739/78/ECSC of 23 November 1978 providing for the suspension of the definitive anti-dumping duty established in relation to iron or steel coils for re-rolling originating in South Korea, *O.J.*, 25 November 1978, No L 330/13 ; Commission Recommendation No 165/79/ECSC of 30 January 1979 providing for the suspension of definitive anti-dumping duties established in relation to imports of steel products originating in Bulgaria, *O.J.*, 31 January 1979, No L 22/11 ; Commission Recommendation No 720/79/ECSC of 9 April 1979 providing for the termination of the application of the provisional anti-dumping duty established in relation to imports of certain hematite pig iron originating in Brazil, *O.J.*, 11 April 1979, No L 92/10 ; Commission Recommendation No 787/79/ECSC of 20 April 1979 providing for the termination of the provisional anti-dumping duties established in relation to imports of certain steel products originating in Spain, *O.J.*, 21 April 1979, No L 99/31 ; Council Regulation (EEC) No 2306/82 of 19 August 1982 repealing the definitive anti-dumping duty on imports of certain cotton yarns originating in Turkey, *O.J.*, 21 August 1982, No L 246/14 ; Commission Decision No 1064/83/ECSC of 28 April 1983 suspending the application of the definitive anti-dumping duty and terminating the anti-subsidy proceeding concerning broad-flanged beams originating in Spain, *O.J.*, 30 April 1983, No L 116/91 ; Commission Decision 83/334/ECSC of 4 July 1983 terminating the anti-dumping proceedings concerning certain U + I sections of iron or steel originating in South Africa, *O.J.*, 6 July 1983, No L 181/26 ; Commission Decision No 1563/84/ECSC of 5 June 1984 suspending the application of the definitive anti-dumping duty on imports of concrete reinforcing bars originating in Spain, *O.J.*, 6 June 1984, No L 150/15 ; Commission Decision No 1718/85/ECSC of 21 June 1985 repealing the definitive anti-dumping duty on imports of broad-flanged beams originating in Spain, *O.J.*, 25 June 1985, No L 165/11 ; Commission Decision No 1719/85/ECSC of 21 June 1985 repealing the definitive anti-dumping duty on imports of concrete reinforcing bars originating in Spain, *O.J.*, 25 June 1985, No L 165/12 ; Commission Decision No 1957/85/ECSC of 15 July 1985 suspending the application of the definitive anti-dumping duty on imports of certain iron or steel coils originating in Brazil, *O.J.*, 17 July 1985, No L 184/6 ; Commission Decision No 1532/87/ECSC of 2 June 1987 suspending the application of the definitive anti-dumping duty on imports of certain iron or steel coils for re-rolling originating in Venezuela, *O.J.*, 3 June 1987, No L 143/16 ; Commission Decision 93/526/EEC of 6 October 1993 terminating the anti-dumping proceeding concerning imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in the Czech Republic and the Slovak Republic, *O.J.*, 9 October 1993, No L 252/39).

The same holds when trade arrangements with the dumping country are still at the negotiation stage (Council Regulation (EEC) No 1189/93 of 14 May 1993 imposing definitive anti-dumping duties on imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in Hungary, Poland and the Republic of Croatia and definitively collecting provisional anti-dumping duties, *O.J.*, 15 May 1993, No L 120/34. See also : BOUDANT, J., *L'anti-dumping communautaire*, Paris, Economica, 1991, 90).

See however : Answer of the Commission to written question No 50/68, *O.J.*, 9 July 1968, No C 68/8, where the Commission stated that the fact that exports take place within the framework of a trade agreement, is not decisive for the application of European anti-dumping law.

¹⁴⁹¹ If the dumping country does not respect the trade agreement it concluded with the Community, anti-dumping relief will be considered to be in the Community interests (Commission Decision No 3113/83/ECSC of 4 November 1983 imposing a provisional anti-dumping duty on imports of concrete reinforcing bars originating in Spain, *O.J.*, 5 November 1983, No L 303/13).

If the trade agreement provides that trade between the Community and the allegedly dumping country must take place within the scope of the respective laws and rules, which undoubtedly include the anti-dumping rules, and dumping actually occurs, anti-dumping relief will not be contrary to that trade agreement, nor to the Community interests (C.J.E.C., case C-16/90, 22 October 1991, *Eugen Nölle v Hauptzollamt Bremen-Freihafen*, E.C.R., 1991, I, (5163), 5170-5171 (Report for the Hearing : conclusions of the Council).

¹⁴⁹² Council Regulation (EEC) No 1189/93 of 14 May 1993 imposing definitive anti-dumping duties on imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in Hungary, Poland and the Republic of Croatia and definitively collecting provisional anti-dumping duties, *O.J.*, 15 May 1993, No L 120/34.

¹⁴⁹³ Council Regulation (EEC) No 1189/93 of 14 May 1993 imposing definitive anti-dumping duties on imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in Hungary, Poland and the Republic of Croatia and definitively collecting provisional anti-dumping duties, *O.J.*, 15 May 1993, No L 120/34.

- the Community interests do not call for anti-dumping relief when the government of the dumping country adopts a series of measures to control the export of the dumped product (*i.e.*, when it enters into an orderly marketing agreement)¹⁴⁹⁴ ;
- anti-dumping relief is found to be in the Community interests when the dumping threatens the renewal or the observance by third countries of the trade agreements which they have concluded with the Community¹⁴⁹⁵ ;
- the adverse effect of anti-dumping relief against dumped imports from East European countries on the Community exports under compensation agreements with those East European countries is found to be outweighed by the difficulties facing the Community production of the like product, in combination with the economic and social importance of such production¹⁴⁹⁶ ;
- the Community's asserted commitment to encourage trade or to increase economic links with East European countries in order to facilitate their transition to market economies does not exclude that anti-dumping measures should be taken¹⁴⁹⁷ ;

¹⁴⁹⁴ Commission Decision 83/126/EEC of 30 March 1983 terminating the anti-dumping proceeding concerning imports of television image and sound recorders or reproducers originating in Japan, *O.J.*, 31 March 1983, No L 86/23 ; Commission Decision 91/142/EEC of 15 March 1991 terminating the anti-dumping proceeding concerning imports of Atlantic salmon originating in Norway, *O.J.*, 16 March 1991, No L 69/32 (corrigendum, *O.J.*, 21 March 1991, No L 75/64).

¹⁴⁹⁵ Anti-dumping relief has been granted because the Commission feared that third countries which had concluded steel trade arrangements with the Community would only respect and renew these arrangements, if they saw a reasonable chance of selling the quantities provided for at the price levels agreed (Commission Decision No 2158/88/ECSC of 20 July 1988 imposing a provisional anti-dumping duty on imports of certain iron or steel sections originating in Yugoslavia or Turkey, *O.J.*, 21 July 1988, No L 190/5 ; Commission Decision No 708/89/ECSC of 17 March 1989 imposing a provisional anti-dumping duty on imports of certain flat-rolled products of iron or non-alloy steel, cold-rolled, originating in Yugoslavia, *O.J.*, 21 March 1989, No L 78/14).

¹⁴⁹⁶ Commission Regulation (EEC) No 2800/86 of 9 September 1986 imposing a provisional anti-dumping duty on imports of certain deep freezers originating in the USSR, accepting the undertakings in connection with the investigation of imports of certain deep freezers originating in Yugoslavia or in the German Democratic Republic and terminating the investigation, and terminating the proceeding concerning imports of certain deep freezers, *O.J.*, 11 September 1986, No L 259/14 ; Council Regulation (EEC) No 29/87 of 22 December 1986 imposing a definitive anti-dumping duty on imports of certain deep freezers originating in the Soviet Union, *O.J.*, 8 January 1987, No L 6/1 ; Council Regulation (EEC) No 864/87 of 23 March 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union, and definitively collecting the amounts secured as provisional duties, *O.J.*, 27 March 1987, No L 83/1. See also : Council Regulation (EEC) No 1304/82 of 25 May 1982 establishing the definitive collection of the provisional anti-dumping duty on certain welded steel tubes originating in Romania, *O.J.*, 29 May 1982, No L 150/1 ; Commission Regulation (EEC) No 1334/82 of 28 May 1982 accepting an undertaking offered in connection with the anti-dumping procedure concerning certain welded steel tubes originating in Romania, terminating that procedure and cancelling the provisional anti-dumping duty, *O.J.*, 29 May 1982, No L 150/79.

¹⁴⁹⁷ Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries ; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24 ; Commission Regulation (EC) No 1506/94 of 27 June 1994 imposing provisional duties on imports of urea ammonium nitrate solution originating in Bulgaria and Poland, *O.J.*, 30 June 1994, No L 162/16.

- there is no legal incompatibility between anti-dumping relief and the generalized preferences system¹⁴⁹⁸ nor is there an interdependence between anti-dumping relief and general preferences¹⁴⁹⁹ ;
- a preferential treatment, under European anti-dumping law, of developing countries, *i.e.*, no or less anti-dumping relief being applied, is rejected on the basis of a literal reading of Article 15 GATT Anti-dumping Code which provides «that the stage of development of exporting countries should be taken into account when examining what measures are most appropriate in a particular case, but should not determine whether or not it is appropriate to take protective measures at all»¹⁵⁰⁰ ;

¹⁴⁹⁸ Council Regulation (EEC) No 450/89 of 20 February 1989 imposing a definitive anti-dumping duty on imports of urea originating in the United States of America or Venezuela and adjusting the definitive anti-dumping duty for Saudi Arabia laid down by Regulation (EEC) No 3339/87, *O.J.*, 24 February 1989, No L 52/1.

¹⁴⁹⁹ In *potassium permanganate from Czechoslovakia, the German Democratic Republic and the People's Republic of China*, it was underscored that the benefits of the generalized Community system of preferences could not be made conditional on there being no dumping (Commission Regulation (EEC) No 2495/86 of 1 August 1986 imposing a provisional anti-dumping duty on imports of potassium permanganate originating in Czechoslovakia, the German Democratic Republic and the People's Republic of China, *O.J.*, 5 August 1986, No L 217/12).

See also :

- *urea from Venezuela*, where the advantage conferred by the generalized preferences system was taken into account and was considered to be preserved, though full anti-dumping relief (anti-dumping duty equal to the dumping margin) was granted (Council Regulation (EEC) No 450/89 of 20 February 1989 imposing a definitive anti-dumping duty on imports of urea originating in the United States of America or Venezuela and adjusting the definitive anti-dumping duty for Saudi Arabia laid down by Regulation (EEC) No 3339/87, *O.J.*, 24 February 1989, No L 52/1) ;
- *DRAMs from Japan*, where the Commission considered that the suspension of customs duties had no impact on anti-dumping proceedings because the objectives pursued by both rules are entirely different (Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79 ; corrigendum, *O.J.*, 10 February 1990, No L 38/44)).

¹⁵⁰⁰ Council Decision 87/66/EEC of 19 January 1987 accepting undertakings given in connection with imports of binder and baler twine originating in Brazil and Mexico, and terminating the investigations, *O.J.*, 5 February 1987, No L 34/55.

See also : Commission Regulation (EEC) No 724/82 of 30 March 1982 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0.75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Poland, Romania and the USSR, and terminating the proceeding in respect of imports of said products originating in Hungary, *O.J.*, 31 March 1982, No L 85/9 ; Commission Recommendation No 2975/82/ECSC of 8 November 1982 imposing a definitive anti-dumping duty on certain sheets and plates, of iron or steel, originating in Brazil, *O.J.*, 9 November 1982, No L 312/10 ; Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia, *O.J.*, 9 May 1987, No L 121/11 ; Council Regulation (EEC) No 3121/89 of 16 October 1989 modifying the anti-dumping measures applicable to imports of certain acrylic fibres originating in Mexico by introducing an anti-dumping duty on such imports, other than those from exporters to the Community whose undertakings are accepted, *O.J.*, 19 October 1989, No L 301/1 (without explicit reference to Article 15 GATT Anti-dumping Code) ; Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1.

See however : *urea from Malaysia*, where the provisional anti-dumping duty was not definitively collected because Malaysia qualified for special differential treatment under Article 15 GATT Anti-dumping Code (Commission Decision 89/143/EEC of 21 February 1989 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of urea originating in Austria, Hungary, Malaysia or Romania, confirming the undertakings accepted pursuant to Council Regulation (EEC) No 3339/87 and terminating the investigations, *O.J.*, 24 February 1989, No L 52/37). It is not sure whether this case really heralds a new and consistent interpretation of Article 15 GATT Anti-dumping Code. It seems that Article 15 GATT Anti-dumping Code was raised as an easy explanation for the non-collection of the provisional anti-dumping duty *vis-à-vis* Malaysia in order to treat it in the same way as the other exporting countries subject to the same anti-dumping proceeding. Indeed, the provisional

- a multilateral free-trading system, which implies that sales do not take place at dumped prices, is considered to be in the interests of all participants (including the Community), though good relations with the dumping countries are in the Community interests as well¹⁵⁰¹.

Clearly, the pursuance of an integrated trade policy seldom results in holding anti-dumping protection to go against the Community interests. It has, at the least, a neutral effect, but, usually, it increases trade protection since it results in anti-dumping relief being even more in the Community interests.

Such an integrated trade policy must be rejected from an economic point of view. First, the European anti-dumping authorities do not investigate whether the advantages of an integrated trade policy outweigh the net cost of anti-dumping protection¹⁵⁰². Second, as an integrated trade policy which anti-dumping relief fits into, must be protectionist by nature, it is economically wrong to give it a high value. Indeed, by giving a high value to an integrated protectionist trade policy, the European anti-dumping authorities in fact argue that the net cost of the existing protectionist trade policy is not yet high enough and must be increased by the net cost of anti-dumping protection.

Also from a legal point of view, European anti-dumping case law must be criticized in two respects. First, though Article 15 GATT Anti-dumping Code explicitly deals only with the kind of remedy which may be taken against dumping from developing countries, its scope should not be restricted to the choice between different types of anti-dumping measures. As a broader

anti-dumping duties against these other exporting countries were not collected either for reasons of either a very small provisional anti-dumping duty or the absence of exports between the imposition of the provisional anti-dumping duty and the termination of the anti-dumping investigation. The first one of these two reasons certainly did not apply to Malaysia (a provisional anti-dumping duty of 31.5 % is not small) and the second one neither probably did. This impression is further strengthened by the fact that in the definitive phase of the anti-dumping proceeding, relief was granted against Malaysia as it has against the other exporting countries. A consistent application of Article 15 GATT Anti-dumping Code, however, would not have resulted in a definitive anti-dumping relief: if Malaysia needs a special differential treatment in terms of provisional anti-dumping relief, it will also need it in terms of definitive anti-dumping relief. However, in the provisional phase of the anti-dumping proceeding, such a special differential treatment was rejected because it would have forced the Community to act in a discriminatory way against exporters engaged in the same dumping practices (Commission Regulation (EEC) No 2623/88 of 24 August 1988 imposing a provisional anti-dumping duty on imports of urea originating in Austria, Hungary, Malaysia, Romania, the USA and Venezuela, *O.J.*, 25 August 1988, No L 235/5). Thus, Malaysia was given a so-called special differential treatment in order to treat it identically as the other exporting countries.

¹⁵⁰¹ Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia, *O.J.*, 9 May 1987, No L 121/11; Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1; Commission Regulation (EEC) No 2623/88 of 24 August 1988 imposing a provisional anti-dumping duty on imports of urea originating in Austria, Hungary, Malaysia, Romania, the USA and Venezuela, *O.J.*, 25 August 1988, No L 235/5; Council Regulation (EEC) No 725/89 of 20 March 1989 imposing a definitive anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty on such imports, *O.J.*, 22 March 1989, No L 79/24.

¹⁵⁰² About the net cost of anti-dumping protection, see: *supra*, p. ...

interpretation seems to be allowed¹⁵⁰³, it might also offer the opportunity of not granting any anti-dumping relief. As required by Article 15 GATT Anti-dumping Code, no anti-dumping measure may be the most constructive remedy which is provided for by the GATT Anti-dumping Code. Indeed, a decision not to enact an anti-dumping measure is an outcome provided for under the GATT Anti-dumping Code, since this Code does not require injurious dumping to result automatically in anti-dumping relief (Article 9.1. GATT Anti-dumping Code). As that idea is rendered in the concept «Community interests» in European anti-dumping law¹⁵⁰⁴, the decision not to grant anti-dumping relief against dumping from developing countries does not go against Article 15 GATT Anti-dumping Code. The only limit to granting a preferential treatment to developing countries is the principle of non-discrimination (Article 9.2. GATT Anti-dumping Code ; Article 9(5) basic EC Regulation ; Article 13(5) basic ECSC Decision). That principle, however, does not exclude a preferential treatment of developing countries. It only requires for such preferential treatment to be grounded on objective criteria justifying a differential treatment between developing and developed countries.

Second, it is not clear why, in some anti-dumping cases, reference is made to the legal compatibility between quantitative restrictions and anti-dumping relief and why it there is concluded that anti-dumping relief is in the Community interests, whereas, in other anti-dumping cases, it is investigated whether quantitative restrictions are sufficient to remedy the injury the Community industry suffers from the dumping. It is also rather vague why the legal compatibility is invoked in respect of quantitative restrictions, but not in respect of trade agreements, though the latter usually also incorporate quantitative restrictions. Such case law seems to be characterized by arbitrariness. The fact that European anti-dumping case law has not yet underscored the legal compatibility between anti-dumping relief and trade agreements gives, moreover, the impression that anti-dumping law is applied in order to induce the dumping countries to conclude trade agreements with the Community. This impression is strengthened by the fact that, in one anti-dumping case, no anti-dumping relief was granted after the government of the dumping country entered into an orderly marketing agreement¹⁵⁰⁵. This improper use of European anti-dumping law cannot be reconciled with the purpose and the spirit of GATT and European anti-dumping law. Nevertheless, under a strict interpretation, the refusal of anti-dumping relief because of the existence of a trade agreement with the dumping country cannot be said to be illegal insofar as it is demonstrated that anti-dumping relief, in view of the trade agreement, does

¹⁵⁰³ The GATT Committee on Anti-dumping Practices provides an extensive reading of Article 15 GATT Anti-dumping Code since, according to that Committee, Article 15 allows the use of normal value standards other than the domestic market price in the country of origin (*B.I.S.D., Twenty-seventh Supplement*, Geneva, GATT, 1981, 17), though that Article does not treat of normal value determination.

¹⁵⁰⁴ *Supra*, 603.

¹⁵⁰⁵ See : Commission Decision 91/142/EEC of 15 March 1991 terminating the anti-dumping proceeding concerning imports of Atlantic salmon originating in Norway, *O.J.*, 16 March 1991, No L 69/32 (corrigendum, *O.J.*, 21 March 1991, No L 75/64).

not benefit the Community interests. Thus, through the concept «Community interest», the Community can pursue «procedural protectionism», *i.e.*, to use the loopholes in GATT in order to restrict trade in an apparently legal way¹⁵⁰⁶.

2.6. ARGUMENTS FOR THE CONTINUED EXISTENCE OF A COMMUNITY INDUSTRY

In several anti-dumping cases, it is admitted that, without anti-dumping relief, the continued existence of the Community industry would be endangered. In some of these cases it is not explained why the continued existence of the Community industry is in the Community interests¹⁵⁰⁷. Usually, however, a further explanation is given. Sometimes, that explanation

¹⁵⁰⁶ *Supra*, 80-84.

¹⁵⁰⁷ Commission Regulation (EEC) No 1631/83 of 15 June 1983 imposing a provisional anti-dumping duty on imports of certain glass textile fibres (rovings) originating in Czechoslovakia, the German Democratic Republic and Japan, accepting a price undertaking from one Japanese exporter and terminating the proceeding in respect of imports of certain glass textile fibres (mats), originating in Czechoslovakia and the German Democratic Republic, *O.J.*, 18 June 1983, No L 160/18 ; Council Regulation (EEC) No 2024/83 of 18 July 1983 establishing a definitive anti-dumping duty on 4,4'-isopropylidenediphenol originating in the United States of America, *O.J.*, 22 July 1983, No L 199/4 ; Council Regulation (EEC) No 3540/83 of 14 December 1983 imposing a definitive anti-dumping duty on imports of certain glass textile fibres (rovings) originating in the German Democratic Republic and Czechoslovakia, *O.J.*, 16 December 1983, No L 354/15 ; Commission Regulation (EEC) No 2823/85 of 7 October 1985 imposing a provisional anti-dumping duty on imports of certain clogs originating in Sweden, *O.J.*, 10 October 1985, No L 268/11 ; Council Regulation (EEC) No 264/86 of 4 February 1986 imposing a definitive anti-dumping duty on imports of certain clogs originating in Sweden and definitively collecting the provisional anti-dumping duty, *O.J.*, 7 February 1986, No L 32/1 ; Commission Decision 86/21/EEC of 4 February 1986 accepting undertakings given in connection with the anti-dumping investigation concerning imports of certain clogs originating in Sweden, *O.J.*, 7 February 1986, No L 32/28 ; Council Regulation (EEC) No 176/89 of 23 January 1989 imposing a definitive anti-dumping duty on imports of copper sulphate originating in Bulgaria or the Soviet Union, *O.J.*, 27 January 1989, No L 23/1 ; Commission Regulation (EEC) No 1937/90 of 4 July 1990 imposing a provisional anti-dumping duty on imports of pure silk typewriter ribbon fabrics originating in the People's Republic of China, and accepting an undertaking offered by the exporter, *O.J.*, 7 July 1990, No L 174/27 ; Commission Decision 90/378/EEC of 13 July 1990 accepting an undertaking given in connection with the anti-dumping review concerning imports of oxalic acid originating in Brazil and terminating the investigation, *O.J.*, 17 July 1990, No L 184/16 ; Commission Decision 91/392/EEC of 21 June 1991 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain asbestos cement pipes originating in Turkey, and terminating the investigation, *O.J.*, 31 July 1991, No L 209/37.

is very brief, namely in cases where the economic and/or social importance¹⁵⁰⁸, the strategic¹⁵⁰⁹ or technological importance¹⁵¹⁰ of the Community industry is referred to. In

1508 Council Regulation (EEC) No 550/83 of 8 March 1983 imposing a definitive anti-dumping duty on imports of certain sodium carbonate originating in the United States of America, *O.J.*, 10 March 1983, No L 64/23; Commission Regulation (EEC) No 1613/83 of 15 June 1983 imposing a provisional anti-dumping duty on imports of unwrought nickel, not alloyed, in the form of cathodes produced by electrolysis, either uncut or cut into squares, originating in the Soviet Union, *O.J.*, 17 June 1983, No L 159/43; Commission Regulation (EEC) No 512/84 of 27 February 1984 imposing a provisional anti-dumping duty on imports of vinyl acetate monomer originating in Canada, *O.J.*, 29 February 1984, No L 58/17; Council Regulation (EEC) No 1826/84 of 28 June 1984 imposing a definitive anti-dumping duty on imports of vinyl acetate monomer originating in Canada, *O.J.*, 29 June 1984, No L 170/70; Council Regulation (EEC) No 2089/84 of 19 July 1984 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 21 July 1984, No L 193/1; Council Regulation (EEC) No 1739/85 of 24 June 1985 imposing a definitive anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan, *O.J.*, 27 June 1985, No L 167/3; Council Regulation (EEC) No 1058/86 of 8 April 1986 imposing a definitive anti-dumping duty on imports of certain electronic scales originating in Japan, *O.J.*, 12 April 1986, No L 97/1; Commission Regulation (EEC) No 2495/86 of 1 August 1986 imposing a provisional anti-dumping duty on imports of potassium permanganate originating in Czechoslovakia, the German Democratic Republic and the People's Republic of China, *O.J.*, 5 August 1986, No L 217/12; Commission Regulation (EEC) No 2800/86 of 9 September 1986 imposing a provisional anti-dumping duty on imports of certain deep freezers originating in the USSR, accepting the undertakings in connection with the investigation of imports of certain deep freezers originating in Yugoslavia or in the German Democratic Republic and terminating the investigation, and terminating the proceeding concerning imports of certain deep freezers, *O.J.*, 11 September 1986, No L 259/14; Council Decision 86/468/EEC of 22 September 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain acrylic fibres originating in Israel, Mexico, Romania and Turkey and terminating the investigation, *O.J.*, 24 September 1986, No L 272/29; Council Regulation (EEC) No 29/87 of 22 December 1986 imposing a definitive anti-dumping duty on imports of certain deep freezers originating in the Soviet Union, *O.J.*, 8 January 1987, No L 6/1; Commission Regulation (EEC) No 1361/87 of 18 May 1987 imposing a provisional anti-dumping duty on imports of ferro-silico-calcium/calcium silicide originating in Brazil, *O.J.*, 19 May 1987, No L 129/5; Commission Regulation (EEC) No 2409/87 of 6 August 1987 imposing a provisional anti-dumping duty on imports of ferro-silicon originating in Brazil and accepting undertakings offered by Italmagnesio SA of Brazil and from Promsyrrio-Import of the USSR, *O.J.*, 8 August 1987, No L 219/24; Commission Regulation (EEC) No 2450/87 of 12 August 1987 imposing a provisional anti-dumping duty on imports of mercury originating in the Union of Soviet Socialist Republics, *O.J.*, 14 August 1987, No L 227/8; Commission Regulation (EEC) No 761/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten ores and concentrates originating in the People's Republic of China, and terminating the proceeding concerning imports originating in Hong Kong, *O.J.*, 30 March 1990, No L 83/23.

1509 Commission Regulation (EEC) No 1613/83 of 15 June 1983 imposing a provisional anti-dumping duty on imports of unwrought nickel, not alloyed, in the form of cathodes produced by electrolysis, either uncut or cut into squares, originating in the Soviet Union, *O.J.*, 17 June 1983, No L 159/43; Council Regulation (EEC) No 2978/83 of 24 October 1983 amending Regulation (EEC) No 191/80 imposing a definitive anti-dumping duty on lithium hydroxide originating in the United States of America and the Soviet Union, *O.J.*, 26 October 1983, No L 294/3; Commission Decision 83/522/EEC of 24 October 1983 accepting the undertaking given in connection with the anti-dumping proceeding in respect of imports of lithium hydroxide originating in the People's Republic of China and terminating that proceeding, *O.J.*, 26 October 1983, No L 294/29; Council Regulation (EEC) No 2089/84 of 19 July 1984 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 21 July 1984, No L 193/1; Council Regulation (EEC) No 1739/85 of 24 June 1985 imposing a definitive anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan, *O.J.*, 27 June 1985, No L 167/3; Commission Regulation (EEC) No 1361/87 of 18 May 1987 imposing a provisional anti-dumping duty on imports of ferro-silico-calcium/calcium silicide originating in Brazil, *O.J.*, 19 May 1987, No L 129/5; Commission Regulation (EEC) No 2409/87 of 6 August 1987 imposing a provisional anti-dumping duty on imports of ferro-silicon originating in Brazil and accepting undertakings offered by Italmagnesio SA of Brazil and from Promsyrrio-Import of the USSR, *O.J.*, 8 August 1987, No L 219/24; Council Regulation (EEC) No 3687/87 of 8 December 1987 imposing a definitive anti-dumping duty on imports of mercury originating in the Soviet Union and definitively collecting the provisional anti-dumping duty imposed on such imports, *O.J.*, 10 December 1987, No L 346/27; Commission Regulation (EEC) No 761/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten ores and concentrates originating in the People's Republic of China, and terminating the proceeding concerning imports originating in Hong Kong, *O.J.*, 30 March 1990, No L 83/23; Commission Regulation (EEC) No 797/93 of 30 March 1993 imposing a provisional anti-dumping duty on imports of ferro-chrome with a carbon content by weight of max. 0,5 % (low carbon ferro-chrome) originating in Kazakhstan, Russia and Ukraine, *O.J.*, 2 April 1993, No L 80/8. See also: Answer of the Commission to written question Nos 188-191/83, *O.J.*, 5 October 1983, No C 266/20.

1510 Council Regulation (EEC) No 1058/86 of 8 April 1986 imposing a definitive anti-dumping duty on imports of certain electronic scales originating in Japan, *O.J.*, 12 April 1986, No L 97/1; Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5; Commission Regulation (EC) No 534/94 of 9 March 1994 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, *O.J.*, 11 March 1994, No L 68/5.

other cases, the explanation is more elaborate and tries to demonstrate the high technological importance of the Community industry¹⁵¹¹, the high degree of innovation and competitiveness as a result of considerable investment¹⁵¹², the multiple uses which may be made of the like

¹⁵¹¹ Commission Regulation (EEC) No 2684/88 of 26 August 1988 imposing a provisional anti-dumping duty on certain imports of video cassette recorders originating in Japan and the Republic of Korea, *O.J.*, 31 August 1988, No L 240/5; Commission Regulation (EEC) No 4062/88 of 23 December 1988 imposing a provisional anti-dumping duty on imports of video cassettes and video tape reels originating in the Republic of Korea and Hong Kong, *O.J.*, 24 December 1988, No L 356/47; Council Regulation (EEC) No 501/89 of 27 February 1989 imposing a definitive anti-dumping duty on imports of certain video cassette recorders originating in Japan and the Republic of Korea and definitively collecting the provisional duty, *O.J.*, 28 February 1989, No L 57/55; Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27); Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1; Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79; corrigendum, *O.J.*, 10 February 1990, No L 38/44); Commission Regulation (EEC) No 665/90 of 16 March 1990 imposing a provisional anti-dumping duty on imports of ferrobore alloy originating in Japan, *O.J.*, 20 March 1990, No L 73/6; Commission Decision 90/138/EEC of 16 March 1990 accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of certain diesel engines originating in Finland and Sweden, and terminating the investigation, *O.J.*, 22 March 1990, No L 76/28; Commission Regulation (EEC) No 720/90 of 22 March 1990 imposing a provisional anti-dumping duty on imports of silicon metal originating in the People's Republic of China, *O.J.*, 27 March 1990, No L 80/9; Commission Regulation (EEC) No 1613/90 of 13 June 1990 imposing a provisional anti-dumping duty on imports of ball bearings with a greatest external diameter not exceeding 30 mm originating in Thailand, *O.J.*, 16 June 1990, No L 152/24; Council Regulation (EEC) No 2112/90 of 23 July 1990 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan and collecting definitively the provisional duty, *O.J.*, 25 July 1990, No L 193/1; Council Regulation (EEC) No 2685/90 of 17 September 1990 amending Regulation (EEC) No 2089/84 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 20 September 1990, No L 256/1 (corrigendum, *O.J.*, 10 January 1991, No L 7/38); Commission Regulation (EEC) No 3262/90 of 5 November 1990 imposing a provisional anti-dumping duty on imports of audio tapes in cassettes originating in Japan, the Republic of Korea and Hong Kong, *O.J.*, 13 November 1990, No L 313/5 (corrigendum, *O.J.*, 12 January 1991, No L 9/36); Commission Regulation (EEC) No 129/91 of 11 January 1991 imposing a provisional anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China, *O.J.*, 19 January 1991, No L 14/31; Council Regulation (EEC) No 577/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as EPROMs (erasable programmable read only memories) originating in Japan, *O.J.*, 12 March 1991, No L 65/1; Commission Regulation (EEC) No 2805/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports into the Community of certain thermal paper originating in Japan, *O.J.*, 26 September 1991, No L 270/15; Commission Regulation (EEC) No 313/92 of 4 February 1992 imposing a provisional anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in South Korea, *O.J.*, 11 February 1992, No L 34/8; Commission Decision No 891/92/ECSC of 30 March 1992 imposing a provisional anti-dumping duty on imports of certain semi-finished products of alloy steel, originating in Turkey and Brazil, *O.J.*, 9 April 1992, No L 95/26; Commission Regulation (EEC) No 2686/92 of 16 September 1992 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea, *O.J.*, 17 September 1992, No L 272/13; Council Regulation (EEC) No 611/93 of 15 March 1993 imposing a definitive anti-dumping duty on imports into the Community of certain electronic microcircuits known as DRAMs originating in the Republic of Korea and exported by companies not exempted from this duty, and collecting definitively the provisional anti-dumping duty, *O.J.*, 18 March 1993, No L 66/1; Council Regulation (EEC) No 993/93 of 26 April 1993 imposing a definitive anti-dumping duty on imports of certain electronic weighing scales originating in Japan, *O.J.*, 29 April 1993, No L 104/4; Commission Regulation (EEC) No 3029/93 of 29 October 1993 imposing provisional antidumping duties on imports of television camera systems originating in Japan, *O.J.*, 30 October 1993, No L 271/1.

¹⁵¹² Commission Decision 91/512/EEC of 25 July 1991 accepting undertakings given in connection with the review of anti-dumping measures concerning imports of artificial corundum originating in the Soviet Union, Hungary, Poland, Czechoslovakia and the People's Republic of China and in connection with the anti-dumping proceeding concerning imports of artificial corundum originating in Brazil and Yugoslavia, and terminating the investigation, *O.J.*, 2 October 1991, No L 275/27; Commission Regulation (EEC) No 313/92 of 4 February 1992 imposing a provisional anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in South Korea, *O.J.*, 11 February 1992, No L 34/8; Commission Regulation (EEC) No 2720/93 of 28 September 1993 imposing a provisional anti-dumping duty on imports of isobutanol originating in the Russian Federation, *O.J.*, 2 October 1993, No L 246/12.

product¹⁵¹³, the importance of Community production of the like product because of environmental reasons¹⁵¹⁴, the strategic importance of Community production because of the applications and uses of the like product¹⁵¹⁵, the strategic importance in view of the national stockpiling programme set up by some Member State¹⁵¹⁶, the widespread repercussions the shutdown of the Community industry would have upstream and downstream of the production process¹⁵¹⁷, the economic, social, technological and/or strategic importance of the industry in

1513 Commission Regulation (EEC) No 3074/89 of 11 October 1989 imposing a provisional anti-dumping duty on imports of welded tubes originating in Yugoslavia and Romania, *O.J.*, 13 October 1989, No L 294/10 ; Council Regulation (EEC) No 385/90 of 12 February 1990 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in Czechoslovakia and definitively collecting the provisional anti-dumping duty imposed on those imports, *O.J.*, 16 February 1990, No L 42/1 ; Commission Decision 90/196/EEC of 10 April 1990 terminating the anti-dumping proceeding concerning imports of methenamine (hexamethylenetetramine) originating in Hungary and Yugoslavia and accepting undertakings offered in connection with the proceeding concerning imports of methenamine (hexamethylenetetramine) originating in Bulgaria, Czechoslovakia, Poland and Romania, *O.J.*, 24 April 1990, No L 104/14 ; Commission Regulation (EEC) No 1537/90 of 28 May 1990 imposing a provisional anti-dumping duty on imports of potassium permanganate originating in the USSR, *O.J.*, 8 June 1990, No L 145/9 ; Commission Regulation (EEC) No 2051/90 of 17 July 1990 imposing a temporary anti-dumping duty on imports of woven polyolefin bags originating in the People's Republic of China, *O.J.*, 19 July 1990, No L 187/36 (corrigendum, *O.J.*, 20 September 1990, No L 256/38) ; Commission Regulation (EEC) No 3617/90 of 11 December 1990 imposing a provisional anti-dumping duty on imports of certain welded tubes of iron or non-alloy steel, originating in Turkey or in Venezuela and accepting undertakings offered in connection with such imports, *O.J.*, 15 December 1990, No L 351/17.

1514 Commission Decision 90/196/EEC of 10 April 1990 terminating the anti-dumping proceeding concerning imports of methenamine (hexamethylenetetramine) originating in Hungary and Yugoslavia and accepting undertakings offered in connection with the proceeding concerning imports of methenamine (hexamethylenetetramine) originating in Bulgaria, Czechoslovakia, Poland and Romania, *O.J.*, 24 April 1990, No L 104/14. See also : Commission Decision 91/512/EEC of 25 July 1991 accepting undertakings given in connection with the review of anti-dumping measures concerning imports of artificial corundum originating in the Soviet Union, Hungary, Poland, Czechoslovakia and the People's Republic of China and in connection with the anti-dumping proceeding concerning imports of artificial corundum originating in Brazil and Yugoslavia, and terminating the investigation, *O.J.*, 2 October 1991, No L 275/27, where the continued existence of the Community industry was motivated by its exemplary investment in anti-pollution installations.

1515 Council Regulation (EEC) No 577/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as EPROMs (erasable programmable read only memories) originating in Japan, *O.J.*, 12 March 1991, No L 65/1 ; Commission Regulation (EEC) No 1808/92 of 30 June 1992 imposing a provisional anti-dumping duty on imports of ferro-silicon originating in Poland and Egypt, *O.J.*, 3 July 1992, No L 183/8 ; Commission Regulation (EC) No 1783/94 of 18 July 1994 imposing a provisional anti-dumping duty on imports of furfuraldehyde originating in the People's Republic of China, *O.J.*, 21 July 1994, No L 186/11.

1516 Council Regulation (EEC) No 2717/93 of 28 September 1993 imposing a definitive anti-dumping duty on imports of ferro-chrome with a carbon content by weight of maximum 0,5 % (low carbon ferro-chrome), originating in Kazakhstan, Russia and Ukraine, *O.J.*, 2 October 1993, No L 246/1/

1517 Commission Regulation (EEC) No 2720/93 of 28 September 1993 imposing a provisional anti-dumping duty on imports of isobutanol originating in the Russian Federation, *O.J.*, 2 October 1993, No L 246/12 ; Commission Regulation (EEC) No 3029/93 of 29 October 1993 imposing provisional antidumping duties on imports of television camera systems originating in Japan, *O.J.*, 30 October 1993, No L 271/1 ; Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50.

the Community processing the like product¹⁵¹⁸, the importance of the suppliers of the Community industry¹⁵¹⁹ or the fact that the Community industry is a key part of a more

¹⁵¹⁸ Commission Regulation (EEC) No 3019/86 of 30 September 1986 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania and the USSR, *O.J.*, 1 October 1986, No L 280/68; Council Regulation (EEC) No 864/87 of 23 March 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union, and definitively collecting the amounts secured as provisional duties, *O.J.*, 27 March 1987, No L 83/1; Council Regulation (EEC) No 2382/87 of 5 August 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Yugoslavia, *O.J.*, 7 August 1987, No L 218/2; Commission Regulation (EEC) No 3074/89 of 11 October 1989 imposing a provisional anti-dumping duty on imports of welded tubes originating in Yugoslavia and Romania, *O.J.*, 13 October 1989, No L 294/10; Commission Regulation (EEC) No 3617/90 of 11 December 1990 imposing a provisional anti-dumping duty on imports of certain welded tubes of iron or non-alloy steel, originating in Turkey or in Venezuela and accepting undertakings offered in connection with such imports, *O.J.*, 15 December 1990, No L 351/17; Council Regulation (EEC) No 577/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as EPROMs (erasable programmable read only memories) originating in Japan, *O.J.*, 12 March 1991, No L 65/1; Commission Decision 91/512/EEC of 25 July 1991 accepting undertakings given in connection with the review of anti-dumping measures concerning imports of artificial corundum originating in the Soviet Union, Hungary, Poland, Czechoslovakia and the People's Republic of China and in connection with the anti-dumping proceeding concerning imports of artificial corundum originating in Brazil and Yugoslavia, and terminating the investigation, *O.J.*, 2 October 1991, No L 275/27; Commission Regulation (EEC) No 1031/92 of 23 April 1992 imposing a provisional anti-dumping duty on imports of potassium chloride (potash) originating in Belarus, Russia or Ukraine, *O.J.*, 28 April 1992, No L 110/5; Commission Regulation (EEC) No 3296/92 of 12 November 1992 imposing a provisional anti-dumping duty on imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in Czechoslovakia, Hungary, Poland and the Republic of Croatia and terminating the anti-dumping proceeding with regard to the Republics of Serbia and of Montenegro, the former Yugoslav Republic of Macedonia, the Republic of Bosnia-Herzegovina and the Republic of Slovenia, *O.J.*, 14 November 1992, No L 328/15; Commission Decision 93/479/EEC of 30 July 1993 accepting undertakings offered in connection with the review of anti-dumping measures applicable to certain imports of monosodium glutamate originating in Indonesia, the Republic of Korea, Taiwan and Thailand, *O.J.*, 4 September 1993, No L 225/35.

¹⁵¹⁹ Commission Regulation (EEC) No 3074/89 of 11 October 1989 imposing a provisional anti-dumping duty on imports of welded tubes originating in Yugoslavia and Romania, *O.J.*, 13 October 1989, No L 294/10; Commission Decision 90/241/EEC of 22 May 1990 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of photo albums originating in South Korea and Hong Kong, and terminating the investigation, *O.J.*, 31 May 1990, No L 138/48; Commission Regulation (EEC) No 3617/90 of 11 December 1990 imposing a provisional anti-dumping duty on imports of certain welded tubes of iron or non-alloy steel, originating in Turkey or in Venezuela and accepting undertakings offered in connection with such imports, *O.J.*, 15 December 1990, No L 351/17; Council Regulation (EEC) No 3017/92 of 19 October 1992 modifying the anti-dumping duties following the review of the anti-dumping measures applicable to imports of synthetic polyester fibres originating in Romania, Taiwan, Turkey and the Republics of Serbia and of Montenegro and the former Yugoslav Republic of Macedonia and terminating the said review in respect of imports of synthetic polyester fibres originating in Mexico and the United States of America, *O.J.*, 22 October 1992, No L 306/1 (corrigendum, *O.J.*, 6 February 1993, No L 30/68); Commission Regulation (EEC) No 3296/92 of 12 November 1992 imposing a provisional anti-dumping duty on imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in Czechoslovakia, Hungary, Poland and the Republic of Croatia and terminating the anti-dumping proceeding with regard to the Republics of Serbia and of Montenegro, the former Yugoslav Republic of Macedonia, the Republic of Bosnia-Herzegovina and the Republic of Slovenia, *O.J.*, 14 November 1992, No L 328/15.

general industry¹⁵²⁰. The consideration that the Community would be entirely dependent on outside sources¹⁵²¹ or the threat to the securities¹⁵²² or the stability¹⁵²³ of supplies of

¹⁵²⁰ C.J.E.C., case 156/87, 14 March 1990, *Gestetner Holdings plc v Council and Commission*, E.C.R., 1990, I, (781), 843; C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, E.C.R., 1992, I, (1335), 1405; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, E.C.R., 1992, I, (1409), 1488; C.J.E.C., case C-176/87, 10 March 1992, *Konishiroku Photo Industry Co. Ltd v Council*, E.C.R., 1992, I, (1493), 1532; C.J.E.C., case C-177/87, 10 March 1992, *Sanyo Electric Co. Ltd v Council*, E.C.R., 1992, I, (1535), 1573; C.J.E.C., case C-179/87, 10 March 1992, *Sharp Corporation v Council*, E.C.R., 1992, I, (1635), 1685; Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, O.J., 26 August 1986, No L 239/5; Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, O.J., 24 February 1987, No L 54/12; Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, O.J., 26 May 1988, No L 130/12; Commission Regulation (EEC) No 2005/88 of 5 July 1988 imposing a provisional anti-dumping duty on imports of serial impact fully formed character printers originating in Japan, O.J., 8 July 1988, No L 177/1; Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, O.J., 24 November 1988, No L 317/33; Council Regulation (EEC) No 34/89 of 5 January 1989 imposing a definitive anti-dumping duty on imports of serial impact fully formed (SIFF) character printers originating in Japan, O.J., 7 January 1989, No L 5/23; Commission Regulation (EEC) No 1034/91 of 23 April 1991 imposing a provisional anti-dumping duty on imports of video tapes in cassettes originating in the People's Republic of China, O.J., 26 April 1991, No L 106/15; Council Regulation (EEC) No 1115/91 of 29 April 1991 imposing definitive anti-dumping duties in connection with the review of anti-dumping measures concerning imports of ferro-silicon originating in Brazil, O.J., 3 May 1991, No L 111/1; Commission Decision 91/240/EEC of 29 April 1991 accepting undertakings offered by certain exporters in connection with the review of anti-dumping measures concerning imports of ferro-silicon originating in Brazil and terminating the investigation as regards those exporters, O.J., 3 May 1991, No L 111/47; Commission Decision No 891/92/ECSC of 30 March 1992 imposing a provisional anti-dumping duty on imports of certain semi-finished products of alloy steel, originating in Turkey and Brazil, O.J., 9 April 1992, No L 95/26; Commission Regulation (EEC) No 2686/92 of 16 September 1992 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea, O.J., 17 September 1992, No L 272/13; Council Regulation (EEC) No 993/93 of 26 April 1993 imposing a definitive anti-dumping duty on imports of certain electronic weighing scales originating in Japan, O.J., 29 April 1993, No L 104/4; Commission Regulation (EEC) No 2172/93 of 30 July 1993 imposing provisional anti-dumping duties on imports of ethanolamine originating in the United States of America, O.J., 4 August 1993, No L 195/5; Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, O.J., 1 October 1994, No L 255/50.

¹⁵²¹ Commission Regulation (EEC) No 3541/82 of 22 December 1982 imposing a provisional anti-dumping duty on imports of natural magnesite, caustic-burned, originating in the People's Republic of China, O.J., 30 December 1982, No L 371/21; Commission Regulation (EEC) No 3542/82 of 22 December 1982 imposing a provisional anti-dumping duty on imports of natural magnesite, dead-burned (sintered), originating in the People's Republic of China and in North Korea, O.J., 30 December 1982, No L 371/25; Council Regulation (EEC) No 551/83 of 8 March 1983 imposing a definitive anti-dumping duty on kraftliner paper and board originating in the United States of America and accepting undertakings given in connection with the review of the anti-dumping proceeding on kraftliner paper and board originating in Austria, Canada, Finland, Portugal, the Soviet Union and Sweden, O.J., 10 March 1983, No L 64/25; Commission Regulation (EEC) No 985/83 of 26 April 1983 imposing a provisional anti-dumping duty on imports of barium chloride originating in the People's Republic of China and the German Democratic Republic, O.J., 27 April 1983, No L 110/11; Commission Decision 83/306/EEC of 16 June 1983 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of low carbon ferro-chromium originating in South Africa, Sweden, Turkey and Zimbabwe, and terminating that proceeding, O.J., 21 June 1983, No L 161/15; Council Regulation (EEC) No 2370/83 of 19 August 1983 imposing a definitive anti-dumping duty on imports of barium chloride originating in the People's Republic of China and in the German Democratic Republic, O.J., 20 August 1983, No L 228/28; Commission Decision 84/129/EEC of 6 March 1984 terminating the anti-dumping proceeding concerning imports of caustic-burned natural magnesite originating in the People's Republic of China, O.J., 8 March 1984, No L 66/32; Commission Regulation (EEC) No 997/85 of 18 April 1985 imposing a provisional anti-dumping duty on imports of glycine originating in Japan, O.J., 19 April 1985, No L 107/8; Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, O.J., 22 June 1985, No L 163/1; Commission Decision 86/36/EEC of 26 February 1986 accepting undertakings entered into in connection with the anti-dumping proceeding concerning imports into Greece of certain categories of glass originating in Turkey, Yugoslavia, Romania, Bulgaria, Hungary and Czechoslovakia and terminating the investigation, O.J., 28 February 1986, No L 51/73; Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, O.J., 26 August 1986, No L 239/5; Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, O.J., 24 February 1987, No L 54/12; Commission Regulation (EEC) No 707/89 of 17 March 1989 imposing a provisional anti-dumping duty on imports of calcium metal originating in the People's Republic of China or the Soviet Union, O.J., 21 March 1989, No L 78/10; Commission Regulation (EEC) No 2402/89 of 31 July 1989 imposing a provisional anti-dumping duty on imports of barium chloride originating in the People's Republic of China or the German Democratic Republic, O.J., 4 August 1989, No L 227/24; Council Regulation (EEC) No 2808/89 of 18 September 1989 imposing a definitive anti-dumping duty on imports of calcium metal originating in the People's Republic of China and the Soviet Union and definitively collecting the provisional anti-dumping duty

the like product after the Community industry would have disappeared, are also a reason for maintaining the Community industry.

imposed on such imports, *O.J.*, 20 September 1989, No L 271/1 ; Commission Decision 89/573/EEC of 30 October 1989 terminating the investigation concerning imports of dicumyl peroxide originating in Taiwan and accepting an undertaking offered in the context of the review concerning imports of dicumyl peroxide originating in Japan and terminating the proceeding, *O.J.*, 31 October 1989, No L 317/49 ; Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79 ; corrigendum, *O.J.*, 10 February 1990, No L 38/44) ; Commission Regulation (EEC) No 720/90 of 22 March 1990 imposing a provisional anti-dumping duty on imports of silicon metal originating in the People's Republic of China, *O.J.*, 27 March 1990, No L 80/9 ; Commission Regulation (EEC) No 761/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten ores and concentrates originating in the People's Republic of China, and terminating the proceeding concerning imports originating in Hong Kong, *O.J.*, 30 March 1990, No L 83/23 ; Commission Decision 90/196/EEC of 10 April 1990 terminating the anti-dumping proceeding concerning imports of methenamine (hexamethylenetetramine) originating in Hungary and Yugoslavia and accepting undertakings offered in connection with the proceeding concerning imports of methenamine (hexamethylenetetramine) originating in Bulgaria, Czechoslovakia, Poland and Romania, *O.J.*, 24 April 1990, No L 104/14 ; Council Regulation (EEC) No 2112/90 of 23 July 1990 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan and collecting definitively the provisional duty, *O.J.*, 25 July 1990, No L 193/1 ; Commission Regulation (EEC) No 3421/90 of 26 November 1990 imposing a provisional anti-dumping duty on imports of aspartame originating in Japan and the United States of America, *O.J.*, 29 November 1990, No L 330/16 ; Council Regulation (EEC) No 577/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as EPROMs (erasable programmable read only memories) originating in Japan, *O.J.*, 12 March 1991, No L 65/1 ; Council Regulation (EEC) No 1115/91 of 29 April 1991 imposing definitive anti-dumping duties in connection with the review of anti-dumping measures concerning imports of ferro-silicon originating in Brazil, *O.J.*, 3 May 1991, No L 111/1 ; Commission Decision 91/240/EEC of 29 April 1991 accepting undertakings offered by certain exporters in connection with the review of anti-dumping measures concerning imports of ferro-silicon originating in Brazil and terminating the investigation as regards those exporters, *O.J.*, 3 May 1991, No L 111/47 ; Commission Regulation (EEC) No 797/93 of 30 March 1993 imposing a provisional anti-dumping duty on imports of ferro-chrome with a carbon content by weight of max. 0,5 % (low carbon ferro-chrome) originating in Kazakhstan, Russia and Ukraine, *O.J.*, 2 April 1993, No L 80/8 ; Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5 ; Commission Regulation (EEC) No 2463/93 of 1 September 1993 imposing a provisional anti-dumping duty on imports of fluorspar originating in the People's Republic of China, *O.J.*, 7 September 1993, No L 226/3 ; Commission Regulation (EEC) No 2477/93 of 6 September 1993 imposing a provisional anti-dumping duty on imports of certain photo albums originating in the People's Republic of China, *O.J.*, 9 September 1993, No L 228/16 ; Commission Regulation (EEC) No 2581/93 of 20 September 1993 imposing provisional anti-dumping duties on imports of ferro-silicon originating in South Africa and the People's Republic of China, *O.J.*, 22 September 1993, No L 237/2 ; Council Regulation (EC) No 3359/93 of 2 December 1993 imposing amended anti-dumping measures on imports of ferro-silicon originating in Russia, Kazakhstan, Ukraine, Iceland, Norway, Sweden, Venezuela and Brazil, *O.J.*, 9 December 1993, No L 302/1 ; Commission Regulation (EC) No 534/94 of 9 March 1994 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, *O.J.*, 11 March 1994, No L 68/5 ; Commission Regulation (EC) No 1648/94 of 6 July 1994 imposing a provisional anti-dumping duty on imports of furazolidone originating in the People's Republic of China, *O.J.*, 8 July 1994, No L 174/4 ; Commission Regulation (EC) No 1783/94 of 18 July 1994 imposing a provisional anti-dumping duty on imports of furfuraldehyde originating in the People's Republic of China, *O.J.*, 21 July 1994, No L 186/11.

1522 For example, in *hematite pig iron from Brazil, Poland, Russia and Ukraine*, the Commission found that existing worldwide production capacity for the product involved was rapidly diminishing as a result of environmental and economic policy changes in the exporting countries. Therefore, the Community interests were found to call for the maintaining of the Community industry (Commission Decision No 67/94/ECSC of 12 January 1994 imposing a provisional anti-dumping duty on imports into the Community of hematite pig iron, originating in Brazil, Poland, Russia and Ukraine, *O.J.*, 15 January 1994, No L 12/5).

Commission Regulation (EEC) No 2051/90 of 17 July 1990 imposing a temporary anti-dumping duty on imports of woven polyolefin bags originating in the People's Republic of China, *O.J.*, 19 July 1990, No L 187/36 (corrigendum, *O.J.*, 20 September 1990, No L 256/38) ; Commission Regulation (EEC) No 797/93 of 30 March 1993 imposing a provisional anti-dumping duty on imports of ferro-chrome with a carbon content by weight of max. 0,5 % (low carbon ferro-chrome) originating in Kazakhstan, Russia and Ukraine, *O.J.*, 2 April 1993, No L 80/8.

1523 Commission Regulation (EEC) No 2720/93 of 28 September 1993 imposing a provisional anti-dumping duty on imports of isobutanol originating in the Russian Federation, *O.J.*, 2 October 1993, No L 246/12 ; Council Regulation (EC) No 2819/94 of 17 November 1994 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in the People's Republic of China, *O.J.*, 19 November 1994, No L 298/32.

The many reasons why the continued existence of the Community industry is in the Community interests, clearly show that the importance of each industry for the Community may always be demonstrated.

For example, the Community industry of photo albums has been found to be of crucial importance for the Community merely because its disappearance would affect the upstream industry, *i.e.*, the suppliers of paper, board, PVC foil etc. would suffer a consequent decline in demand¹⁵²⁴. However, no explanation was offered why it was in the Community interests to protect these suppliers against a decline in demand.

Similarly, it is possible to show that not only serial-impact dot-matrix (SIDM) printers¹⁵²⁵ and serial-impact fully formed character (SIFF) printers¹⁵²⁶, but also electronic typewriters¹⁵²⁷ are a key part of office equipment industry :

- the Council, in *electronic typewriters from Japan*¹⁵²⁸, was not convinced by the Japanese exporters' argument «that the future of the overall business equipment and office automation industry depends not so much on the viability of the electronic typewriter industry but rather on the viability of the office computer industry». It held that it is not for the Community authorities to prejudice the outcome of the argued evolution from electronic typewriter to computer as key element of business equipment and office automation, by sacrificing the Community electronic typewriter producers ;
- in *SIFF printers from Japan*¹⁵²⁹ the Commission, however, recognized that other print technologies had reduced the importance of SIFF printers in the market. Nevertheless, on the basis of the Community industry's forecasts, it considered itself qualified to predict that SIFF printers were, at least in the near future, to occupy a significant share of the total printer market. Consequently, it was able to draw the same conclusion in respect of SIFF printers as in respect of SIDM printers¹⁵³⁰ that :
 «(in view of the fact) that printers are the computer's main output device and the only device capable of providing the end user with a hard copy of the computer input and output (...) printer technology has to be developed in parallel with computer technology in terms of configuration, sophistication and

¹⁵²⁴ Commission Decision 90/241/EEC of 22 May 1990 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of photo albums originating in South Korea and Hong Kong, and terminating the investigation, *O.J.*, 31 May 1990, No L 138/48.

¹⁵²⁵ Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12 ; Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 24 November 1988, No L 317/33.

¹⁵²⁶ Commission Regulation (EEC) No 2005/88 of 5 July 1988 imposing a provisional anti-dumping duty on imports of serial impact fully formed character printers originating in Japan, *O.J.*, 8 July 1988, No L 177/1 ; Council Regulation (EEC) No 34/89 of 5 January 1989 imposing a definitive anti-dumping duty on imports of serial impact fully formed (SIFF) character printers originating in Japan, *O.J.*, 7 January 1989, No L 5/23.

¹⁵²⁷ Commission Regulation (EEC) No 3643/84 of 20 December 1984 imposing a provisional anti-dumping duty on imports of electronic typewriters originating in Japan and terminating the anti-dumping proceeding with regard to Nakajima All Co. Ltd, *O.J.*, 22 December 1984, No L 335/43 ; Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1.

¹⁵²⁸ Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1.

¹⁵²⁹ Commission Regulation (EEC) No 2005/88 of 5 July 1988 imposing a provisional anti-dumping duty on imports of serial impact fully formed character printers originating in Japan, *O.J.*, 8 July 1988, No L 177/1 ; Council Regulation (EEC) No 34/89 of 5 January 1989 imposing a definitive anti-dumping duty on imports of serial impact fully formed (SIFF) character printers originating in Japan, *O.J.*, 7 January 1989, No L 5/23.

¹⁵³⁰ Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12 ; Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 24 November 1988, No L 317/33.

power. Since printers and computers are closely connected, the abandoning of, or substantial cuts in, the production of printers by the Community industry would also have serious negative effects on the electronic data-processing industry in the Community.»

Furthermore, the Commission considered that :

«since the numerous printer technologies are fast developing, printer manufacturers have to be in a healthy economic position in order to participate in this development. It is indeed evident that only companies which have sufficient resources can make the market for the latest generation of printers, i.e. those possessing non-impact technologies such as laser, ion deposition, thermal or ink-jet techniques.»

Both examples show that only a little good will is required for demonstrating the vital character of any industry. The argument that the continued existence of an industry is in the Community interests is based on a political evaluation of the advantages of preserving a national industry from the costs of anti-dumping protection. Indeed, mere legal and/or economic criteria do not indicate whether or not an industry is essential for the welfare of the Community. From a legal point of view, European anti-dumping case law can only be criticized for its sometimes brief statements of reasons. From an economic point of view, anti-dumping protection is not the most adequate instrument to preserve the continued existence of a Community industry. Sometimes, any government intervention will be superfluous. For example, if the European anti-dumping authorities can acknowledge that the production capacity for the dumped product in the dumping countries is rapidly diminishing, but that there will be long-run supply requirements in the Community¹⁵³¹, the Community industry should also have this information. In view of that information, they should know that the dumping will only be temporarily and, therefore, they should stay in the market. Moreover, in cases where anti-dumping relief is necessary for maintaining the Community industry, the same objective may be realized by a production subsidy to the Community industry. As such a production subsidy does not affect the Community consumers' decision, it cannot cause a loss in consumer surplus and, consequently, it avoids the net cost of anti-dumping protection¹⁵³². As to the European anti-dumping authorities, such subsidies, however, are a reason for granting anti-dumping relief when, despite such subsidies, the dumping causes injury to the Community industry. The European anti-dumping authorities consider such subsidies as showing the importance of the Community industry¹⁵³³.

1531 Commission Decision No 67/94/ECSC of 12 January 1994 imposing a provisional anti-dumping duty on imports into the Community of hematite pig iron, originating in Brazil, Poland, Russia and Ukraine, *O.J.*, 15 January 1994, No L 12/5.

1532 **ETHIER, W.**, *Modern International Economics*, New York, Norton, 1983, 202-203.

1533 Commission Regulation (EEC) No 2686/92 of 16 September 1992 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea, *O.J.*, 17 September 1992, No L 272/13.

2.7. EMPLOYMENT

In several anti-dumping cases, the negative effects of the dumping and, conversely, the positive effects of anti-dumping relief on employment are underscored. Usually, only the positive effect of anti-dumping relief on employment within the Community industry is taken into account¹⁵³⁴.

Sometimes, attention is paid to its effect on employment in the industries which supply the

1534 C.J.E.C., case 156/87, 14 March 1990, *Gestetner Holdings plc v Council and Commission*, E.C.R., 1990, I, (781), 843; C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, E.C.R., 1992, I, (1335), 1405; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, E.C.R., 1992, I, (1409), 1488; C.J.E.C., case C-176/87, 10 March 1992, *Konishiroku Photo Industry Co. Ltd v Council*, E.C.R., 1992, I, (1493), 1532; C.J.E.C., case C-177/87, 10 March 1992, *Sanyo Electric Co. Ltd v Council*, E.C.R., 1992, I, (1535), 1573; C.J.E.C., case C-179/87, 10 March 1992, *Sharp Corporation v Council*, E.C.R., 1992, I, (1635), 1685; Commission Regulation (EEC) No 2684/88 of 26 August 1988 imposing a provisional anti-dumping duty on certain imports of video cassette recorders originating in Japan and the Republic of Korea, O.J., 31 August 1988, No L 240/5; Commission Regulation (EEC) No 2402/89 of 31 July 1989 imposing a provisional anti-dumping duty on imports of barium chloride originating in the People's Republic of China or the German Democratic Republic, O.J., 4 August 1989, No L 227/24; Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, O.J., 28 October 1989, No L 314/1; Council Regulation (EEC) No 385/90 of 12 February 1990 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in Czechoslovakia and definitively collecting the provisional anti-dumping duty imposed on those imports, O.J., 16 February 1990, No L 42/1; Commission Regulation (EEC) No 547/90 of 2 March 1990 imposing a provisional anti-dumping duty on imports of certain glutamic acid and its salts originating in Indonesia, the Republic of Korea, Taiwan and Thailand, and accepting undertakings in connection with imports of certain glutamic acid and its salts originating in these countries, O.J., 3 March 1990, No L 56/23; Commission Decision 90/138/EEC of 16 March 1990 accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of certain diesel engines originating in Finland and Sweden, and terminating the investigation, O.J., 22 March 1990, No L 76/28; Commission Regulation (EEC) No 1537/90 of 28 May 1990 imposing a provisional anti-dumping duty on imports of potassium permanganate originating in the USSR, O.J., 8 June 1990, No L 145/9; Commission Regulation (EEC) No 1613/90 of 13 June 1990 imposing a provisional anti-dumping duty on imports of ball bearings with a greatest external diameter not exceeding 30 mm originating in Thailand, O.J., 16 June 1990, No L 152/24; Commission Regulation (EEC) No 3421/90 of 26 November 1990 imposing a provisional anti-dumping duty on imports of aspartame originating in Japan and the United States of America, O.J., 29 November 1990, No L 330/16; Commission Regulation (EEC) No 129/91 of 11 January 1991 imposing a provisional anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China, O.J., 19 January 1991, No L 14/31; Council Regulation (EEC) No 738/92 of 23 March 1992 imposing a definitive anti-dumping duty on imports of cotton yarn originating in Brazil and Turkey, O.J., 27 March 1992, No L 82/1; Commission Decision No 2297/92/ECSC of 31 July 1992 amending Decision No 2131/88/ECSC, accepting undertakings offered in connection with imports of certain sheets and plates, of iron or steel, originating in the Republic of Slovenia and the Yugoslav republics of Macedonia, Montenegro and Serbia, and terminating the anti-dumping proceeding with regard to the Republic of Croatia and the Republic of Bosnia-Herzegovina, O.J., 6 August 1992, No L 221/36; Commission Regulation (EEC) No 550/93 of 5 March 1993 imposing a provisional anti-dumping duty on imports of bicycles originating in the People's Republic of China, O.J., 11 March 1993, No L 58/12; Commission Decision 93/479/EEC of 30 July 1993 accepting undertakings offered in connection with the review of anti-dumping measures applicable to certain imports of monosodium glutamate originating in Indonesia, the Republic of Korea, Taiwan and Thailand, O.J., 4 September 1993, No L 225/35; Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, O.J., 21 May 1994, No L 129/24; Commission Regulation (EC) No 3119/94 of 19 December 1994 imposing a provisional anti-dumping duty on imports of ferro-silico-manganese originating in Russia, Ukraine, Brazil and South Africa, O.J., 21 December 1994, No L 330/15.

Community industry or process the Community industry's like product¹⁵³⁵. Exceptionally, the decline in employment caused by anti-dumping relief in the sector distributing the dumped product on the Community market, is also taken into account¹⁵³⁶. In none of the anti-dumping cases, an attempt is made to calculate the net effect of anti-dumping protection on total employment¹⁵³⁷. Because of anti-dumping relief, the fall in employment in other sectors of the Community may, indeed, exceed the growth of employment in the Community industry. In such case, anti-dumping relief is apparently not in the Community interests.

¹⁵³⁵ Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12 ; Commission Regulation (EEC) No 2005/88 of 5 July 1988 imposing a provisional anti-dumping duty on imports of serial impact fully formed character printers originating in Japan, *O.J.*, 8 July 1988, No L 177/1 ; Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 24 November 1988, No L 317/33 ; Council Regulation (EEC) No 34/89 of 5 January 1989 imposing a definitive anti-dumping duty on imports of serial impact fully formed (SIFF) character printers originating in Japan, *O.J.*, 7 January 1989, No L 5/23 ; Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27) ; Commission Regulation (EEC) No 3262/90 of 5 November 1990 imposing a provisional anti-dumping duty on imports of audio tapes in cassettes originating in Japan, the Republic of Korea and Hong Kong, *O.J.*, 13 November 1990, No L 313/5 (corrigendum, *O.J.*, 12 January 1991, No L 9/36) ; Council Regulation (EEC) No 1391/91 of 27 May 1991 imposing a definitive anti-dumping duty on imports of of aspartame originating in Japan and the United States of America, *O.J.*, 29 May 1991, No L 134/1 ; Commission Regulation (EEC) No 2805/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports into the Community of certain thermal paper originating in Japan, *O.J.*, 26 September 1991, No L 270/15 ; Council Regulation (EEC) No 3017/92 of 19 October 1992 modifying the anti-dumping duties following the review of the anti-dumping measures applicable to imports of synthetic polyester fibres originating in Romania, Taiwan, Turkey and the Republics of Serbia and of Montenegro and the former Yugoslav Republic of Macedonia and terminating the said review in respect of imports of synthetic polyester fibres originating in Mexico and the United States of America, *O.J.*, 22 October 1992, No L 306/1 (corrigendum, *O.J.*, 6 February 1993, No L 30/68) ; Commission Decision No 1751/94/ECSC of 15 July 1994 imposing a definitive anti-dumping duty on imports into the Community of hematite pig-iron, originating in Brazil, Poland, Russia and Ukraine, *O.J.*, 16 July 1994, No L 182/37. See also : Commission Regulation (EEC) No 1034/91 of 23 April 1991 imposing a provisional anti-dumping duty on imports of video tapes in cassettes originating in the People's Republic of China, *O.J.*, 26 April 1991, No L 106/15, where reference was made to the «related industries» without any further explanation.

See, however : *artificial corundum from the People's Republic of China and Czechoslovakia*, where the argument that anti-dumping protection would cause problems in the processing industry which employs a greater number of workers than the artificial corundum manufacturing industry, was, according to the Commission, outweighed by the degree of injury suffered by the artificial corundum manufacturing industry (Commission Regulation (EEC) No 2690/84 of 21 September 1984 imposing a provisional anti-dumping duty on imports of artificial corundum originating in the People's Republic of China and Czechoslovakia and terminating the proceeding in respect of imports of artificial corundum originating in Spain and Yugoslavia, *O.J.*, 25 September 1984, No L 255/9).

¹⁵³⁶ Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12 ; Commission Regulation (EEC) No 2005/88 of 5 July 1988 imposing a provisional anti-dumping duty on imports of serial impact fully formed character printers originating in Japan, *O.J.*, 8 July 1988, No L 177/1 ; Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 24 November 1988, No L 317/33 ; Council Regulation (EEC) No 34/89 of 5 January 1989 imposing a definitive anti-dumping duty on imports of serial impact fully formed (SIFF) character printers originating in Japan, *O.J.*, 7 January 1989, No L 5/23 ; Commission Regulation (EEC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50.

¹⁵³⁷ See : *plain paper photocopiers from Japan*, where the lack of evidence which might suggest that the overall effect on employment in the PPC business in the Community caused by the imposition of anti-dumping measures would be anything but limited, was sufficient to disprove the argument that total employment drops in pursuance of anti-dumping relief (Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5 ; Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12).

However, as, within the framework of the Community's general economic policy, not all jobs may be given the same value, a sharp decline in the number of low-valued jobs may be outweighed by a small increase in the number of high-valued jobs. Indeed, in some anti-dumping cases, employment in the distribution sector is valued lower than employment in the manufacturing sector because the distribution sectors depends to a greater extent on imports¹⁵³⁸. In other anti-dumping cases, anti-dumping relief is granted because otherwise employment would have deteriorated in regions with high unemployment rates¹⁵³⁹. The valuation of jobs is purely political. The only valid economic criticism concerns the choice of the instrument to increase overall employment or to obtain import-independent and regional employment. In view of its net cost, anti-dumping relief is not the most appropriate method to preserve or to increase employment¹⁵⁴⁰.

¹⁵³⁸ Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 26 August 1986, No L 239/5 ; Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12 ; Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12 ; Commission Regulation (EEC) No 4062/88 of 23 December 1988 imposing a provisional anti-dumping duty on imports of video cassettes and video tape reels originating in the Republic of Korea and Hong Kong, *O.J.*, 24 December 1988, No L 356/47.

¹⁵³⁹ Council Regulation (EEC) No 1198/88 of 25 April 1988 imposing a definitive anti-dumping duty on imports of roller chains for cycles originating in the People's Republic of China and providing for the definitive collection of the provisional anti-dumping duty on the said imports, *O.J.*, 3 May 1988, No L 115/1 ; Council Regulation (EEC) No 1531/88 of 31 May 1988 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty imposed on those imports, *O.J.*, 3 June 1988, No L 138/1 ; Commission Regulation (EEC) No 1745/88 of 21 June 1988 imposing a provisional anti-dumping duty on imports of paracetamol originating in the People's Republic of China, *O.J.*, 22 June 1988, No L 155/29 ; Council Regulation (EEC) No 725/89 of 20 March 1989 imposing a definitive anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty on such imports, *O.J.*, 22 March 1989, No L 79/24 ; Commission Regulation (EEC) No 2402/89 of 31 July 1989 imposing a provisional anti-dumping duty on imports of barium chloride originating in the People's Republic of China or the German Democratic Republic, *O.J.*, 4 August 1989, No L 227/24 ; Commission Regulation (EEC) No 3074/89 of 11 October 1989 imposing a provisional anti-dumping duty on imports of welded tubes originating in Yugoslavia and Romania, *O.J.*, 13 October 1989, No L 294/10 ; Commission Decision 90/241/EEC of 22 May 1990 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of photo albums originating in South Korea and Hong Kong, and terminating the investigation, *O.J.*, 31 May 1990, No L 138/48 ; Commission Regulation (EEC) No 2054/91 of 11 July 1991 imposing a provisional anti-dumping duty on imports of dihydrostreptomycin originating in the People's Republic of China, *O.J.*, 13 July 1991, No L 187/23 ; Commission Decision No 891/92/ECSC of 30 March 1992 imposing a provisional anti-dumping duty on imports of certain semi-finished products of alloy steel, originating in Turkey and Brazil, *O.J.*, 9 April 1992, No L 95/26 ; Commission Regulation (EEC) No 3296/92 of 12 November 1992 imposing a provisional anti-dumping duty on imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in Czechoslovakia, Hungary, Poland and the Republic of Croatia and terminating the anti-dumping proceeding with regard to the Republics of Serbia and of Montenegro, the former Yugoslav Republic of Macedonia, the Republic of Bosnia-Herzegovina and the Republic of Slovenia, *O.J.*, 14 November 1992, No L 328/15 ; Commission Regulation (EC) No 1783/94 of 18 July 1994 imposing a provisional anti-dumping duty on imports of furfuraldehyde originating in the People's Republic of China, *O.J.*, 21 July 1994, No L 186/11.

¹⁵⁴⁰ ETHIER, W., *Modern International Economics*, New York, Norton, 1983, 207.

3. CONCLUSION

The concept «Community interests» is intended to meet the idea of GATT anti-dumping law that anti-dumping relief should be permissive. As it comprises not only the Community industry's interests, but also the interests of the consumers and processing industries, as well as employment in the Community and the various Community policies, it might frequently prevent anti-dumping relief in view of the net cost of anti-dumping protection.

However, because of the European anti-dumping authorities' assessment of its components, the concept «Community interests» seldom prevents anti-dumping relief from being granted. First, in many cases, the Community interests are equated to the Community industry's interests. Since the dumping causes injury to the Community industry, the Community interests must then call for anti-dumping relief. Second, the interests of consumers and processing industries, which are harmed by anti-dumping relief, are disregarded for many, though irrelevant reasons. Third, the aim to maintain competition on the Community market is understood as the need to maintain competition between Community producers, with or without competition from foreign producers, and the expected monopolization by the dumping producers is proved on the basis of insufficient evidence, such as the (unrebuttable) assumption that dumping is predatory. Fourth, the question about the welfare effects of trade diversion is only secondary, since it only arises in the hypothesis that anti-dumping relief is granted. Trade diversion never increases Community welfare. Under certain circumstances, it may decrease the net cost of anti-dumping protection, but European anti-dumping case law never investigates whether it actually does. Fifth, the pursuit of an integrated trade policy does not prevent the imposition of anti-dumping relief, if that trade policy is protectionist by nature ; on the contrary, it enhances the granting of anti-dumping relief. Sixth, the continued existence of the Community industry is a clincher in favour of protectionism, which it is as easy to prove as to disprove. Seventh, only employment within the Community industry is taken into account for, whereas overall employment should be considered.

Moreover, when anti-dumping relief is economically justified, it is usually not the first-best remedy. First, the «infant industry»-argument is a valid cause for granting temporary anti-dumping relief. However, anti-dumping relief is seldom temporary and does not remedy the market imperfections which prevent a country from realizing its comparative advantages. On the contrary, it would permanently be needed as it shelters the Community industry from foreign competition, which is the very incentive for the Community industry to invest in more efficient production methods. Second, anti-dumping relief may also guarantee competition and may increase overall employment, but, contrary to first-best remedies, always causes a net cost to the Community.

CHAPTER VII

ANTI-DUMPING RELIEF

1. INTRODUCTION

In European anti-dumping law four types of anti-dumping relief are being distinguished : provisional measures, which take the form of a provisional anti-dumping duty (Article 7 basic EC Regulation ; Article 11 basic ECSC Decision), definitive anti-dumping duties (Article 9 basic EC Regulation ; Article 12 basic ECSC Decision), undertakings (Article 8 basic EC Regulation ; Article 10 basic ECSC Decision) and special measures (Article 22(iii) basic EC Regulation ; Article 17(2) basic ECSC Decision)¹⁵⁴¹. The two types of anti-dumping duties, *i.e.*, provisional and definitive anti-dumping duties, are identical but for the following, especially formal differences :

- provisional duties may be imposed where a *preliminary* investigation shows that there is sufficient evidence of injurious dumping and where the Community interests call for intervention to prevent injury from being caused during the anti-dumping proceeding (Article 7(1) basic EC Regulation ; Article 11(1) basic ECSC Decision) ; definitive anti-dumping duties may only be imposed, if the facts as *finally* established show that the Community interests call for intervention against injurious dumping (Article 9(4) basic EC Regulation ; Article 12(1) basic ECSC Decision) ; as a consequence, an anti-dumping investigation may be concluded by a definitive duty, but not by a provisional (Article 9(4) basic EC Regulation ; Articles 7(9)(a) and 12 basic ECSC Decision) ; nevertheless, provisional duties, like definitive duties, cannot be imposed unless the three conditions concerning dumping, injury and Community interests are fulfilled¹⁵⁴² ;
- under EC anti-dumping law, provisional duties are valid for a maximum period of nine months (Article 7(7) basic EC Regulation), whereas, under ECSC anti-dumping law, they are valid for a maximum period of six months (Article 11(5) and (6) basic ECSC Decision) ; definitive duties lapse five years after the date on which they entered into force or were last

¹⁵⁴¹ In GATT anti-dumping law only three categories of anti-dumping relief are being distinguished : provisional measures (Article 7 GATT Anti-dumping Code), anti-dumping duties (Article 9 GATT Anti-dumping Code) and price undertakings (Article 8 GATT Anti-dumping Code). As the provisional measures may take the form of a provisional duty or, preferably, a security equal to the amount of the anti-dumping duty provisionally estimated, they correspond to the provisional measures of European anti-dumping law. The anti-dumping duties and price undertakings correspond respectively to the definitive anti-dumping duties and the undertakings of European anti-dumping law. GATT anti-dumping law does not provide special measures as a type of anti-dumping relief. European anti-dumping law defines its special measures as measures which do not run counter to the GATT obligations. As it is inherent in each legal order that it only allows those measures which do not violate that legal order, GATT anti-dumping law does not have to pronounce such special measures.

¹⁵⁴² Commission Decision 83/64/EEC of 14 February 1983 concerning a request for the immediate imposition of a provisional anti-dumping duty on imports of nickel originating in the Soviet Union, *O.J.*, 15 February 1983, No L 43/19.

modified or confirmed, and may only be extended by re-opening the investigation for their review (Article 11(2) basic EC Regulation ; Article 15 basic ECSC Decision) ;

- contrary to definitive duties, provisional duties are not immediately collected, but the release of the products subjected to a provisional duty for free circulation in the Community is conditional upon the provision of security for the amount of the provisional duty (Article 7(3) basic EC Regulation ; Article 11(1) basic ECSC Decision) ; the provisional duty may only be definitively collected, if the facts as finally established show that there has been injurious dumping (Article 10(2) basic EC Regulation ; Article 12(2)(b) basic ECSC Decision) ; the definitive collection of the provisional duty does not depend on the imposition of a definitive duty (Article 10(2) basic EC Regulation ; Article 12(2)(a) basic ECSC Decision).

Therefore, section 2 deals with provisional and definitive anti-dumping duties simultaneously. Section 3 discusses undertakings and section 4 pays attention to the special measures. These three sections investigate if and how those three types of anti-dumping relief are legally regulated, whether they are, from a legal point of view, correctly applied and what are the economic consequences of European anti-dumping law and its application. They investigate in particular whether European anti-dumping law helps to determine the type and degree of anti-dumping relief required to remedy only the injury caused by the dumping, and examine whether it sufficiently regulates the different types of anti-dumping relief in order to prevent a too excessive anti-dumping relief from being granted.

2. ANTI-DUMPING DUTIES

2.1. FORM OF DUTY : AD VALOREM, SPECIFIC AND VARIABLE DUTIES

As GATT and European anti-dumping law do not regulate the form of anti-dumping duties, European anti-dumping authorities may freely choose between the different possible forms of duty¹⁵⁴³, namely :

¹⁵⁴³ C.J.E.C., case 189/88, 27 March 1990, *Cartorobica SpA v Ministero delle Finanze dello Stato*, E.C.R., 1990, I, (1269), 1286 and 1298 ; C.J.E.C., joined cases C-305/86 and C-160/87, 11 July 1990, *Neotype Techmashexport GmbH v Commission and Council*, E.C.R., 1990, I, (2945), 2989 (Opinion of Advocate General VAN GERVEN) and 3007 ; C.J.E.C., case C-49/88, 27 June 1991, *Al-Jubail Fertilizer Company and Saudi Arabian Fertilizer Company v Council*, E.C.R., 1991, I, (3187), 3208 (Opinion of Advocate General DARMON).

- a specific duty, *i.e.*, a fixed amount per unit, weight of measure imported¹⁵⁴⁴ ;
- an *ad valorem* duty, *i.e.*, a percentage of the import price ;
- a variable duty, *i.e.*, the amount by which the import price undercuts a certain minimum price ;
- a combination of an *ad valorem* and a variable duty, *i.e.*, either the *ad valorem* or the variable duty will be effectively applied depending on which of them yields the highest revenue ;
- a combination of a specific and a variable duty, *i.e.*, either the specific or the variable duty will be effectively applied depending on which of them yields the highest revenue or on other conditions.

European anti-dumping case law hardly specifies the reasons for choosing one or the other of the various forms of anti-dumping duty. In some cases, it is only stated that a specific duty is appropriate¹⁵⁴⁵, or that a variable duty is appropriate¹⁵⁴⁶ or the most equitable¹⁵⁴⁷. An *ad valorem* duty has also been chosen because it has already been imposed on the dumped imports coming from other countries¹⁵⁴⁸. In other cases, identical reasons are put forward to justify the choice of different forms of duties. Those reasons do not clearly focus on the characteristics of each form of duty.

¹⁵⁴⁴ Sometimes, an anti-dumping duty is imposed, taking the form of a percentage of a fixed amount per unit, weight or measure, which boils down to a fixed amount per unit, weight or measure. See : Council Regulation (EEC) No 191/80 of 29 January 1980 imposing a definitive anti-dumping duty on lithium hydroxide originating in the United States of America and the Soviet Union, *O.J.*, 30 January 1980, No L 23/19 (corrigendum, *O.J.*, 8 February 1980, No L 31/23) ; Commission Regulation (EEC) No 2516/81 of 26 August 1981 imposing a provisional anti-dumping duty on imports of light sodium carbonate originating in Bulgaria, *O.J.*, 29 August 1981, No L 246/14 ; Council Regulation (EEC) No 2978/83 of 24 October 1983 amending Regulation (EEC) No 191/80 imposing a definitive anti-dumping duty on lithium hydroxide originating in the United States of America and the Soviet Union, *O.J.*, 26 October 1983, No L 294/3.

¹⁵⁴⁵ Commission Regulation (EEC) No 3018/82 of 11 November 1982 imposing a provisional anti-dumping duty on imports of certain sodium carbonate originating in the United States of America and accepting certain undertakings concerning the imports of certain sodium carbonate originating in the United States of America, *O.J.*, 13 November 1982, No L 317/5 ; Commission Decision No 2767/86/ECSC of 5 September 1986 imposing a provisional anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Yugoslavia, *O.J.*, 6 September 1986, No L 254/18 ; Commission Decision No 2247/87/ECSC of 28 July 1987 imposing a provisional anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Mexico, *O.J.*, 29 July 1987, No L 207/21 ; Commission Decision (EEC) No 3499/87/ECSC of 19 November 1987 imposing a definitive anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Mexico and definitively collecting the provisional anti-dumping duty imposed on those imports, *O.J.*, 21 November 1987, No L 330/42.

¹⁵⁴⁶ Commission Decision No 67/94/ECSC of 12 January 1994 imposing a provisional anti-dumping duty on imports into the Community of hematite pig iron, originating in Brazil, Poland, Russia and Ukraine, *O.J.*, 15 January 1994, No L 12/5.

¹⁵⁴⁷ Commission Regulation (EEC) No 1633/82 of 23 June 1982 imposing a provisional anti-dumping duty on imports of fibre building board (hardboard) originating in Romania, repealing Commission Decision No 80/564/EEC of 4 June 1980 and accepting undertakings in connection with the proceeding in respect of imports of fibre building board from Czechoslovakia, Finland, Hungary, Norway, Poland, Spain, Sweden and the Soviet Union and terminating the proceeding with regard to those countries and Bulgaria, *O.J.*, 25 June 1982, No L 181/19.

¹⁵⁴⁸ Council Regulation (EC) No 621/94 of 17 March 1994 imposing a definitive anti-dumping duty on imports of ferro-silicon originating in South Africa and in the People's Republic of China, *O.J.*, 19 March 1994, No L 77/48.

- Specific duties¹⁵⁴⁹, variable duties¹⁵⁵⁰, as well as combinations of variable duties with

¹⁵⁴⁹ Commission Regulation (EEC) No 2516/81 of 26 August 1981 imposing a provisional anti-dumping duty on imports of light sodium carbonate originating in Bulgaria, *O.J.*, 29 August 1981, No L 246/14; Council Regulation (EEC) No 3365/87 of 9 November 1987 imposing a definitive anti-dumping duty on imports of ferro-silico-calcium/calcium silicide originating in Brazil, *O.J.*, 12 November 1987, 322/1; Commission Decision No 163/88/ECSC of 20 January 1988 imposing a provisional anti-dumping duty on imports of certain iron or steel coils, originating in Algeria, Mexico and Yugoslavia, *O.J.*, 22 January 1988, No L 18/31; Commission Decision No 708/89/ECSC of 17 March 1989 imposing a provisional anti-dumping duty on imports of certain flat-rolled products of iron or non-alloy steel, cold-rolled, originating in Yugoslavia, *O.J.*, 21 March 1989, No L 78/14; Commission Decision No 2297/92/ECSC of 31 July 1992 amending Decision No 2131/88/ECSC, accepting undertakings offered in connection with imports of certain sheets and plates, of iron or steel, originating in the Republic of Slovenia and the Yugoslav republics of Macedonia, Montenegro and Serbia, and terminating the anti-dumping proceeding with regard to the Republic of Croatia and the Republic of Bosnia-Herzegovina, *O.J.*, 6 August 1992, No L 221/36; Commission Regulation (EEC) No 797/93 of 30 March 1993 imposing a provisional anti-dumping duty on imports of ferro-chrome with a carbon content by weight of max. 0,5 % (low carbon ferro-chrome) originating in Kazakhstan, Russia and Ukraine, *O.J.*, 2 April 1993, No L 80/8; Council Regulation (EEC) No 2717/93 of 28 September 1993 imposing a definitive anti-dumping duty on imports of ferro-chrome with a carbon content by weight of maximum 0,5 % (low carbon ferro-chrome), originating in Kazakhstan, Russia and Ukraine, *O.J.*, 2 October 1993, No L 246/1; Commission Regulation (EEC) No 2720/93 of 28 September 1993 imposing a provisional anti-dumping duty on imports of isobutanol originating in the Russian Federation, *O.J.*, 2 October 1993, No L 246/12; Commission Regulation (EC) No 892/94 of 21 April 1994 imposing a provisional anti-dumping duty on imports of calcium metal originating in the People's Republic of China and Russia, *O.J.*, 23 April 1994, No L 104/5; Commission Regulation (EC) No 1783/94 of 18 July 1994 imposing a provisional anti-dumping duty on imports of furfuraldehyde originating in the People's Republic of China, *O.J.*, 21 July 1994, No L 186/11; Council Regulation (EC) No 2819/94 of 17 November 1994 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in the People's Republic of China, *O.J.*, 19 November 1994, No L 298/32.

See also : *mercury from the Soviet Union*, where a specific duty was chosen «(i)n view of the characteristics of the world market for the product in question and the competitive situation on that market (Council Regulation (EEC) No 3687/87 of 8 December 1987 imposing a definitive anti-dumping duty on imports of mercury originating in the Soviet Union and definitively collecting the provisional anti-dumping duty imposed on such imports, *O.J.*, 10 December 1987, No L 346/27). In particular, these characteristics referred to the Soviet exporter as a price maker on the world market, i.e., his power to determine the world price. As the Soviet exporter is able to manipulate his prices, only a duty that is calculated on another basis than the price of the product, would prevent him to avoid the payment of the anti-dumping duty.

¹⁵⁵⁰ Commission Regulation (EEC) No 2667/82 of 4 October 1982 imposing a provisional anti-dumping duty on imports of certain sodium carbonate originating in Bulgaria, the German Democratic Republic, Poland, Romania and the Soviet Union, *O.J.*, 6 October 1982, No L 283/9; Council Regulation (EEC) No 1306/89 of 11 May 1989 imposing a definitive anti-dumping duty on imports of light sodium carbonate originating in Bulgaria, the German Democratic Republic, Poland and Romania, *O.J.*, 13 May 1989, No L 131/4; Council Regulation (EEC) No 385/90 of 12 February 1990 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in Czechoslovakia and definitively collecting the provisional anti-dumping duty imposed on those imports, *O.J.*, 16 February 1990, No L 42/1; Council Regulation (EEC) No 1473/93 of 14 June 1993 imposing a definitive anti-dumping duty on imports of magnesium oxide originating in the People's Republic of China, *O.J.*, 17 June 1993, No L 145/1; Commission Regulation (EEC) No 2172/93 of 30 July 1993 imposing provisional anti-dumping duties on imports of ethanolamine originating in the United States of America, *O.J.*, 4 August 1993, No L 195/5; Commission Regulation (EEC) No 2463/93 of 1 September 1993 imposing a provisional anti-dumping duty on imports of fluorspar originating in the People's Republic of China, *O.J.*, 7 September 1993, No L 226/3; Council Regulation (EC) No 3386/93 of 6 December 1993 imposing a definitive anti-dumping duty on imports of dead-burned (sintered) magnesite originating in the People's Republic of China, *O.J.*, 11 December 1993, No L 306/16; Commission Regulation (EC) No 1506/94 of 27 June 1994 imposing provisional duties on imports of urea ammonium nitrate solution originating in Bulgaria and Poland, *O.J.*, 30 June 1994, No L 162/16.

either *ad valorem*¹⁵⁵¹ or specific duties¹⁵⁵² are adopted in order to prevent evasion.

It seems rather astonishing that the prevention of evasion is advanced as the reason for imposing not only specific and *ad valorem* duties, but also variable duties. Indeed, the payment of variable duties can be completely avoided. The dumping exporters must only raise their prices to the level of the minimum price¹⁵⁵³. Moreover, it is highly probable that the dumping exporters will try to avoid the payment of variable duties. Indeed, by charging prices below the minimum price, the dumping exporters suffer a loss of income: they would have to pay anti-dumping duties and they cannot increase their sales figures since their prices on the Community market remain at the minimum price level because of the variable duty.

The payment of specific and *ad valorem* duties may only partially be avoided. The total amount of duty to be paid declines only in proportion to the drop, respectively, in the volume and in the prices of the dumped imports¹⁵⁵⁴. Therefore, evasion has probably a different

1551 In some cases the *ad valorem* duty is backed up by a variable duty in order to prevent evasion (Commission Regulation (EEC) No 2667/82 of 4 October 1982 imposing a provisional anti-dumping duty on imports of certain sodium carbonate originating in Bulgaria, the German Democratic Republic, Poland, Romania and the Soviet Union, *O.J.*, 6 October 1982, No L 283/9; Council Regulation (EEC) No 273/83 of 1 February 1983 imposing a definitive anti-dumping duty on imports of light sodium carbonate originating in Bulgaria, the German Democratic Republic, Poland, Romania and the Soviet Union, *O.J.*, 3 February 1983, No L 32/1; Council Regulation (EEC) No 2786/83 of 3 October 1983 imposing a definitive anti-dumping duty on imports of copper sulphate originating in Czechoslovakia and the USSR, *O.J.*, 7 October 1983, No L 274/1; Council Regulation (EEC) No 1244/86 of 28 April 1986 imposing a definitive anti-dumping duty on imports of copper sulphate originating in Yugoslavia, *O.J.*, 30 April 1986, No L 113/4; Commission Regulation (EEC) No 2495/86 of 1 August 1986 imposing a provisional anti-dumping duty on imports of potassium permanganate originating in Czechoslovakia, the German Democratic Republic and the People's Republic of China, *O.J.*, 5 August 1986, No L 217/12; Council Regulation (EEC) No 2512/87 of 18 August 1987 amending Regulation (EEC) No 2786/83 imposing a definitive anti-dumping duty on imports of copper sulphate originating in Czechoslovakia and the USSR, *O.J.*, 20 August 1987, No L 235/18 (corrigendum, *O.J.*, 9 September 1987, No L 259/7); Council Regulation (EEC) No 1198/88 of 25 April 1988 imposing a definitive anti-dumping duty on imports of roller chains for cycles originating in the People's Republic of China and providing for the definitive collection of the provisional anti-dumping duty on the said imports, *O.J.*, 3 May 1988, No L 115/1).

In other cases the variable duty is backed up by an *ad valorem* duty in order to prevent evasion (Council Regulation (EEC) No 1531/88 of 31 May 1988 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty imposed on those imports, *O.J.*, 3 June 1988, No L 138/1; Commission Regulation (EEC) No 1745/88 of 21 June 1988 imposing a provisional anti-dumping duty on imports of paracetamol originating in the People's Republic of China, *O.J.*, 22 June 1988, No L 155/29; Council Regulation (EEC) No 1812/91 of 24 June 1991 imposing a definitive anti-dumping duty on imports of espadrilles originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty, *O.J.*, 28 June 1991, No L 166/1).

1552 Council Regulation (EEC) No 191/80 of 29 January 1980 imposing a definitive anti-dumping duty on lithium hydroxide originating in the United States of America and the Soviet Union, *O.J.*, 30 January 1980, No L 23/19 (corrigendum, *O.J.*, 8 February 1980, No L 31/23); Council Regulation (EEC) No 407/80 of 18 February 1980 imposing a definitive anti-dumping duty on certain sodium carbonate originating in the Soviet Union, *O.J.*, 22 February 1980, No L 48/1; Commission Regulation (EEC) No 2516/81 of 26 August 1981 imposing a provisional anti-dumping duty on imports of light sodium carbonate originating in Bulgaria, *O.J.*, 29 August 1981, No L 246/14; Commission Recommendation No 2086/82/ECSC of 28 July 1982 amending recommendation No 1104/82/ECSC imposing a provisional anti-dumping duty on certain sheets and plates, of iron or steel, originating in Brazil and prolonging this provisional anti-dumping duty, *O.J.*, 30 July 1982, No L 221/17; Council Regulation (EEC) No 3836/91 of 19 December 1991 imposing a definitive anti-dumping duty on imports of dihydrostreptomycin originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty, *O.J.*, 31 December 1991, No 362/1; Council Regulation (EC) No 643/94 of 21 March 1994 amending Regulation (EEC) No 3068/92 in respect of definitive anti-dumping duties on imports of potassium chloride originating in Belarus, Russia and Ukraine, *O.J.*, 24 March 1994, No L 80/1.

1553 C.J.E.C., joined cases C-305/86 and C-160/87, 11 July 1990, *Neotype Techmashexport GmbH v Commission and Council*, *E.C.R.*, 1990, I, (2945), 2963-1964 (Report for the Hearing: conclusions of the intervener), 2989 (Opinion of Advocate General VAN GERVEN) and 3007.

1554 C.J.E.C., case 189/88, 27 March 1990, *Cartorobica SpA v Ministero delle Finanze dello Stato*, *E.C.R.*, 1990, I, (1269), 1286 (Opinion of Advocate-General TESAURIO).

meaning here. In respect of specific and *ad valorem* duties, prevention of evasion should mean that the dumping exporters cannot avoid paying some amount of duty¹⁵⁵⁵. In respect of variable duties, which guarantee a constant and *a priori* known minimum price level below which the prices of the dumped product cannot drop, it should mean that the dumping exporter cannot prevent the prices of the dumped product from falling below the minimum price¹⁵⁵⁶.

- Specific duties¹⁵⁵⁷, *ad valorem* duties¹⁵⁵⁸, as well as combinations of variable duties

¹⁵⁵⁵ Commission Regulation (EEC) No 797/93 of 30 March 1993 imposing a provisional anti-dumping duty on imports of ferro-chrome with a carbon content by weight of max. 0,5 % (low carbon ferro-chrome) originating in Kazakhstan, Russia and Ukraine, *O.J.*, 2 April 1993, No L 80/8 (a specific duty cannot be circumvented by means of price manipulation); Council Regulation (EEC) No 2717/93 of 28 September 1993 imposing a definitive anti-dumping duty on imports of ferro-chrome with a carbon content by weight of maximum 0,5 % (low carbon ferro-chrome), originating in Kazakhstan, Russia and Ukraine, *O.J.*, 2 October 1993, No L 246/1 (a specific duty cannot be circumvented by means of price manipulation); Commission Regulation (EEC) No 2720/93 of 28 September 1993 imposing a provisional anti-dumping duty on imports of isobutanol originating in the Russian Federation, *O.J.*, 2 October 1993, No L 246/12 (a specific duty cannot be circumvented by means of price manipulation); Council Regulation (EC) No 643/94 of 21 March 1994 amending Regulation (EEC) No 3068/92 in respect of definitive anti-dumping duties on imports of potassium chloride originating in Belarus, Russia and Ukraine, *O.J.*, 24 March 1994, No L 80/1 (a specific duty cannot be circumvented by means of price manipulation); Commission Regulation (EC) No 892/94 of 21 April 1994 imposing a provisional anti-dumping duty on imports of calcium metal originating in the People's Republic of China and Russia, *O.J.*, 23 April 1994, No L 104/5 (a specific duty cannot be circumvented by price manipulation); Commission Regulation (EC) No 1783/94 of 18 July 1994 imposing a provisional anti-dumping duty on imports of furfuraldehyde originating in the People's Republic of China, *O.J.*, 21 July 1994, No L 186/11 (a specific duty cannot be circumvented by price manipulation).

¹⁵⁵⁶ Council Regulation (EEC) No 3836/91 of 19 December 1991 imposing a definitive anti-dumping duty on imports of dihydrostreptomycin originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty, *O.J.*, 31 December 1991, No 362/1; Council Regulation (EEC) No 1473/93 of 14 June 1993 imposing a definitive anti-dumping duty on imports of magnesium oxide originating in the People's Republic of China, *O.J.*, 17 June 1993, No L 145/1; Commission Regulation (EEC) No 2172/93 of 30 July 1993 imposing provisional anti-dumping duties on imports of ethanolamine originating in the United States of America, *O.J.*, 4 August 1993, No L 195/5; Commission Regulation (EEC) No 2463/93 of 1 September 1993 imposing a provisional anti-dumping duty on imports of fluorspar originating in the People's Republic of China, *O.J.*, 7 September 1993, No L 226/3; Council Regulation (EC) No 3386/93 of 6 December 1993 imposing a definitive anti-dumping duty on imports of dead-burned (sintered) magnesia originating in the People's Republic of China, *O.J.*, 11 December 1993, No L 306/16; Council Regulation (EC) No 643/94 of 21 March 1994 amending Regulation (EEC) No 3068/92 in respect of definitive anti-dumping duties on imports of potassium chloride originating in Belarus, Russia and Ukraine, *O.J.*, 24 March 1994, No L 80/1; Commission Regulation (EC) No 1506/94 of 27 June 1994 imposing provisional duties on imports of urea ammonium nitrate solution originating in Bulgaria and Poland, *O.J.*, 30 June 1994, No L 162/16.

¹⁵⁵⁷ Commission Regulation (EEC) No 2409/87 of 6 August 1987 imposing a provisional anti-dumping duty on imports of ferro-silicon originating in Brazil and accepting undertakings offered by Italmagnesio SA of Brazil and from Promsyrrio-Import of the USSR, *O.J.*, 8 August 1987, No L 219/24; Commission Decision No 2131/88/ECSC of 18 July 1988 imposing a definitive anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Yugoslavia and definitively collecting the provisional anti-dumping duty imposed on those imports, *O.J.*, 19 July 1988, No L 188/14; Commission Decision No 2158/88/ECSC of 20 July 1988 imposing a provisional anti-dumping duty on imports of certain iron or steel sections originating in Yugoslavia or Turkey, *O.J.*, 21 July 1988, No L 190/5; Commission Decision No 708/89/ECSC of 17 March 1989 imposing a provisional anti-dumping duty on imports of certain flat-rolled products of iron or non-alloy steel, cold-rolled, originating in Yugoslavia, *O.J.*, 21 March 1989, No L 78/14; Commission Regulation (EEC) No 547/90 of 2 March 1990 imposing a provisional anti-dumping duty on imports of certain glutamic acid and its salts originating in Indonesia, the Republic of Korea, Taiwan and Thailand, and accepting undertakings in connection with imports of certain glutamic acid and its salts originating in these countries, *O.J.*, 3 March 1990, No L 56/23; Commission Decision No 2297/92/ECSC of 31 July 1992 amending Decision No 2131/88/ECSC, accepting undertakings offered in connection with imports of certain sheets and plates, of iron or steel, originating in the Republic of Slovenia and the Yugoslav republics of Macedonia, Montenegro and Serbia, and terminating the anti-dumping proceeding with regard to the Republic of Croatia and the Republic of Bosnia-Herzegovina, *O.J.*, 6 August 1992, No L 221/36.

with *ad valorem*¹⁵⁵⁹ or specific duties¹⁵⁶⁰ are adopted in order to make anti-dumping relief effective.

Anti-dumping duties are effective in a different way, depending on the form of duty : a variable duty will be effective if the prices of the dumped product do not fall below the minimum price¹⁵⁶¹ and specific and *ad valorem* duties will be effective if the amount due by the dumping exporters is actually paid.

¹⁵⁵⁸ Commission Regulation (EEC) No 1695/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of polyester yarn originating in Mexico, South Korea, Taiwan and Turkey, *O.J.*, 17 June 1988, No L 151/39 (corrigendum, *O.J.*, 18 June 1988, No L 152/58) ; Commission Regulation (EEC) No 1696/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 June 1988, No L 151/47 ; Commission Regulation (EEC) No 2623/88 of 24 August 1988 imposing a provisional anti-dumping duty on imports of urea originating in Austria, Hungary, Malaysia, Romania, the USA and Venezuela, *O.J.*, 25 August 1988, No L 235/5 ; Council Regulation (EEC) No 176/89 of 23 January 1989 imposing a definitive anti-dumping duty on imports of copper sulphate originating in Bulgaria or the Soviet Union, *O.J.*, 27 January 1989, No L 23/1 ; Council Regulation (EEC) No 2808/89 of 18 September 1989 imposing a definitive anti-dumping duty on imports of calcium metal originating in the People's Republic of China and the Soviet Union and definitively collecting the provisional anti-dumping duty imposed on such imports, *O.J.*, 20 September 1989, No L 271/1 ; Council Regulation (EEC) No 3121/89 of 16 October 1989 modifying the anti-dumping measures applicable to imports of certain acrylic fibres originating in Mexico by introducing an anti-dumping duty on such imports, other than those from exporters to the Community whose undertakings are accepted, *O.J.*, 19 October 1989, No L 301/1 ; Commission Regulation (EEC) No 761/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten ores and concentrates originating in the People's Republic of China, and terminating the proceeding concerning imports originating in Hong Kong, *O.J.*, 30 March 1990, No L 83/23 ; Commission Regulation (EEC) No 1937/90 of 4 July 1990 imposing a provisional anti-dumping duty on imports of pure silk typewriter ribbon fabrics originating in the People's Republic of China, and accepting an undertaking offered by the exporter, *O.J.*, 7 July 1990, No L 174/27.

¹⁵⁵⁹ In some cases the *ad valorem* duty is backed up by a variable duty in order to guarantee the effectiveness of anti-dumping protection (Commission Regulation (EEC) No 2667/82 of 4 October 1982 imposing a provisional anti-dumping duty on imports of certain sodium carbonate originating in Bulgaria, the German Democratic Republic, Poland, Romania and the Soviet Union, *O.J.*, 6 October 1982, No L 283/9 ; Council Regulation (EEC) No 273/83 of 1 February 1983 imposing a definitive anti-dumping duty on imports of light sodium carbonate originating in Bulgaria, the German Democratic Republic, Poland, Romania and the Soviet Union, *O.J.*, 3 February 1983, No L 32/1 ; Council Regulation (EEC) No 1244/86 of 28 April 1986 imposing a definitive anti-dumping duty on imports of copper sulphate originating in Yugoslavia, *O.J.*, 30 April 1986, No L 113/4 ; Council Regulation (EEC) No 2512/87 of 18 August 1987 amending Regulation (EEC) No 2786/83 imposing a definitive anti-dumping duty on imports of copper sulphate originating in Czechoslovakia and the USSR, *O.J.*, 20 August 1987, No L 235/18 (corrigendum, *O.J.*, 9 September 1987, No L 259/7) ; Council Regulation (EEC) No 1198/88 of 25 April 1988 imposing a definitive anti-dumping duty on imports of roller chains for cycles originating in the People's Republic of China and providing for the definitive collection of the provisional anti-dumping duty on the said imports, *O.J.*, 3 May 1988, No L 115/1).

In other cases the variable duty is backed up by an *ad valorem* duty in order to guarantee the effectiveness of anti-dumping protection (Council Regulation (EEC) No 1531/88 of 31 May 1988 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty imposed on those imports, *O.J.*, 3 June 1988, No L 138/1 ; Commission Regulation (EEC) No 1745/88 of 21 June 1988 imposing a provisional anti-dumping duty on imports of paracetamol originating in the People's Republic of China, *O.J.*, 22 June 1988, No L 155/29).

¹⁵⁶⁰ Commission Regulation (EEC) No 1031/92 of 23 April 1992 imposing a provisional anti-dumping duty on imports of potassium chloride (potash) originating in Belarus, Russia or Ukraine, *O.J.*, 28 April 1992, No L 110/5.

¹⁵⁶¹ The fact that a variable duty can induce the dumping exporters to raise their prices has been invoked as an argument for imposing a variable duty (Commission Regulation (EEC) No 3019/86 of 30 September 1986 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania and the USSR, *O.J.*, 1 October 1986, No L 280/68 ; Council Regulation (EEC) No 864/87 of 23 March 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union, and definitively collecting the amounts secured as provisional duties, *O.J.*, 27 March 1987, No L 83/1). Effective variable duties, thus, must not yield income for the Community authorities ; they must result in prices at least as high as the minimum price.

- Specific duties¹⁵⁶², as well as *ad valorem* duties¹⁵⁶³ are adopted because they are easy to administer.

The basis to calculate the amount of duty to be paid for *ad valorem* and variable duties, on the one hand, and for specific duties, on the other hand, is not alike. For *ad valorem* and variable duties, the price of the dumped products must be known, whereas specific duties are calculated on the basis of the quantity of the dumped imports. Because the calculation basis for *ad valorem* and variable duties is the same, it may be wondered why the ease of administration has never been invoked as argument for preferring a variable duty¹⁵⁶⁴. On the other hand, there is not necessarily a contradiction in the fact that the ease of administration has been invoked for both specific and *ad valorem* duties. It is quite possible that the quantity of some products may be more easily determined than their price and *vice-versa*.

¹⁵⁶² Commission Regulation (EEC) No 2450/87 of 12 August 1987 imposing a provisional anti-dumping duty on imports of mercury originating in the Union of Soviet Socialist Republics, *O.J.*, 14 August 1987, No L 227/8 ; Commission Regulation (EEC) No 547/90 of 2 March 1990 imposing a provisional anti-dumping duty on imports of certain glutamic acid and its salts originating in Indonesia, the Republic of Korea, Taiwan and Thailand, and accepting undertakings in connection with imports of certain glutamic acid and its salts originating in these countries, *O.J.*, 3 March 1990, No L 56/23.

¹⁵⁶³ Commission Regulation (EEC) No 699/88 of 15 March 1988 imposing a provisional anti-dumping duty on imports of oxalic acid originating in Taiwan and South Korea, *O.J.*, 18 March 1988, No L 72/12 ; Commission Regulation (EEC) No 1695/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of polyester yarn originating in Mexico, South Korea, Taiwan and Turkey, *O.J.*, 17 June 1988, No L 151/39 (corrigendum, *O.J.*, 18 June 1988, No L 152/58) ; Commission Regulation (EEC) No 1696/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 June 1988, No L 151/47 ; Commission Regulation (EEC) No 2623/88 of 24 August 1988 imposing a provisional anti-dumping duty on imports of urea originating in Austria, Hungary, Malaysia, Romania, the USA and Venezuela, *O.J.*, 25 August 1988, No L 235/5 ; Council Regulation (EEC) No 176/89 of 23 January 1989 imposing a definitive anti-dumping duty on imports of copper sulphate originating in Bulgaria or the Soviet Union, *O.J.*, 27 January 1989, No L 23/1 ; Council Regulation (EEC) No 2808/89 of 18 September 1989 imposing a definitive anti-dumping duty on imports of calcium metal originating in the People's Republic of China and the Soviet Union and definitively collecting the provisional anti-dumping duty imposed on such imports, *O.J.*, 20 September 1989, No L 271/1 ; Council Regulation (EEC) No 3121/89 of 16 October 1989 modifying the anti-dumping measures applicable to imports of certain acrylic fibres originating in Mexico by introducing an anti-dumping duty on such imports, other than those from exporters to the Community whose undertakings are accepted, *O.J.*, 19 October 1989, No L 301/1 ; Council Regulation (EEC) No 341/90 of 5 February 1990 accepting undertakings and imposing a definitive anti-dumping duty on imports of ferro-silicon originating in Iceland, Norway, Sweden, Venezuela or Yugoslavia, except those sold for export to the Community by companies whose undertakings have been accepted, *O.J.*, 10 February 1990, No L 38/1 ; Commission Regulation (EEC) No 761/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten ores and concentrates originating in the People's Republic of China, and terminating the proceeding concerning imports originating in Hong Kong, *O.J.*, 30 March 1990, No L 83/23 ; Commission Regulation (EEC) No 1937/90 of 4 July 1990 imposing a provisional anti-dumping duty on imports of pure silk typewriter ribbon fabrics originating in the People's Republic of China, and accepting an undertaking offered by the exporter, *O.J.*, 7 July 1990, No L 174/27 ; Council Regulation (EEC) No 1115/91 of 29 April 1991 imposing definitive anti-dumping duties in connection with the review of anti-dumping measures concerning imports of ferro-silicon originating in Brazil, *O.J.*, 3 May 1991, No L 111/1.

¹⁵⁶⁴ Perhaps, variable duties are not yet that easy to administer as *ad valorem* duties, though their calculation basis is identical. Advocate-General TESAURO, for instance, has held that variable duties are more difficult to apply than specific and *ad valorem* duties, but he does not offer an explanation in this respect (C.J.E.C., case 189/88, 27 March 1990, *Cartorobica SpA v Ministero delle Finanze dello Stato*, E.C.R., 1990, I, (1269), 1286).

- *Ad valorem* duties¹⁵⁶⁵, as well as variable duties¹⁵⁶⁶ are adopted because of the variety of the dumped products.

It is not at all clear why the existence of a wide range of products is brought up in order to explain the imposition not only of *ad valorem*, but also of variable duties. It will not be easy for the European anti-dumping authorities to determine the height of a variable duty, if there is a wide variety of dumped products. If the dumping margin, which is usually expressed in terms of a percentage of the dumping price, is identical for all the types and models of the dumped product, it will be sufficient to determine one single *ad valorem* duty. However, several variable duties should be determined, as prices of the different product types will vary, even if their dumping margin is identical. Thus, when there is a variety of dumped products, *ad valorem* duties will be easier to determine and to apply than variable duties¹⁵⁶⁷.

- *Ad valorem*¹⁵⁶⁸, as well as variable duties¹⁵⁶⁹ are adopted because of the price differences between the various types or models of the dumped product.

¹⁵⁶⁵ Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1; Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79; corrigendum, *O.J.*, 10 February 1990, No L 38/44); Council Regulation (EEC) No 2112/90 of 23 July 1990 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan and collecting definitively the provisional duty, *O.J.*, 25 July 1990, No L 193/1; Council Regulation (EC) No 621/94 of 17 March 1994 imposing a definitive anti-dumping duty on imports of ferro-silicon originating in South Africa and in the People's Republic of China, *O.J.*, 19 March 1994, No L 77/48.

¹⁵⁶⁶ Commission Regulation (EEC) No 3019/86 of 30 September 1986 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania and the USSR, *O.J.*, 1 October 1986, No L 280/68; Council Regulation (EEC) No 864/87 of 23 March 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union, and definitively collecting the amounts secured as provisional duties, *O.J.*, 27 March 1987, No L 83/1. See also: Commission Regulation (EEC) No 1043/87 of 10 April 1987 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Yugoslavia, *O.J.*, 14 April 1987, No L 102/5.

¹⁵⁶⁷ Council Regulation (EC) No 621/94 of 17 March 1994 imposing a definitive anti-dumping duty on imports of ferro-silicon originating in South Africa and in the People's Republic of China, *O.J.*, 19 March 1994, No L 77/48.

¹⁵⁶⁸ Commission Regulation (EEC) No 2865/85 of 14 October 1985 imposing a provisional anti-dumping duty on imports of certain electronic scales originating in Japan and accepting undertakings and terminating the proceeding in respect of certain imports of such products originating in Japan, *O.J.*, 16 October 1985, No L 275/5; Council Regulation (EEC) No 1058/86 of 8 April 1986 imposing a definitive anti-dumping duty on imports of certain electronic scales originating in Japan, *O.J.*, 12 April 1986, No L 97/1; Council Regulation (EEC) No 374/87 of 5 February 1987 definitively collecting the provisional anti-dumping duty and imposing a definitive anti-dumping duty on imports of housed bearing units originating in Japan, *O.J.*, 6 February 1987, No L 35/32; Council Regulation (EEC) No 725/89 of 20 March 1989 imposing a definitive anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty on such imports, *O.J.*, 22 March 1989, No L 79/24.

¹⁵⁶⁹ Commission Regulation (EEC) No 3798/90 of 21 December 1990 imposing a provisional anti-dumping duty on imports of espadrilles originating in the People's Republic of China, *O.J.*, 28 December 1990, No L 365/25; Council Regulation (EEC) No 3091/91 of 21 October 1991 imposing a definitive anti-dumping duty on imports of video tapes in cassettes originating in the People's Republic of China and definitively collecting the provisional duty, *O.J.*, 24 October 1991, No L 293/2.

Price differences between the various types or models of the dumped product do not sufficiently explain why variable duties are imposed. Such price differences necessitate the determination of as much variable duties as there are product types or models, whereas only one *ad valorem* duty suffices if the dumping margin is identical for all product types or models.

- Specific¹⁵⁷⁰, *ad valorem*¹⁵⁷¹, as well as variable¹⁵⁷² duties are adopted because of the volatility of the prices (and sometimes also of the production costs) of the dumped product.

Variable duties guarantee a constant minimum price level : as long as prices do not rise above that level, prices in the Community will remain constant. However, a drawback as to variable duties is that the Community will never benefit from price decreases, *e.g.*, caused by a decline in the price of the inputs used for manufacturing the product or the price-decreasing effect of the rationalisation of production methods. As to the European anti-dumping authorities, variable duties have been imposed precisely because of that «drawback»¹⁵⁷³.

But, perhaps, in other cases, this drawback of variable duties explains the choice of specific and *ad valorem* duties. It should, however, be noted that a price decrease benefits the Community more for *ad valorem* duties than for specific duties. Indeed, only for *ad valorem* duties, the amount of duty to be paid will decrease in proportion to the price decrease and the Community will fully benefit of the price decrease¹⁵⁷⁴. With specific duties, on the other hand, the amount of duty to be paid will remain unchanged when the same volume is

¹⁵⁷⁰ Commission Regulation (EEC) No 2450/87 of 12 August 1987 imposing a provisional anti-dumping duty on imports of mercury originating in the Union of Soviet Socialist Republics, *O.J.*, 14 August 1987, No L 227/8 ; Council Regulation (EEC) No 729/92 of 16 March 1992 imposing a definitive anti-dumping duty on imports of certain thermal paper originating in Japan and definitively collecting the provisional anti-dumping duty, *O.J.*, 26 March 1992, No L 81/1 (corrigendum, *O.J.*, 21 May 1992, No L 138/40).

¹⁵⁷¹ Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79 ; corrigendum, *O.J.*, 10 February 1990, No L 38/44) ; Council Regulation (EEC) No 2112/90 of 23 July 1990 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan and collecting definitively the provisional duty, *O.J.*, 25 July 1990, No L 193/1 ; Commission Regulation (EEC) No 2799/92 of 25 September 1992 imposing a provisional anti-dumping duty on imports of deadburned (sintered) magnesia originating in the People's Republic of China, *O.J.*, 26 September 1992, No L 282/15.

¹⁵⁷² Council Regulation (EEC) No 1292/92 of 18 May 1992 amending Regulation (EEC) No 1768/89 with regard to a definitive anti-dumping duty on imports of video cassettes originating in Hong Kong, *O.J.*, 22 May 1992, No L 139/1 ; Commission Regulation (EEC) No 2463/93 of 1 September 1993 imposing a provisional anti-dumping duty on imports of fluorspar originating in the People's Republic of China, *O.J.*, 7 September 1993, No L 226/3.

¹⁵⁷³ Commission Regulation (EEC) No 2463/93 of 1 September 1993 imposing a provisional anti-dumping duty on imports of fluorspar originating in the People's Republic of China, *O.J.*, 7 September 1993, No L 226/3.

¹⁵⁷⁴ Commission Regulation (EEC) No 2799/92 of 25 September 1992 imposing a provisional anti-dumping duty on imports of deadburned (sintered) magnesia originating in the People's Republic of China, *O.J.*, 26 September 1992, No L 282/15 ; Commission Regulation (EEC) No 2800/92 of 25 September 1992 imposing a provisional anti-dumping duty on imports of magnesium oxide originating in the People's Republic of China, *O.J.*, 26 September 1992, No L 282/23.

imported ; consequently, the amount of duty to be paid will increase in proportion to the price as prices decline and the Community will benefit only partly of the price decline¹⁵⁷⁵.

- Variable duties¹⁵⁷⁶, as well as combinations of *ad valorem* and variable duties¹⁵⁷⁷ are adopted in order to prevent increased dumping.

The reference to the prevention of increased dumping probably does not reflect accurately what is meant by the European anti-dumping authorities. Indeed, neither specific, *ad valorem* and variable duties nor a combination of them can prevent increased dumping. However, there is a difference between specific and *ad valorem* duties, on the one hand, and variable duties, on the other hand, if the dumping margin is calculated on the basis of prices after the levy of the anti-dumping duty : specific and *ad valorem* duties do not exclude increased dumping, whenever the export price declines or normal value increases ; under variable duties, however, increased dumping will only be possible through an increase in normal value¹⁵⁷⁸. Since under a variable duty the dumping prices cannot fall below the minimum price, the prevention of increased dumping probably means that variable duties prevent increased dumping through further decreases in the dumping prices.

- Specific¹⁵⁷⁹ and variable¹⁵⁸⁰ duties, as well as combinations of *ad valorem* and variable duties¹⁵⁸¹ are adopted in order to remedy price decreases of the dumped imports.

It is impossible to understand how specific duties, besides variable duties, may remedy price decreases of the dumped product. Indeed, whereas variable duties induce the dumping exporters to charge prices equal to the minimum price, specific duties do not guarantee that

¹⁵⁷⁵ Probably this difference in effects made the European anti-dumping authorities prefer a specific duty, rather than an *ad valorem* duty, when confronted with a continuing decline in the import prices (Council Regulation (EEC) No 729/92 of 16 March 1992 imposing a definitive anti-dumping duty on imports of certain thermal paper originating in Japan and definitively collecting the provisional anti-dumping duty, *O.J.*, 26 March 1992, No L 81/1 (corrigendum, *O.J.*, 21 May 1992, No L 138/40)).

¹⁵⁷⁶ Commission Regulation (EEC) No 1537/90 of 28 May 1990 imposing a provisional anti-dumping duty on imports of potassium permanganate originating in the USSR, *O.J.*, 8 June 1990, No L 145/9.

¹⁵⁷⁷ Council Regulation (EEC) No 2786/83 of 3 October 1983 imposing a definitive anti-dumping duty on imports of copper sulphate originating in Czechoslovakia and the USSR, *O.J.*, 7 October 1983, No L 274/1 ; Commission Regulation (EEC) No 2495/86 of 1 August 1986 imposing a provisional anti-dumping duty on imports of potassium permanganate originating in Czechoslovakia, the German Democratic Republic and the People's Republic of China, *O.J.*, 5 August 1986, No L 217/12.

¹⁵⁷⁸ See e.g. : Council Regulation (EEC) No 2294/80 of 28 August 1980 amending Regulation (EEC) No 191/80 imposing a definitive anti-dumping duty on lithium hydroxide originating in the United States of America and the Soviet Union, *O.J.*, 30 August 1980, No L 228/59.

¹⁵⁷⁹ Council Regulation (EEC) No 2200/90 of 27 July 1990 imposing a definitive anti-dumping duty on imports of silicon metal originating in the People's Republic of China, *O.J.*, 28 July 1990, No L 198/57.

¹⁵⁸⁰ Commission Regulation (EEC) No 1537/90 of 28 May 1990 imposing a provisional anti-dumping duty on imports of potassium permanganate originating in the USSR, *O.J.*, 8 June 1990, No L 145/9 ; Council Regulation (EC) No 3319/94 of 22 December 1994 imposing a definitive anti-dumping duty on imports of urea ammonium nitrate solution originating in Bulgaria and Poland, exported by companies not exempted from the duty, and collecting definitively the provisional duty imposed, *O.J.*, 31 December 1994, No L 350/20.

¹⁵⁸¹ Council Regulation (EEC) No 2786/83 of 3 October 1983 imposing a definitive anti-dumping duty on imports of copper sulphate originating in Czechoslovakia and the USSR, *O.J.*, 7 October 1983, No L 274/1 ; Commission Regulation (EEC) No 2495/86 of 1 August 1986 imposing a provisional anti-dumping duty on imports of potassium permanganate originating in Czechoslovakia, the German Democratic Republic and the People's Republic of China, *O.J.*, 5 August 1986, No L 217/12.

the dumping exporters will increase their prices, since specific duties are calculated on the import volume.

By way of exception, one reason has been invoked in respect of variable duties which clearly fits only the characteristics of this type of duty¹⁵⁸². In particular, variable duties have been imposed because their economic effect is the same as that of price undertakings¹⁵⁸³. Indeed, like a price undertaking¹⁵⁸⁴, a variable duty sets a minimum price below which the price of the imported product cannot fall.

Though European anti-dumping case law only very exceptionally justifies the choice of a specific type of duty on the basis of the characteristics of that type of duty, the Court of Justice probably will not consider European anti-dumping case law to provide an insufficient statement of reasons. The Court does not consider the information with regard to the type of duty as essential¹⁵⁸⁵. The Court, though, undervalues the difference in economic effects of the different duties¹⁵⁸⁶. For instance, as the Court has admitted¹⁵⁸⁷, a variable duty always favours the exporters as they can avoid paying the duty merely by raising their export prices up to the minimum price; on the other hand, they can never fully avoid the payment of *ad valorem* and specific duties¹⁵⁸⁸.

¹⁵⁸² In two cases the choice of a variable duty was explained through an argument which has not yet been invoked for the other types of duty, namely «the economic structure of the exporters» (*sic*) (Commission Regulation (EEC) No. 3798/90 of 21 December 1990 imposing a provisional anti-dumping duty on imports of espadrilles originating in the People's Republic of China, *O.J.*, 28 December 1990, No. L 365/25; Council Regulation (EEC) No 3091/91 of 21 October 1991 imposing a definitive anti-dumping duty on imports of video tapes in cassettes originating in the People's Republic of China and definitively collecting the provisional duty, *O.J.*, 24 October 1991, No L 293/2). The insufficient information makes it impossible to know whether this reason actually concerns the specific characteristics of variable duties.

¹⁵⁸³ Council Regulation (EEC) No 96/85 of 14 January 1985 imposing a definitive anti-dumping duty on imports of pentaerythritol originating in Canada, *O.J.*, 16 January 1985, No L 13/1 (corrigendum, *O.J.*, 24 January 1985, No L 20/46); Council Regulation (EEC) No 338/86 of 14 February 1986 imposing a definitive anti-dumping duty on imports of roller chains for cycles originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty imposed on those imports, *O.J.*, 15 February 1986, No L 40/25; Commission Decision No 1751/94/ECSC of 15 July 1994 imposing a definitive anti-dumping duty on imports into the Community of hematite pig-iron, originating in Brazil, Poland, Russia and Ukraine, *O.J.*, 16 July 1994, No L 182/37.

¹⁵⁸⁴ *Supra*, 368.

¹⁵⁸⁵ C.J.E.C., case C-49/88, 27 June 1991, *Al-Jubail Fertilizer Company and Saudi Arabian Fertilizer Company v Council*, E.C.R., 1991, I, (3187), 3243.

¹⁵⁸⁶ VERMULST, E.A., and HOOIJER, J.J., «Annotation on Case C-69/89, *Nakajima All Precision Co. v. Council*, Judgment of 7 May 1991, not yet reported; Case C-358/89, *Extramet v. Council*, Judgment of 16 May 1991, not yet reported; Case C-49/88, *Al-Jubail Fertilizer Company (Samad) and Saudi Arabian Fertilizer Company (Safco) v. Council*, Judgment of 17 June 1991, not yet reported; Case C-16/90, *Deleef Nölle v. Hauptzollamt Bremen-Freihafen*, Judgment of 22 October 1991, not yet reported», *Common Market Law Review*, 1992, (380), 394-396.

¹⁵⁸⁷ C.J.E.C., joined cases C-305/86 and C-160/87, 11 July 1990, *Neotype Techmasheexport GmbH v Commission and Council*, E.C.R., 1990, I, (2945), 3007.

¹⁵⁸⁸ According to the European anti-dumping authorities, exporters may indeed fully avoid the payment of an *ad valorem* duty: they only should raise their export prices to a level at which the duty exceeds entirely the dumping margin; in that case, a refund of the duty paid (Article 11(8) up to (10) basic EC Regulation; Article 16 basic ECSC Decision) may be possible (C.J.E.C., case C-49/88, 27 June 1991, *Al-Jubail Fertilizer Company and Saudi Arabian Fertilizer Company v Council*, E.C.R., 1991, I, (3187), 3194 (Report for the Hearing: conclusions of the Council)). The European anti-dumping authorities, however, disregard the costs for the exporters to initiate such a refund proceeding (e.g., the fees of legal counsellors), as well as the uncertainty about the outcome of it (see *infra*, 681-685).

Clearly, to exporters, this difference is quite essential. Another difference, which certainly is essential to the Community authorities, concerns the fact that *ad valorem* duties are more easily to administer : when there is a wide range of products, only one and the same percentage must be applied, whereas for each type of the product another specific or variable duty must be determined.

The European anti-dumping authorities, on the other hand, have argued that the reasons for the choice made between the different types of duties does not have to be provided each time, as the features concerning their evasion and administration are inherent in their nature¹⁵⁸⁹. Their point of view is quite surprising as European anti-dumping case law has characterized all types of duties as difficult to evade and easy to administer. In view of such a confusion in European anti-dumping case law, the idea to offer no explanation at all seems inappropriate. Instead, European anti-dumping case law should explain more clearly the choice made between the different types of duty by relying only on the characteristics of each type of duty.

2.2. SCOPE OF APPLICATION

2.2.1. *Ratione temporis*

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As anti-dumping duties are imposed by regulation, they enter into force on the date specified in the regulation or, in absence thereof, on the 20th day following their publication in the Official Journal of the European Communities (Article 191(1) EC Treaty). Practically all regulations imposing anti-dumping duties specify the date of their entry into force : it is usually the day of

¹⁵⁸⁹ C.J.E.C., case C-49/88, 27 June 1991, *Al-Jubail Fertilizer Company and Saudi Arabian Fertilizer Company v Council*, E.C.R., 1991, I, (3187), 3197 (Report for the Hearing : conclusions of the Commission).

their publication or the day following their publication¹⁵⁹⁰. As they never explain why, they may seem to go against the Court of Justice's case law, according to which the European authorities cannot resort without reason to the procedure of an immediate entry into force, without having an adverse effect on a legitimate regard for legal certainty¹⁵⁹¹. However, for the Court, these reasons need not necessarily to be set out in the preamble to the regulation, insofar as the Court, in the provisions which the regulation enacts, finds serious reasons for holding that any interval between the publication and the entry into force of the regulation might be prejudicial to the Community¹⁵⁹². According to the Court of Justice, such a reason can be found in respect of definitive anti-dumping duties, when their immediate entry into force is necessary in order to avoid a hiatus in the protection of the Community interests between the date of expiry of the provisional duty and the date of entry into force of the definitive one. The immediate entry into force of the definitive anti-dumping duty is indeed foreseeable for exporters and importers when it enters into force at the end of the period of validity of the provisional duty and when the European anti-dumping authorities constantly keep the exporters and importers informed of the course of the procedure¹⁵⁹³. In view of this application of the Court's case law to definitive anti-dumping duties, it seems that the legality of the immediate entry into force of provisional anti-dumping duties will not stand before the Court, unless the European anti-dumping authorities can prove that it was foreseeable for exporters and importers as they were constantly kept informed of the course of the procedure. Or, perhaps, the Court may find the explanation why

¹⁵⁹⁰ Exceptionally, they enter into force three days after their publication (Council Regulation (EEC) No 3439/80 of 22 December 1980 imposing a definitive anti-dumping duty on imports of certain polyester yarn originating in the United States of America, *O.J.*, 31 December 1980, No L 358/91; Council Regulation (EEC) No 1882/82 of 12 July 1982 imposing a definitive anti-dumping duty on mechanical wrist-watches originating in the USSR, *O.J.*, 15 July 1982, No L 207/1; Council Regulation (EEC) No 2236/82 of 11 August 1982 imposing a definitive anti-dumping duty on upright pianos originating in the USSR, *O.J.*, 13 August 1982, No L 238/1 (corrigendum, *O.J.*, 21 September 1982, No L 271/20); Council Regulation (EEC) No 273/83 of 1 February 1983 imposing a definitive anti-dumping duty on imports of light sodium carbonate originating in Bulgaria, the German Democratic Republic, Poland, Romania and the Soviet Union, *O.J.*, 3 February 1983, No L 32/1; Council Regulation (EEC) No 3385/85 of 28 November 1985 imposing a definitive anti-dumping duty on imports of basic chromium sulphate originating in Yugoslavia, *O.J.*, 30 November 1985, No L 321/81), or even ten days after their publication (Commission Regulation (EEC) No 2695/80 of 21 October 1980 amending Regulation (EEC) No 2297/80 imposing a provisional anti-dumping duty on imports of certain polyester yarn originating in the United States of America, *O.J.*, 23 October 1980, No L 279/18; Commission Regulation (EEC) No 2843/80 of 30 October 1980 amending Regulation (EEC) No 2297/80 imposing a provisional anti-dumping duty on imports of certain polyester yarn originating in the United States of America, *O.J.*, 4 November 1980, No L 294/5; Council Regulation (EEC) No 3198/81 of 9 November 1981 amending Regulation (EEC) No 3439/80 imposing a definitive anti-dumping duty on imports of certain polyester yarn originating in the United States of America, *O.J.*, 11 November 1981, No L 322/2; Commission Regulation (EEC) No 486/88 of 22 February 1988 amending the regulations, recommendations and decisions imposing anti-dumping duties, *O.J.*, 24 February 1988, No L 50/5; Council Regulation (EEC) No 3443/89 of 14 November 1989 amending Regulation (EEC) No 2347/87 imposing a definitive anti-dumping duty on mechanical wrist-watches originating in the Union of Soviet Socialist Republics, *O.J.*, 16 November 1989, No L 331/44).

¹⁵⁹¹ C.J.E.C., case 17/67, 13 December 1967, *Firma Max Neumann v Hauptzollamt Hoff/Saale*, *E.C.R.*, 1967, (441), 456.

¹⁵⁹² C.J.E.C., case 17/67, 13 December 1967, *Firma Max Neumann v Hauptzollamt Hoff/Saale*, *E.C.R.*, 1967, (441), 456.

¹⁵⁹³ C.J.E.C., joined cases C-304/86 and C-185/87, 11 July 1990, *Enital SpA v Commission and Council*, *E.C.R.*, 1990, I, (2939), 2941; C.J.E.C., joined cases C-305/86 and C-160/87, 11 July 1990, *Neotype Techmashexport GmbH v Commission and Council*, *E.C.R.*, 1990, I, (2945), 2990-2991 (Opinion of Advocate General VAN GERVEN).

the Community interests called for intervention to prevent injury from being caused during the proceeding, to constitute a sufficiently serious ground for the immediate entry into force.

In principle, anti-dumping duties can not be imposed nor increased with retroactive effect (Article 10.1. GATT Anti-dumping Code ; Article 10(1) basic EC Regulation ; Article 13(4)(a) basic ECSC Decision). Only under very exceptional circumstances, retroactive effect may be given to definitive anti-dumping duties, though not to provisional duties (Articles 8.6. and 10.6. GATT Anti-dumping Code ; Article 10(4) and (5) basic EC Regulation ; Article 13(4)(b) basic ECSC Decision). There is no evidence that the European anti-dumping authorities have imposed or increased anti-dumping duties with retroactive effect¹⁵⁹⁴, but in one case¹⁵⁹⁵.

1594 The European anti-dumping authorities have always refused to impose or increase definitive anti-dumping duties with retroactive effect :

- in *video cassettes from the Republic of Korea and Hong Kong*, press articles referring the anti-dumping proceeding in question were not considered as sufficient evidence that the importers were, or should have been aware, that the exporters practised dumping and that such dumping would cause injury ; moreover, in view of the relatively low dumping margins, it could not be reasonably considered that the importers should have been aware of any dumping (Council Regulation (EEC) No 1768/89 of 19 June 1989 imposing a definitive anti-dumping duty on imports of video cassettes originating in the Republic of Korea and Hong Kong, collecting definitively the provisional duty and terminating the anti-dumping proceeding with regard to the imports of video tape reels originating in the Republic of Korea, *O.J.*, 22 June 1989, No L 174/1) ;
- in *mercury from the Soviet Union*, irrespective of whether the importers were or should have been aware that the exporter practised dumping, it was found not necessary to impose an anti-dumping duty with retroactive effect because the dumped imports during the 90 days prior to the imposition of the provisional anti-dumping duty were negligible ; nevertheless, the European anti-dumping authorities agreed that it was a case of sporadic dumping (Council Regulation (EEC) No 3687/87 of 8 December 1987 imposing a definitive anti-dumping duty on imports of mercury originating in the Soviet Union and definitively collecting the provisional anti-dumping duty imposed on such imports, *O.J.*, 10 December 1987, No L 346/27) ;
- in *aspartame from Japan and the United States of America* and *furazolidone from the People's Republic of China*, the European anti-dumping authorities did not examine whether the conditions for imposing anti-dumping duties with retroactive effect were fulfilled, as the Community producer did not substantiate his request sufficiently (Council Regulation (EEC) No 1391/91 of 27 May 1991 imposing a definitive anti-dumping duty on imports of aspartame originating in Japan and the United States of America, *O.J.*, 29 May 1991, No L 134/1 ; Council Regulation (EC) No 2674/94 of 31 October 1994 imposing a definitive anti-dumping duty on imports of furazolidone originating in the People's Republic of China and collecting definitively the provisional duty imposed, *O.J.*, 4 November 1994, No L 285/1).

See also : *compact disc players from Japan and the Republic of Korea*, where the extension of the scope *ratione materiae* of the definitive anti-dumping duty entered into force only on the day following its publication, whereas the limitation of its scope entered into force in retroaction to the date the definitive anti-dumping duty entered into force (Council Regulation (EEC) No 819/92 of 30 March 1992 amending Regulation (EEC) No 112/90 imposing a definitive anti-dumping duty on imports of certain compact disc players originating in Japan and the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 2 April 1992, No L 87/1).

The fact that definitive anti-dumping duties have not yet been imposed or increased with retroactive effect, does not mean that there have not been anti-dumping decisions with retroactive effect. Usually, these decisions do not impose or increase anti-dumping duties. Indeed, retroactive effect has been given to decisions :

- repealing existing anti-dumping duties (Council Regulation (EEC) No 4017/88 of 19 December 1988 amending Regulation (EEC) No 3205/88 as regards certain plain paper photocopiers assembled in the Community by Matsushita Business Machine (Europe) GmbH and Toshiba Systèmes (France) SA, *O.J.*, 23 December 1988, No L 355/1 ; Council Regulation (EEC) No 359/89 of 13 February 1989 repealing Regulation (EEC) No 3205/88 in respect of certain plain paper photocopiers assembled in the Community by Konica Business Machines Manufacturing GmbH, *O.J.*, 15 February 1989, No L 43/1 ; Commission Decision 89/116/EEC of 23 December 1988 accepting an undertaking relating to the anti-dumping proceeding concerning certain plain paper photocopiers assembled or produced in the Community by Konica Business Machines Manufacturing GmbH, *O.J.*, 15 February 1989, No L 43/54 ; Council Regulation (EEC) No 502/89 of 27 February 1989 amending Regulation (EEC) No 2735/88 repealing Regulation (EEC) No 1021/88 in respect of certain electronic scales assembled in the Community by TEC (UK) Ltd, *O.J.*, 1 March 1989, No L 58/1 ; Council Regulation (EEC) No 3490/89 of 21 November 1989 repealing Regulation (EEC) No 3042/89 extending the anti-dumping duty imposed by Regulation (EEC) No 3651/88 to certain serial-impact dot-matrix printers assembled in the Community, *O.J.*, 23 November 1989, No L 340/5 ; Commission Decision 89/596/EEC of 13 October 1989 accepting undertakings relating to the anti-dumping proceeding concerning certain serial-impact dot-matrix printers assembled in the Community by NEC Technology Ltd and Star Micronics Manufacturing Ltd, *O.J.*, 23 November 1989, No L 340/25 ; Council Regulation (EEC) No 3514/91 of 2 December 1991 amending Regulation (EEC) No 450/89 in so far as it adjusts the definitive anti-dumping duty on imports of urea originating in Saudi Arabia laid down by Regulation (EEC) No 3339/87, *O.J.*, 5 December 1991, No L 334/1 ; Council Regulation (EEC) No 2553/93 of 13 September 1993 amending Regulation (EEC) No 2089/84 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 18 September 1993, No L 235/3 ; Council Regulation (EEC) No 2655/93 of 27 September 1993 repealing with retroactive effect the anti-dumping measures applying to imports into the

Nevertheless, retroactive effect may have actually been granted : a regulation may have entered into force on the date the Official Journal, in which has been published, is bearing, but the Journal may have been distributed several days later¹⁵⁹⁶.

Community of tapered roller bearings originating in Japan, *O.J.*, 30 September 1993, No L 244/1 ; Council Regulation (EC) No 2238/94 of 14 September 1994 amending Regulation (EC) No 3359/93 in so far as it imposes an anti-dumping duty on imports of ferro-silicon originating in Brazil and produced by the Brazilian company Rima Electrometalurgia SA, *O.J.*, 15 September 1994, No L 240/28 ;

- suspending anti-dumping duties (Council Regulation (EC) No 5/94 of 22 December 1993 on the suspension of the anti-dumping measures against EFTA countries, *O.J.*, 5 January 1994, No L 3/1) ;
- decreasing the amount of anti-dumping duties (Council Regulation (EEC) No 3280/84 of 22 November 1984 amending the definitive anti-dumping duty on imports of certain ball bearings originating in Japan and exported by NTN Toyo Bearing Co. Ltd., *O.J.*, 24 November of 1984, No L 307/15 ; Council Regulation (EEC) No 1238/85 of 13 May 1985 amending the definitive anti-dumping duty on imports of certain ball bearings originating in Japan and exported by Nippon Seiko KK and others, *O.J.*, 15 May 1985, No L 129/1 ; Commission Regulation (EEC) No 2871/88 of 15 September 1988 amending Regulation (EEC) No 1695/88 imposing a provisional anti-dumping duty on imports of polyester yarn originating in Mexico, South Korea, Taiwan and Turkey, *O.J.*, 17 September 1988, No L 257/24 ; Council Regulation (EEC) No 2966/92 of 12 October 1992 amending Regulation (EEC) No 1798/90 in respect of the definitive anti-dumping duty on certain imports of monosodium glutamate originating, *inter alia*, in Indonesia and the Republic of Korea, *O.J.*, 15 October 1992, No L 299/1. See also : Council Regulation (EEC) No 2166/89 of 18 July 1989 amending Regulation (EEC) No 1282/81 imposing a definitive anti-dumping duty on imports of vinyl acetate monomer originating in the United States of America, *O.J.*, 20 July 1989, No L 208/2, where one of the dumping companies changed its business name without any change in ownership, production or marketing structures of the company ; in order to maintain the application of the anti-dumping duty of 5.9 % to that company, the Regulation imposing the anti-dumping duties had to be amended ; the amendment was given retroactive effect ; nevertheless, it is not illegal because without the amendment the company would have been subjected to the residual anti-dumping duty of 15 % ; thus, the amendment decreased the amount of anti-dumping duty) ;
- restricting the scope of an anti-dumping duty (Council Regulation (EEC) No 3002/85 of 28 October 1985 amending Regulation (EEC) No 1698/85 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 30 October 1985, No L 288/5 ; Council Regulation (EEC) No 113/86 of 20 January 1986 amending Regulation (EEC) No 1698/85 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 23 January 1986, No L 17/2 ; Council Regulation (EEC) No 2127/86 of 7 July 1986 amending Regulation (EEC) No 1698/85 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 9 July 1986, No L 187/3 ; Council Regulation (EEC) No 154/88 of 18 January 1988 amending Regulation (EEC) No 1698/85 imposing a definitive duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 January 1988, No L 18/4 ; Commission Decision No 1324/89/ECSC of 12 May 1989 amending Decision No 708/89/ECSC imposing a provisional anti-dumping duty on imports of certain flat-rolled products of iron or non-alloy steel, cold-rolled, originating in Yugoslavia, *O.J.*, 17 May 1989, No L 133/5 ; Council Regulation (EEC) No 2519/93 of 13 September 1993 amending Regulation (EEC) No 729/92 imposing a definitive anti-dumping duty on imports of certain thermal paper originating in Japan, *O.J.*, 15 September 1993, No L 232/1) ;
- definitively collecting provisional anti-dumping duties (Council Regulation (EEC) No 2761/81 of 22 September 1981 imposing a definitive anti-dumping duty on *o*-xylene (orthoxylene) originating in Puerto Rico and the United States of America, *O.J.*, 25 September 1981, No L 270/1) ;
- adapting the scope *ratione personae* of the anti-dumping duty to the new name of the dumping exporter (Council Regulation (EC) No 872/94 of 19 April 1994 amending Regulations (EEC) No 2089/84 and (EEC) No 1739/85 concerning definitive anti-dumping duties on imports of certain ball bearings originating in Japan, *O.J.*, 20 April 1994, No L 101/7).

¹⁵⁹⁵ In *brushes from the People's Republic of China* the extension of the scope of the provisional anti-dumping duty was made retroactive (Commission Regulation (EEC) No 3453/88 of 4 November 1988 amending Regulation (EEC) No 3052/88 imposing a provisional anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China, *O.J.*, 8 November 1988, No L 303/11). As it concerned a provisional anti-dumping duty, it cannot have been an application of one of the exceptions in which retroactivity is legally allowed, since these exceptions apply only to definitive anti-dumping duties.

There may also be another instance of illegal retroactivity. In *sheets and plates, of iron or steel, from Yugoslavia* a decision adapting the scope *ratione materiae* of a provisional anti-dumping duty to the new combined nomenclature was granted retroactive effect (Commission Decision No 980/88/ECSC of 13 April 1988 amending Decision No 229/88/ECSC imposing a provisional anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Yugoslavia, *O.J.*, 15 April 1988, No L 98/33). The retroactive effect of that decision is only illegal in so far as the new nomenclature is larger is than the former.

¹⁵⁹⁶ C.J.E.C., joined cases C-305/86 and C-160/87, 11 July 1990, *Neotype Techmasheexport GmbH v Commission and Council*, E.C.R., 1990, I, (2945), 2991 (Opinion of Advocate General VAN GERVEN).

Anti-dumping duties are imposed on future imports (Article 10.1 GATT Anti-dumping Code ; Article 10(1) basic EC Regulation)¹⁵⁹⁷, but the existence of injurious dumping is determined on imports in the past. Indeed, the investigation of dumping should normally cover a period of not less than six months immediately prior to the initiation of the proceeding (Article 6(1) basic EC Regulation ; Article 7(1)(c) basic ECSC Decision). Further, the investigation should normally be concluded within one year after the initiation of the proceeding (Article 5.10. GATT Anti-dumping Code ; Article 6(9) basic EC Regulation ; Article 7(9)(a) basic ECSC Decision), with the possibility of an extension of maximum six months, under GATT anti-dumping law (Article 5.10. GATT Anti-dumping Code), and of maximum three months, under EC anti-dumping law (Article 6(9) basic EC Regulation)¹⁵⁹⁸. Thus, as the period of one year is usually not observed¹⁵⁹⁹, the anti-dumping duties would be imposed on the basis of facts which occurred

¹⁵⁹⁷ C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, E.C.R., 1991, I, (2069), 2085 (Report for the Hearing : conclusions of the Commission) and 2164 (Opinion of Advocate General LENZ).

As the Commission has held, «(t)he basic purpose of these duties is not to compensate for past injury, but to stop distortion of competition arising from unfair commercial practices like dumping» (Answer of the Commission to written question No 3270/91, *O.J.*, 10 August 1992, No C 202/37).

¹⁵⁹⁸ ECSC anti-dumping law does not provide the possibility of any extension of the period within which the investigation must be concluded.

¹⁵⁹⁹ Answer of the Commission to written question No 1795/91, *O.J.*, 16 March 1992, No C 66/37.

According to the Court of Justice, the frequent non-observance of the period of one year is not necessarily illegal. The period of one year is a guide rather than a mandatory period. Nevertheless, the anti-dumping proceeding must not be extended beyond a reasonable period to be assessed according to the particular circumstances of each case (C.J.E.C., case 246/87, 12 May 1989, *Continentalte ProduktenGesellschaft Erhardt-Renken GmbH & Co. v Hauptzollamt München-West*, E.C.R., 1989, (1151), 1162-1163 and 1172 ; C.J.E.C., case 121/86, 28 November 1989, *Anonymos Etaireia Epicheiriseon Metallefikon Viomichanikon kai Nafiliakon AE a.o. v Council*, E.C.R., 1989, (3919), 3953).

Since the judgement of the Court of Justice, the non-observance of the period of one year has always been explained. The following reasons have been invoked :

- the complexity of the case (*sic*) (Commission Decision 90/507/EEC of 7 September 1990 terminating the review of the anti-dumping measures concerning dense sodium carbonate originating in the United States of America, *O.J.*, 16 October 1990, No L 283/38 ; Council Regulation (EC) No 2557/94 of 19 October 1994 imposing a definitive anti-dumping duty on imports of calcium metal originating in the People's Republic of China and Russia, *O.J.*, 21 October 1994, No L 270/27) ;
- the volume and complexity of the data gathered initially (Commission Regulation (EEC) No 313/92 of 4 February 1992 imposing a provisional anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in South Korea, *O.J.*, 11 February 1992, No L 34/8) ;
- the volume and complexity of the data gathered and examined (Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5 ; Council Regulation (EEC) No 2861/93 of 18 October 1993 imposing a definitive anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, and collecting definitively the provisional duty imposed, *O.J.*, 21 October 1993, No L 262/4 ; Commission Regulation (EC) No 534/94 of 9 March 1994 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, *O.J.*, 11 March 1994, No L 68/5 ; Council Regulation (EC) No 2199/94 of 9 September 1994 imposing a definitive anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, and collecting definitively the provisional duty imposed, *O.J.*, 10 September 1994, No L 236/2) ;
- the volume and complexity of the data initially gathered and examined, together with the fact that the investigation had required the study of related issues which arose during the proceeding and which could not have been foreseen at its outset (Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1 ; Commission Regulation (EEC) No 1613/90 of 13 June 1990 imposing a provisional anti-dumping duty on imports of ball bearings with a greatest external diameter not exceeding 30 mm originating in Thailand, *O.J.*, 16 June 1990, No L 152/24 ; Council Regulation (EEC) No 2685/90 of 17 September 1990 amending Regulation (EEC) No 2089/84 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 20 September 1990, No L 256/1 (corrigendum, *O.J.*, 10 January 1991, No L 7/38) ; Commission Decision 90/540/EEC of 29 October 1990 terminating the anti-

dumping review proceeding concerning imports of propanolol originating in the United States of America, *O.J.*, 6 November 1990, No L 306/23 ; Commission Regulation (EEC) No 129/91 of 11 January 1991 imposing a provisional anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China, *O.J.*, 19 January 1991, No L 14/31 ; Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7 ; Council Regulation (EEC) No 3091/91 of 21 October 1991 imposing a definitive anti-dumping duty on imports of video tapes in cassettes originating in the People's Republic of China and definitively collecting the provisional duty, *O.J.*, 24 October 1991, No L 293/2 ; Council Regulation (EEC) No 2849/92 of 28 September 1992 modifying the definitive anti-dumping duty on imports of ball bearings with a greatest external diameter exceeding 30 mm originating in Japan imposed by Regulation (EEC) No 1739/85, *O.J.*, 1 October 1992, No L 286/2 (corrigendum, *O.J.*, 25 March 1993, No L 72/36) ; Council Regulation (EEC) No 993/93 of 26 April 1993 imposing a definitive anti-dumping duty on imports of certain electronic weighing scales originating in Japan, *O.J.*, 29 April 1993, No L 104/4 ;

- the complexity of the proceeding and the volume of the data gathered (Council Regulation (EC) No 821/94 of 12 April 1994 imposing a definitive anti-dumping duty on imports of silicon carbide, originating in the People's Republic of China, Poland, the Russian Federation and Ukraine, *O.J.*, 13 April 1994, No L 94/21) ;
- the complexity of the investigation, in particular the numerous models of the product and the variety of technical specifications (Council Regulation (EEC) No 2474/93 of 8 September 1993 imposing a definitive anti-dumping duty on imports into the Community of bicycles originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 9 September 1993, No L 228/1) ;
- the complexity of the investigation, in particular in the light of the numerous product types and the calculation of the normal value on a quarterly basis (Commission Regulation (EEC) No 2686/92 of 16 September 1992 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea, *O.J.*, 17 September 1992, No L 272/13) ;
- the large number of exporters and importers, the very high number of models of the product and the variety and complexity of the distribution systems of the individual companies on the individual markets (Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27)) ;
- the complexity of the proceeding, in particular the difficulties met by the Commission in obtaining, from interested parties, the relevant data (Commission Regulation (EEC) No 665/90 of 16 March 1990 imposing a provisional anti-dumping duty on imports of ferrobore alloy originating in Japan, *O.J.*, 20 March 1990, No L 73/6 ; Commission Decision 90/383/EEC of 13 July 1990 terminating the anti-dumping proceeding concerning imports of NPK fertilizers originating in Hungary, Poland, Romania and Yugoslavia, *O.J.*, 20 July 1990, No L 188/63 ; Commission Decision No 3692/91/ECSC of 12 December 1991 repealing Decision No 2132/88/ECSC imposing definitive anti-dumping duties on imports of certain iron or steel coils, originating in Algeria, Mexico and Yugoslavia, *O.J.*, 19 December 1991, No L 350/11 ; Commission Decision No 322/92/ECSC of 7 February 1992 repealing Decision No 3499/87/ECSC imposing a definitive anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Mexico, *O.J.*, 12 February 1992, No L 35/9 ; Commission Decision No 891/92/ECSC of 30 March 1992 imposing a provisional anti-dumping duty on imports of certain semi-finished products of alloy steel, originating in Turkey and Brazil, *O.J.*, 9 April 1992, No L 95/26) ;
- the complexity of the proceeding and the numerous arguments put forward (Council Regulation (EEC) No 54/93 of 8 January 1993 imposing a definitive duty on imports of synthetic fibres of polyesters originating in India and the Republic of Korea, *O.J.*, 15 January 1993, No L 9/2) ;
- the complexity of the proceeding, in particular the detailed verification of the voluminous data involved and the numerous arguments put forward (Council Regulation (EEC) No 1048/90 of 25 April 1990 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 27 April 1990, No L 107/56 (corrigendum, *O.J.*, 24 May 1990, No L 133/92) ; Council Regulation (EEC) No 2112/90 of 23 July 1990 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan and collecting definitively the provisional duty, *O.J.*, 25 July 1990, No L 193/1 ; Council Regulation (EEC) No 1251/91 of 13 May 1991 imposing a definitive anti-dumping duty on imports of audio tapes in cassettes originating in Japan and the Republic of Korea, collecting definitively the provisional duty and terminating the procedure concerning Hong Kong, *O.J.*, 14 May 1991, No L 119/35 ; Council Regulation (EEC) No 1391/91 of 27 May 1991 imposing a definitive anti-dumping duty on imports of aspartame originating in Japan and the United States of America, *O.J.*, 29 May 1991, No L 134/1 ; Council Regulation (EEC) No 3836/91 of 19 December 1991 imposing a definitive anti-dumping duty on imports of dihydrostreptomycin originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty, *O.J.*, 31 December 1991, No 362/1 ; Council Regulation (EEC) No 3068/92 of 23 October 1992 imposing a definitive anti-dumping duty on imports of potassium chloride originating in Belarus, Russia or Ukraine, *O.J.*, 24 October 1992, No L 308/41 ; Council Regulation (EEC) No 3482/92 of 30 November 1992 imposing a definitive anti-dumping duty on imports of certain large electrolytic aluminium capacitors originating in Japan and collecting definitively the provisional anti-dumping duty, *O.J.*, 3 December 1992, No L 353/1 (corrigendum, *O.J.*, 28 January 1993, No L 19/34)), including the study of related issues which arose during the proceeding and which could have been foreseen at its outset (Council Regulation (EEC) No 2093/91 of 15 July 1991 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China and collecting definitively the provisional duty, *O.J.*, 18 July 1991, No L 195/1 ; Council Regulation (EEC) No 830/92 of 30 March 1992 imposing a definitive anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and collecting definitively the provisional duty, *O.J.*, 3

- April 1992, No L 88/1 (corrigendum, *O.J.*, 5 June 1992, No L 153/16) ;
- the complexity of the proceeding, in particular the detailed verification of the data and the number of exporters involved and the numerous arguments put forward (Council Regulation (EEC) No 112/90 of 16 January 1990 imposing a definitive anti-dumping duty on imports of certain compact disc players originating in Japan and the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 17 January 1990, No L 13/21) ;
 - the complexity of the proceeding, in particular the assessment of the status of the dumping exporters and the Community industry and the new developments occurring after the period of investigation and affecting the Community industry (Commission Decision 93/376/EEC of 16 June 1993 terminating the review of anti-dumping measures adopted under Council Regulation (EEC) 1698/85 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 29 June 1993, No L 157/76) ;
 - the complexity of the proceeding and the difficulties of communication and information-gathering, resulting in numerous requests from the parties concerned for extensions of deadlines, which were granted by the Commission when justified by the circumstances (Council Regulation (EEC) No 1189/93 of 14 May 1993 imposing definitive anti-dumping duties on imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in Hungary, Poland and the Republic of Croatia and definitively collecting provisional anti-dumping duties, *O.J.*, 15 May 1993, No L 120/34) ;
 - the large number of interested parties involved, and the complexity of the proceeding, in particular the difficulties met by the Commission in obtaining from interested parties, the relevant data (Commission Regulation (EEC) No 2818/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports of cotton yarn originating in Brazil, Egypt and Turkey and terminating the anti-dumping proceeding in respect of cotton yarn originating in India and Thailand, *O.J.*, 27 September 1991, No L 271/17) ;
 - the complexity of the case, in particular due to the number of producers located in the Community and due to the fact that the Polish producers and exporter, as well as the producers located in the analogous country, were newly operating under market economy conditions (Council Regulation (EC) No 3319/94 of 22 December 1994 imposing a definitive anti-dumping duty on imports of urea ammonium nitrate solution originating in Bulgaria and Poland, exported by companies not exempted from the duty, and collecting definitively the provisional duty imposed, *O.J.*, 31 December 1994, No L 350/20) ;
 - the large number of interested parties involved and the numerous extensions of time limits requested by some of the exporters involved (Commission Regulation (EEC) No 3262/90 of 5 November 1990 imposing a provisional anti-dumping duty on imports of audio tapes in cassettes originating in Japan, the Republic of Korea and Hong Kong, *O.J.*, 13 November 1990, No L 313/5 (corrigendum, *O.J.*, 12 January 1991, No L 9/36) ;
 - the large number of interested parties involved, the number of hearings which had to be granted, the prolongation of time limits requested by some exporters and the extension of the investigation to imports from two additional countries (Commission Decision 91/512/EEC of 25 July 1991 accepting undertakings given in connection with the review of anti-dumping measures concerning imports of artificial corundum originating in the Soviet Union, Hungary, Poland, Czechoslovakia and the People's Republic of China and in connection with the anti-dumping proceeding concerning imports of artificial corundum originating in Brazil and Yugoslavia, and terminating the investigation, *O.J.*, 2 October 1991, No L 275/27) ;
 - the large number of both Community producers and exporters in third countries, together with their relatively small average size (Answer of the Commission to written question No 3270/91, *O.J.*, 10 August 1992, No C 202/36) ;
 - the large number of Community producers involved (Commission Decision 93/325/EEC of 18 May 1993 terminating the anti-dumping proceeding concerning imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China, *O.J.*, 25 May 1993, No L 127/15) ;
 - the number of exporting countries (Commission Regulation (EEC) No 547/90 of 2 March 1990 imposing a provisional anti-dumping duty on imports of certain glutamic acid and its salts originating in Indonesia, the Republic of Korea, Taiwan and Thailand, and accepting undertakings in connection with imports of certain glutamic acid and its salts originating in these countries, *O.J.*, 3 March 1990, No L 56/23) ;
 - the complexity of the like product industry combined with the internationalization of the manufacturing processes (Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79 ; corrigendum, *O.J.*, 10 February 1990, No L 38/44) ; Council Regulation (EEC) No 2112/90 of 23 July 1990 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan and collecting definitively the provisional duty, *O.J.*, 25 July 1990, No L 193/1 ; Council Regulation (EEC) No 577/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as EPROMs (erasable programmable read only memories) originating in Japan, *O.J.*, 12 March 1991, No L 65/1) ;
 - the complexity of the data examined and the difficulties faced in selecting the reference country (Council Regulation (EC) No 486/94 of 4 March 1994 imposing definitive anti-dumping duties on imports of fluor spar originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 5 March 1994, No L 62/1) ;
 - the difficulty of finding a reference country to determine the dumping margin in respect of the allegedly dumping NME country (Commission Regulation (EEC) No 720/90 of 22 March 1990 imposing a provisional anti-dumping duty on imports of silicon metal originating in the People's Republic of China, *O.J.*, 27 March 1990, No L 80/9 ; Commission Regulation (EEC) No 2051/90 of 17 July 1990 imposing a temporary anti-dumping duty on imports of woven polyolefin bags originating in the People's Republic of China, *O.J.*, 19 July 1990, No L 187/36 (corrigendum, *O.J.*, 20 September 1990, No L 256/38) ; Commission Regulation (EEC) No 1031/92 of 23 April 1992 imposing a provisional anti-dumping duty on imports of potassium chloride (potash) originating in Belarus, Russia or Ukraine, *O.J.*, 28 April 1992, No L 110/5 ; Commission Regulation (EEC) No 2477/93 of 6 September 1993 imposing a provisional anti-dumping duty on imports of certain photo

twenty-one months before, a period over which for changes in circumstances and pricing policies may have taken place. Nevertheless, the injury incurred twenty-one months before is qualified as present injury¹⁶⁰⁰. Moreover, the European anti-dumping authorities have consistently and, according to the Court of Justice¹⁶⁰¹, rightfully refused to take into account changes in circumstances and pricing policies which occurred after the investigation period. According to them, any other method would render anti-dumping investigations virtually permanent, would

albums originating in the People's Republic of China, *O.J.*, 9 September 1993, No L 228/16 ; Council Regulation (EC) No 3664/93 of 22 December 1993 imposing a definitive anti-dumping duty on imports into the Community of photo albums in bookbound form originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 31 December 1993, No L 333/67 ;

- the difficulty of finding a cooperative producer in a reference country to determine the dumping margin in respect of the allegedly dumping NME country and the complexity of the injury examination (Commission Decision 94/389/EC of 6 June 1994 terminating the anti-dumping proceeding regarding imports of refined antimony trioxide originating in the People's Republic of China, *O.J.*, 9 July 1994, No L 176/41) ;

- the fact that the Commission had to contact various companies in different ME countries in order to establish normal value for the allegedly dumping NME countries (Commission Decision 90/196/EEC of 10 April 1990 terminating the anti-dumping proceeding concerning imports of methenamine (hexamethylenetetramine) originating in Hungary and Yugoslavia and accepting undertakings offered in connection with the proceeding concerning imports of methenamine (hexamethylenetetramine) originating in Bulgaria, Czechoslovakia, Poland and Romania, *O.J.*, 24 April 1990, No L 104/14) ;

- the complexity of the proceeding, in particular the difficulties met by the Commission under the prevailing political conditions (in former Yugoslavia in 1992) in obtaining the relevant data (Commission Decision No 2297/92/ECSC of 31 July 1992 amending Decision No 2131/88/ECSC, accepting undertakings offered in connection with imports of certain sheets and plates, of iron or steel, originating in the Republic of Slovenia and the Yugoslav republics of Macedonia, Montenegro and Serbia, and terminating the anti-dumping proceeding with regard to the Republic of Croatia and the Republic of Bosnia-Herzegovina, *O.J.*, 6 August 1992, No L 221/36) ;

- the duration of the exchanges of information with the dumping exporter (Commission Decision 92/313/EEC of 13 June 1992 accepting an undertaking given in connection with the review proceeding of the anti-dumping measure concerning imports of container corner fittings of worked cast steel originating in Austria and terminating the investigation, *O.J.*, 19 June 1992, No L 165/37) ;

- the time spent in consultation within the Advisory Committee (see : Article 15 basic EC Regulation ; Article 6 basic ECSC Decision) (Commission Regulation (EEC) No 761/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten ores and concentrates originating in the People's Republic of China, and terminating the proceeding concerning imports originating in Hong Kong, *O.J.*, 30 March 1990, No L 83/23 ; Commission Regulation (EEC) No 762/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungstic oxide and tungstic acid originating in the People's Republic of China, *O.J.*, 30 March 1990, No L 83/29 ; Commission Regulation (EEC) No 763/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten carbide and fused tungsten carbide originating in the People's Republic of China and terminating the anti-dumping proceeding concerning imports of those products from the Republic of Korea, *O.J.*, 30 March 1990, No L 83/36 ; Commission Decision 90/154/EEC of 26 March 1990 terminating the anti-dumping proceeding concerning imports of ammonium paratungstate originating in the People's Republic of China and the Republic of Korea, *O.J.*, 30 March 1990, No L 83/117 ; Commission Decision 90/155/EEC of 26 March 1990 terminating the anti-dumping proceeding concerning imports of tungsten metal powder originating in the People's Republic of China or the Republic of Korea, *O.J.*, 30 March 1990, No L 83/124 ; Council Regulation (EEC) No 2735/90 of 24 September 1990 imposing a definitive anti-dumping duty on imports of tungsten ores and concentrates originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty, *O.J.*, 27 September 1990, No L 264/1 ; Council Regulation (EEC) No 2736/90 of 24 September 1990 imposing a definitive anti-dumping duty on imports of tungstic oxide and tungstic acid originating in the People's Republic of China and definitively collecting the provisional duty, *O.J.*, 27 September 1990, No L 264/4 (corrigendum, *O.J.*, 24 October 1990, No L 292/30) ; Council Regulation (EEC) No 2737/90 of 24 September 1990 imposing a definitive anti-dumping duty on imports of tungsten carbide and fused tungsten carbide originating in the People's Republic of China and definitively collecting the provisional duty, *O.J.*, 27 September 1990, No L 264/7 (corrigendum, *O.J.*, 24 October 1990, No L 292/30)).

¹⁶⁰⁰ C.J.E.C., case C-121/86, 28 November 1989, *Anonymos Etairia Epicheiriseon Metalleftikon Viomichanikon kai Nafiliakon AR a.o. v Council*, E.C.R., 1989, (3919), 3955 ; C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, E.C.R., 1991, I, (2069), 2164 (Opinion of Advocate General LENZ).

¹⁶⁰¹ C.J.E.C., case 240/84, 7 May 1987, *NTN Toyo Bearing Company Limited a.o. v Council*, E.C.R., 1987, (1809), 1856 ; C.J.E.C., case 258/84, 7 May 1987, *Nippon Seiko KK v Council*, E.C.R., 1987, (1923), 1971 ; C.J.E.C., case C-49/88, 27 June 1991, *Al-Jubail Fertilizer Company and Saudi Arabian Fertilizer Company v Council*, E.C.R., 1991, I, (3187), 3212-3216 (Opinion of Advocate General DARMON) ; C.J.E.C., case C-216/91, 7 December 1993, *Rima Electrometalurgia SA v Council*, recital 71 (Opinion of Advocate General LENZ) (not yet reported).

allow exporters to manipulate the results of the anti-dumping investigation by short-lived price increases and is not warranted under European anti-dumping law nor under GATT anti-dumping law¹⁶⁰². Another approach would be illegal in view of the provision that the investigation period must cover the period prior to the initiation of the proceeding (see : Article 6(1) basic EC Regulation ; Article 7(1)(c) basic ECSC Decision)¹⁶⁰³.

In principle, anti-dumping duties are applicable during a five-year period (Article 11.3. GATT Anti-dumping Code ; Article 11(2) basic EC Regulation ; Article 15(1) basic ECSC Decision). Consequently, a period of six and a half years may have lapsed between the facts which have triggered the anti-dumping duties and the last day on which the anti-dumping duties are applicable. The circumstances and pricing policies may vary over such a long period. Two remedies may

1602 C.J.E.C., case C-49/88, 27 June 1991, *Al-Jubail Fertilizer Company and Saudi Arabian Fertilizer Company v Council, E.C.R.*, 1991, I, (3187), 3200 (Report for the Hearing : conclusions of the Council) ; Council Regulation (EEC) No 2089/84 of 19 July 1984 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 21 July 1984, No L 193/1 ; Council Regulation (EEC) No 1739/85 of 24 June 1985 imposing a definitive anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan, *O.J.*, 27 June 1985, No L 167/3.

1603 Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1. See also : Council Regulation (EEC) No 1877/85 of 4 July 1985 imposing a definitive anti-dumping duty on imports of certain hydraulic excavators originating in Japan, *O.J.*, 6 July 1985, No L 176/1 ; Council Regulation (EEC) No 490/90 of 26 February 1990 repealing Regulations (EEC) No 1826/84 and (EEC) No 1282/81 imposing definitive anti-dumping duties on imports of vinyl acetate monomer originating in Canada and the United States of America respectively, *O.J.*, 1 March 1990, No L 53/1 ; Council Regulation (EEC) No 2200/90 of 27 July 1990 imposing a definitive anti-dumping duty on imports of silicon metal originating in the People's Republic of China, *O.J.*, 28 July 1990, No L 198/57.

There are, however, some exceptions which are prior to 1987 :

- in several anti-dumping cases, projected imports have been taken into account (see : *supra*, 440-441, note 1126) ;
- in two anti-dumping cases, increases either in world market and Community market prices, or in the dumping prices, which occurred after the investigation period, have been taken into account (Council Regulation (EEC) No 2907/83 of 17 October 1983 terminating the anti-dumping proceeding concerning imports of unwrought nickel, not alloyed, in the form of cathodes produced by electrolysis, either uncut or cut into squares, originating in the Soviet Union, *O.J.*, 19 October 1983, No L 286/29 ; Commission Decision 84/103/EEC of 23 February 1984 terminating the anti-dumping proceeding concerning imports of non-alloyed unwrought aluminium originating in Norway, Surinam, the Soviet Union and Yugoslavia, *O.J.*, 28 February 1984, No L 57/19).

In 1987, the European anti-dumping authorities, in pursuance of Article 7(1)(c) of the then prevailing basic EC legislation, adopted the general principle as to the illegality of taking into account developments occurring after the investigation period (this principle is now explicitly provided by Article 6(1) basic EC Regulation). With regard to the assessment of the volume of the dumped imports, they, moreover, in the same year, held that this aspect of European anti-dumping case law was illegal, because European anti-dumping law required only to establish «whether there has been a significant increase» (Council Regulation (EEC) No 29/87 of 22 December 1986 imposing a definitive anti-dumping duty on imports of certain deep freezers originating in the Soviet Union, *O.J.*, 8 January 1987, No L 6/1). As similar wordings prevail in respect of the assessment of the development of the dumping prices (see : Article 3(3) basic EC Regulation ; Article 4(2)(b) basic ECSC Decision), this decision probably also applies to it.

In two cases dating from after 1987, the European anti-dumping authorities, though, have taken account of decisions taken by a number of Community producers after the investigation period (Commission Decision 93/376/EEC of 16 June 1993 terminating the review of anti-dumping measures adopted under Council Regulation (EEC) 1698/85 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 29 June 1993, No L 157/76 ; Council Regulation (EEC) No 2861/93 of 18 October 1993 imposing a definitive anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, and collecting definitively the provisional duty imposed, *O.J.*, 21 October 1993, No L 262/4). This is probably due to the fact that European anti-dumping law allows the taking into account of the actual and potential trends in the relevant economic factors for assessing the state of the Community industry (see : Article 4(5) basic EC Regulation ; Article 4(2)(c) basic ECSC Decision) and, thus, provides an exception to the rule that the investigation period must cover the period prior to the initiation of the proceeding.

remedy such changes : a review of the anti-dumping duty (Articles 11.2. up to 11.4. GATT Anti-dumping Code ; Article 11(2) up to (7), (9) and (10) basic EC Regulation ; Articles 14 and 15 basic ECSC Decision) and an application for a refund (Article 9.3. GATT Anti-dumping Code ; 11(8) up to (10) basic EC Regulation ; Article 16 basic ECSC Decision)¹⁶⁰⁴. A review has only effects for the future¹⁶⁰⁵. It does not remedy the fact that in the past anti-dumping duties have been paid on non-dumped imports or on dumped imports which did not inflict injury upon the Community industry¹⁶⁰⁶. Moreover, a review implies that the investigation will be started all over again, which holds the risk that a higher instead of a lower dumping and/or injury margin may be found¹⁶⁰⁷. Therefore, the cost of a review may exceed the expected, but uncertain benefits of a successful review. A refund proceeding, on the other hand, directly remedies the application of anti-dumping duties on non-dumped imports. However, the probability of a successful request for refund is slight. Though anti-dumping duties are only intended for removing the injury suffered by the Community industry, refunds will not be possible on the basis of a reduction in the injury suffered by the Community industry¹⁶⁰⁸. Moreover, if the exporter wholly or partly bears the burden of the anti-dumping duty¹⁶⁰⁹, an increase of the export price by the amount of the dumping margin will not always entail the full refund of the

¹⁶⁰⁴ C.J.E.C., case C-49/88, 27 June 1991, *Al-Jubail Fertilizer Company and Saudi Arabian Fertilizer Company v Council*, E.C.R., 1991, I, (3187), 3203 (Report for the Hearing : conclusions of the Council).

¹⁶⁰⁵ BELLIS, J.-F., «The EEC Antidumping System», in *Antidumping Law and Practice. A Comparative Study*, JACKSON, J.H., and VERMULST, E.A. (eds.), New York, Harvester Wheatsheaf, 1990, (41), 64 ; VERMULST, E.A., and GRAAFSMA, F., «A Decade of European Community Anti-Dumping Law and Practice Applicable to Imports from China», *Journal of World Trade*, 1992/3, (5), 35.

¹⁶⁰⁶ See : C.J.E.C., case C-358/89, 11 June 1992, *Extramet Industrie SA v Council*, E.C.R., 1992, I, (3813), 3836 (Opinion of Advocate General JACOBS), where Advocate General JACOBS has held that it is clearly not sufficient to point to the possibility of a review of the injury determination at the occasion of the Community producers being found to have violated antitrust law, since the exporters, accusing the Community producers of inflicting injury upon themselves by engaging in anti-competitive behaviour, may very well have suffered irreparable damage.

¹⁶⁰⁷ Council Regulation (EEC) No 3017/92 of 19 October 1992 modifying the anti-dumping duties following the review of the anti-dumping measures applicable to imports of synthetic polyester fibres originating in Romania, Taiwan, Turkey and the Republics of Serbia and of Montenegro and the former Yugoslav Republic of Macedonia and terminating the said review in respect of imports of synthetic polyester fibres originating in Mexico and the United States of America, O.J., 22 October 1992, No L 306/1 (corrigendum, O.J., 6 February 1993, No L 30/68).

See e.g. : *lithium hydroxide from the United States of America*, where the original anti-dumping Regulation imposed a variable anti-dumping duty (Council Regulation (EEC) No 191/80 of 29 January 1980 imposing a definitive anti-dumping duty on lithium hydroxide originating in the United States of America and the Soviet Union, O.J., 30 January 1980, No L 23/19 (corrigendum, O.J., 8 February 1980, No L 31/23)). However, the price on the American domestic market, which was used as normal value standard, increased after the conclusion of the investigation, while the minimum price on which the variable anti-dumping duty was determined, equalled the American domestic market price as established during the investigation. As a consequence, even if the export prices equalled the minimum price, dumping occurred again. Therefore, the original Regulation was reviewed and the minimum price was increased (Council Regulation (EEC) No 2294/80 of 28 August 1980 amending Regulation (EEC) No 191/80 imposing a definitive anti-dumping duty on lithium hydroxide originating in the United States of America and the Soviet Union, O.J., 30 August 1980, No L 228/59).

¹⁶⁰⁸ BELLIS, J.-F., «The EEC Antidumping System», in *Antidumping Law and Practice. A Comparative Study*, JACKSON, J.H., and VERMULST, E.A. (eds.), New York, Harvester Wheatsheaf, 1990, (41), 61 ; VERMULST, E.A., and GRAAFSMA, F., «A Decade of European Community Anti-Dumping Law and Practice Applicable to Imports from China», *Journal of World Trade*, 1992/3, (5), 37 ; VERMULST, E., and WAER, P., «The Calculation of Injury Margins in EC Anti-Dumping Proceedings», *Journal of World Trade*, 1991/6, (5), 32.

¹⁶⁰⁹ *Infra*, 733-739.

anti-dumping duty paid¹⁶¹⁰. Since, from an economic point of view, absorption of anti-

¹⁶¹⁰ In order to see whether the anti-dumping duties paid must be reimbursed, the Commission recalculates normal value and export price, in the same way as within the scope of an ordinary anti-dumping proceeding (Article 11(9) basic EC Regulation ; Article 16(1) basic ECSC Decision), and compares the resulting dumping margin with the anti-dumping duty actually paid. The amount by which the anti-dumping duty exceeds the thus established dumping margin, will be reimbursed.

The results of this technique are correct as long as the exporter does not bear (part of) the burden of the anti-dumping duty and as long as the export price is not constructed on the basis of the price at which the product is first resold to an independent buyer minus the costs incurred between importation and resale, such as anti-dumping duties (Article 2(9) basic EC Regulation ; 2(8)(b) basic ECSC Decision). If both these conditions are fulfilled, then less than the amount by which the anti-dumping duty actually paid exceeds the dumping margin, will be reimbursed, as the following numerical example clearly demonstrates :

- during the investigation period the normal value and the export price equaled respectively 120 and 100 ;
- hence, a dumping margin of 20 was established ;
- consequently, an anti-dumping duty of 20 % was imposed ;
- it might be expected that the export price, duty paid, will rise from 100 up to 120. This would indeed be so if there was no absorption of the anti-dumping duty. Assume, however, that there is absorption up to 50 % of the anti-dumping duty. Then the export price, duty paid, increases only by 10 instead of 20, and will equal 110 ;
- assume further that, after the imposition of the anti-dumping duty, the exporter increases his export price, duty unpaid, by 20. Hence, if his normal value remains unchanged, he will not dump anymore ;
- at this new export price, it might be expected that the export price, duty paid, will go up by 24 and will equal 144 (=120+24). However, as there is absorption of 50 %, the export price, duty paid, will actually will go up by 12 and will equal 132 ;
- since at an export price, duty unpaid, of 120, the exporter does not dump anymore, a full refund of the anti-dumping duty actually paid might be expected. At such an export price, the amount of anti-dumping duty to be paid equals 24, which the exporter actually has paid (the fact that he bears part of the burden of the duty does not imply that he does not have to pay the full amount of the anti-dumping duty).

However, the exporter will be refunded only 12 instead of 24. Indeed, assume that the anti-dumping duty is the only cost between importation and resale, then the price first paid by an independent buyer will equal 132. The Commission will then deduct the amount of anti-dumping duty actually paid (i.e., 24) out of that price of 132 and will obtain a constructed export price of 108. Since, at such an export price, the dumping margin equals 12 and the amount of anti-dumping duty must not exceed the dumping margin (Articles 7(2) and 9(4) basic EC Regulation ; Article 13(3) basic ECSC Decision), the exporter, according to European anti-dumping law, has paid 12 too much in anti-dumping duties. This surplus of 12 will be reimbursed to the exporter (Article 11(8) basic EC Regulation ; Article 16(1) basic EC legislation), although he does not actually dump anymore and yet has paid an amount of 24 on anti-dumping duties.

This technique, which the Commission has consistently applied, has been criticized because it requires exporters associated with their importers to increase the export price by twice the amount of the dumping margin (VERMULST, E.A., and HOOVER, J.J., «Annotation on Case C-170/89, *Bureau Européen des Unions de Consommateurs v. Commission*, Judgment of 28 November 1991 ; Case C-105/90, *Goldstar Co. Ltd. v. Council*, Judgment of 13 February 1992 ; Case C-188/88, *NMB (Deutschland) GmbH, NMB Italia Srl, NMB (UK) Ltd. v. Commission of the European Communities*, Judgment of 10 March 1992 ; Case 171/87, *Canon Inc. v. Council* ; Case 172/87, *Mita Industrial Co. Ltd. v. Council* ; Case 174/87, *Ricoh Company Ltd. v. Council* ; Case 175/87, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd. v. Council* ; Case 176/87, *Konishiroky Photo Industry Co. Ltd. v. Council* ; Case 177/87, *Sanyo Electric Co. Ltd. v. Council* ; Case 178/87, *Minolta Camera Co. Ltd. v. Council* ; Case 179/87, *Sharp Corporation v. Council*, Judgments of 10 March 1992 ; Case C-358/89, *Extramet Industrie SA v. Council*, Judgment of 11 June 1992», *Common Market Law Review*, 1993, (115), 170-171). Therefore, Advocate General TESAURO has argued that the full amount of the anti-dumping duty must be reimbursed when the prices first paid by an independent buyer are increased by an amount equal to the dumping margin (C.J.E.C, case C-188/88, 10 March 1992, *NMB (Deutschland) GmbH a.o. v Commission, E.C.R.*, 1992, I, (1689), 1712-1715 (Opinion of Advocate General TESAURO). This point of view, however, cannot be shared. On the contrary, the technique applied by the Commission and approved by the Court of Justice (C.J.E.C, case C-188/88, 10 March 1992, *NMB (Deutschland) GmbH a.o. v Commission, E.C.R.*, 1992, I, (1689), 1736-1739), is correct insofar as the exporter does not bear the burden of the anti-dumping duty. Then, it is mathematically logical that the export price, anti-dumping duty paid, must go up twice the amount of the dumping margin, namely once to stop the dumping and once because of the payment of the anti-dumping duty. As in that case, after a refund proceeding, the amount of the anti-dumping duty would be fully reimbursed, the export price will eventually increase only once ; accordingly, no dumping occurs anymore and no anti-dumping duty is paid. The alternative approach as suggested by Advocate General TESAURO would in this case eventually result in the full reimbursement of the anti-dumping duty while dumping is still being practised, since the unique increase in the export price was caused only by the payment of the anti-dumping duty and not by the disappearance of the dumping.

However, in case the exporter fully or partly bears the burden of the anti-dumping duty, the approach of the Commission and the Court of Justice cannot be sustained from an economic point of view. A twofold increase of the export price is then too exaggerated. Instead, it should be examined by how much the exporter bears the burden of the anti-dumping duty and, for a full reimbursement of the anti-dumping duty, the export price must increase by the amount of the anti-dumping duty actually paid plus the amount of the duty not being absorbed by the exporter.

Finally, it should be pointed out that the approach of the Commission and of the Court of Justice, though partially incorrect from an economic point of view, is entirely logical from a legal point of view. Their disregard of a possible absorption by the exporter of the burden of the anti-dumping duty is, indeed, fully consistent with the provisions of European anti-dumping law which sanction such absorption by the imposition of additional duties and, thus, prohibit absorption.

The new GATT Anti-dumping Code, though, might render the economic point of view in legal terms. They hold that, when the export price has been constructed, that price must be calculated, in refund proceedings, with no deduction for the amount of anti-dumping duties when conclusive

dumping duties is quite ordinary¹⁶¹¹, refund proceedings will seldom prevent the payment of anti-dumping duties in cases where no (or less) dumping is being practised¹⁶¹². Thus, unless

evidence is provided that the anti-dumping authorities have actually taken account of any change in normal value, any change of costs incurred between importing and resale, and any movement in the resale price which is duly reflected in subsequent selling prices (Article 9.3.3. GATT Anti-dumping Code). This provision may be interpreted as an obligation for the anti-dumping authorities to investigate whether the exporter bears (part of) the burden of the anti-dumping duty and, if so, not to deduct the amount of the anti-dumping duty. However, it may also be interpreted as allowing current European anti-dumping case law. In particular, the requirement that any movement in resale prices is «duly reflected in subsequent selling prices» may be open to such an interpretation (VERMULST, E.A., and HOOIJER, J.J., «Annotation on Case C-170/89, *Bureau Européen des Unions de Consommateurs v. Commission*, Judgment of 28 November 1991; Case C-105/90, *Goldstar Co. Ltd. v. Council*, Judgment of 13 February 1992; Case C-188/88, *NMB (Deutschland) GmbH, NMB Italia Srl, NMB (UK) Ltd. v. Commission of the European Communities*, Judgment of 10 March 1992; Case 171/87, *Canon Inc. v. Council*; Case 172/87, *Mita Industrial Co. Ltd. v. Council*; Case 174/87, *Ricoh Company Ltd. v. Council*; Case 175/87, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd. v. Council*; Case 176/87, *Konishiroky Photo Industry Co. Ltd. v. Council*; Case 177/87, *Sanyo Electric Co. Ltd. v. Council*; Case 178/87, *Minolta Camera Co. Ltd. v. Council*; Case 179/87, *Sharp Corporation v. Council*, Judgments of 10 March 1992; Case C-358/89, *Extramet Industrie SA v. Council*, Judgment of 11 June 1992», *Common Market Law Review*, 1993, (115), 173; WAER, P., and VERMULST, E., «EC Anti-Dumping Law and Practice after the Uruguay Round. A New Lease of Life?», *Journal of World Trade*, 1994/2, (5), 20).

The new EC anti-dumping legislation, which has been enacted in order to adapt EC anti-dumping law to the new GATT Anti-dumping Code, does not use a clearer wording than the GATT Anti-dumping Code. It stipulates that, when the export price is constructed, the export price must be calculated «with no deduction for the amount of anti-dumping duties paid when conclusive evidence is provided that the anti-dumping duty is duly reflected in resale prices and the subsequent selling prices in the Community» (Article 11(10) basic EC Regulation). In view of the fact that EC anti-dumping law sanctions the absorption of the burden of the anti-dumping duty (see: Article 12 basic EC legislation), it might be argued that the wording «the duty is duly reflected in resale prices and the subsequent selling prices in the Community» should logically be interpreted as requiring that the anti-dumping duty is fully reflected in the selling prices; only in that case, the exporter will not bear (part of) the burden of the anti-dumping duty. This «logical» interpretation implies that existing European anti-dumping case law will be maintained. If GATT and EC anti-dumping law should, nevertheless, be interpreted as requiring that the resale prices must only be increased by the amount of the anti-dumping duty, they will be too generous in respect of exporters who do not bear the burden of the anti-dumping duty.

¹⁶¹¹ *Infra*, 736-739.

¹⁶¹² The small chance of a successful application for refund might explain the low number of applications for refund (see: VERMULST, E.A., and GRAAFSMA, F., «A Decade of European Community Anti-Dumping Law and Practice Applicable to Imports from China», *Journal of World Trade*, 1992/3, (5), 13). Indeed, only in 51 cases, the refund of undue anti-dumping duties has been requested: Commission Decision 85/19/EEC of 29 October 1984 concerning an application for refund of anti-dumping duties collected on certain imports of cotton yarn from Turkey, *O.J.*, 12 January 1985, No L 11/34; Commission Decision 85/166/EEC of 11 February 1985 concerning an application for refund of anti-dumping duties collected on certain imports of glass textile fibres (rovings) originating in Czechoslovakia, *O.J.*, 2 March 1985, No L 63/29; Commission Decision 85/207/EEC of 22 March 1985 concerning an application for the refund of anti-dumping duties collected on certain imports of cotton yarn originating in Turkey, *O.J.*, 29 March 1985, No L 89/61; Commission Decision 85/256/EEC of 2 May 1985 concerning an application for refund of anti-dumping duties collected on imports of certain acrylic fibres originating in the United States of America, *O.J.*, 11 May 1985, No L 125/32; Commission Decision 85/319/EEC of 21 June 1985 concerning applications submitted by Görtz & Co., Duisburg, for the refund of anti-dumping duties collected on certain imports of cotton yarn originating in Turkey, *O.J.*, 27 June 1985, No L 167/50; Commission Decision 85/421/EEC of 1 August 1985 concerning an application submitted by ApS Holger Pedersen & Co., Odense, for the refund of anti-dumping duties collected on certain imports of hardboard from Sweden, *O.J.*, 4 September 1985, No L 237/17; Commission Decision 85/515/EEC of 22 November 1985 concerning applications submitted by Nellen & Quack GmbH & Co KG, Gronau, for refund of anti-dumping duties collected on certain imports of cotton yarn originating in Turkey, *O.J.*, 27 November 1985, No L 316/54; Commission Decision 86/207/EEC of 10 April 1986 concerning applications submitted by Beckmann & Vagedes KG, Bocholt, for refund of anti-dumping duties collected on certain imports of cotton yarn originating in Turkey, *O.J.*, 5 June 1986, No L 151/26; Commission Decision 86/208/EEC of 10 April 1986 concerning applications submitted by Industrieverband Gewebe, Frankfurt/Main, on behalf of Hecking & Co, Leo Middelhoff GmbH & Co KG and Frottierweberei Vossen GmbH, for refund of anti-dumping duties collected on certain imports of cotton yarn originating in Turkey, *O.J.*, 5 June 1986, No L 151/28; Commission Decision 86/209/EEC of 10 April 1986 concerning applications submitted by Carl Weiske, Hof/Saale, for refund of anti-dumping duties collected on certain imports of cotton yarn originating in Turkey, *O.J.*, 5 June 1986, No L 151/30; Commission Decision 86/210/EEC of 10 April 1986 concerning applications submitted by Textilveredlungs- und handelsgesellschaft mbH & Co KG, Neuenkirchen, for refund of anti-dumping duties collected on certain imports of cotton yarn originating in Turkey, *O.J.*, 5 June 1986, No L 151/32; Commission Decision 86/211/EEC of 10 April 1986 concerning applications submitted by Cotimex GmbH, Düsseldorf, for refund of anti-dumping duties collected on certain imports of cotton yarn originating in Turkey, *O.J.*, 5 June 1986, No L 151/34; Commission Decision 86/212/EEC of 10 April 1986 concerning applications submitted by Textil-Imex GmbH, Bremen, for refund of anti-dumping duties collected on certain imports of cotton yarn originating in Turkey, *O.J.*, 5 June 1986, No L 151/36; Commission Decision 87/232/EEC of 27 March 1987 concerning the application submitted by Vita-tex Ltd, Slough, United Kingdom, for refund of anti-dumping duties collected on certain imports of polyester yarn originating in the United States of America, *O.J.*, 14 April 1987, No L 102/25; Commission Decision 88/327/EEC of 22 April 1988 concerning applications for refund of anti-dumping duties collected on certain imports of certain ball bearings originating in Singapore (NMB (UK) Limited),

O.J., 15 June 1988, No L 148/26 ; Commission Decision 88/328/EEC of 22 April 1988 concerning applications for refund of anti-dumping duties collected on certain imports of certain ball bearings originating in Singapore (NMB (Deutschland) GmbH), *O.J.*, 15 June 1988, No L 148/28 ; Commission Decision 88/329/EEC of 22 April 1988 concerning applications for refund of anti-dumping duties collected on certain imports of certain ball bearings originating in Singapore (NMB Italia SA), *O.J.*, 15 June 1988, No L 148/30 ; Commission Decision 89/257/EEC of 21 March 1989 concerning applications for refund of anti-dumping duties collected on certain imports of hydraulic excavators originating in Japan (Kobemac Ltd), *O.J.*, 19 April 1989, No L 108/1 ; Commission Decision 89/258/EEC of 21 March 1989 concerning applications for refund of anti-dumping duties collected on certain imports of hydraulic excavators originating in Japan (Oswald de Bruycker NV), *O.J.*, 19 April 1989, No L 108/3 ; Commission Decision 89/259/EEC of 21 March 1989 concerning applications for refund of anti-dumping duties collected on certain imports of hydraulic excavators originating in Japan (Boeg-Thomsen A/S), *O.J.*, 19 April 1989, No L 108/5 ; Commission Decision 89/260/EEC of 21 March 1989 concerning applications for refund of anti-dumping duties collected on certain imports of hydraulic excavators originating in Japan (Louis Reyners BV), *O.J.*, 19 April 1989, No L 108/7 ; Commission Decision 89/261/EEC of 21 March 1989 concerning applications for refund of anti-dumping duties collected on certain imports of hydraulic excavators originating in Japan (Tridiam Ltd), *O.J.*, 19 April 1989, No L 108/9 (corrigendum, *O.J.*, 27 July 1989, No L 216/76) ; Commission Decision 89/262/EEC of 21 March 1989 concerning applications for refund of anti-dumping duties collected on certain imports of hydraulic excavators originating in Japan (Hitachi Construction Machinery (Europe) BV), *O.J.*, 19 April 1989, No L 108/11 ; Commission Decision 89/263/EEC of 21 March 1989 concerning applications for refund of anti-dumping duties collected on certain imports of hydraulic excavators originating in Japan (Equipco SA), *O.J.*, 19 April 1989, No L 108/14 ; Commission Decision 89/264/EEC of 21 March 1989 concerning applications for refund of anti-dumping duties collected on certain imports of hydraulic excavators originating in Japan (C.H. Beazer (Plant Sales) Ltd), *O.J.*, 19 April 1989, No L 108/17 ; Commission Decision 90/86/EEC of 22 February 1990 concerning applications for refund of anti-dumping duties collected on certain imports of light sodium carbonate originating in Bulgaria (Industrial Resinera Valcan, SA), *O.J.*, 9 March 1990, No L 60/14 ; Commission Decision 90/87/EEC of 22 February 1990 concerning an application for refund of an anti-dumping duty collected on the imports of flat-rolled products of iron or non-alloy steel originating in Mexico and Yugoslavia (Transformados Siderúrgicos, SA), *O.J.*, 9 March 1990, No L 60/17 ; Commission Decision 90/460/EEC of 6 August 1990 concerning applications for refund of anti-dumping duties collected on the import of vinyl acetate monomer originating in the United States of America (Gantrade (UK) Ltd), *O.J.*, 3 September 1990, No L 240/19 ; Commission Decision 90/461/EEC of 6 August 1990 concerning applications for refund of anti-dumping duties collected on the import of vinyl acetate monomer originating in the United States of America (Quantum Chemical Corporation), *O.J.*, 3 September 1990, No L 240/21 ; Commission Decision 90/462/EEC of 6 August 1990 concerning applications for refund of anti-dumping duties collected on the import of vinyl acetate monomer originating in the United States of America (Guzman, SA), *O.J.*, 3 September 1990, No L 240/23 ; Commission Decision 91/80/EEC of 4 February 1991 concerning the application for the reimbursement of anti-dumping duties imposed on imports of dense sodium carbonate originating in the United States of America (Verrerie Cristallerie d'Arques - J.G. Durand et Cie), *O.J.*, 20 February 1991, No L 47/8 ; Commission Decision 91/164/EEC of 20 December 1990 concerning applications for the refund of anti-dumping duties collected on certain imports of vinyl acetate monomer originating in the United States of America (Gantrade (UK) Ltd), *O.J.*, 27 March 1991, No L 80/49 ; Commission Decision 91/165/EEC of 20 December 1990 concerning applications for the refund of anti-dumping duties collected on certain imports of vinyl acetate monomer originating in the United States of America (Quantum Chemical Corporation), *O.J.*, 27 March 1991, No L 80/51 ; Commission Decision 91/166/EEC of 20 December 1990 concerning applications for the refund of anti-dumping duties collected on certain imports of vinyl acetate monomer originating in the United States of America, (Guzman SA), *O.J.*, 27 March 1991, No L 80/53 ; Commission Decision 91/233/EEC of 9 April 1991 concerning an application for reimbursement of anti-dumping duties collected on imports of certain kinds of compact disc players originating in Japan (Harman Deutschland), *O.J.*, 24 April 1991, No L 104/44 ; Commission Decision 91/283/EEC of 15 May 1991 concerning applications for the refund of anti-dumping duties collected on certain imports of compact disc players in Japan (Amroh BV - Elektronika & Technische Produkten), *O.J.*, 7 June 1991, No L 143/61 ; Commission Decision 91/284/EEC of 15 May 1991 concerning applications for the refund of anti-dumping duties collected on certain imports of compact disc players originating in Japan (PIA Hi-Fi Vertriebs GmbH), *O.J.*, 7 June 1991, No L 143/64 ; Commission Decision 91/302/EEC of 23 May 1991 concerning applications for the refund of anti-dumping duties collected on certain imports of compact disc players originating in Japan (Analog und Digital Systeme GmbH), *O.J.*, 15 June 1991, No L 151/86 ; Commission Decision 91/550/EEC of 26 September 1991 concerning applications for refund of anti-dumping duties collected on certain imports of compact disc players originating in Japan (Analog und Digital Systeme GmbH), *O.J.*, 29 October 1991, No L 298/16 ; Commission Decision 92/332/EEC of 3 June 1992 concerning applications for the refund of anti-dumping duties collected on certain imports of certain ball bearings originating in Singapore (NMB France Sarl), *O.J.*, 4 July 1992, No L 185/35 ; Commission Decision 92/333/EEC of 3 June 1992 concerning applications for the refund of anti-dumping duties collected on certain imports of certain ball bearings originating in Singapore (NMB (Deutschland) GmbH), *O.J.*, 4 July 1992, No L 185/38 ; Commission Decision 92/334/EEC of 3 June 1992 concerning applications for the refund of anti-dumping duties collected on certain imports of certain ball bearings originating in Singapore (NMB UK Ltd), *O.J.*, 4 July 1992, No L 185/41 ; Commission Decision 92/335/EEC of 3 June 1992 concerning applications for the refund of anti-dumping duties collected on certain imports of certain ball bearings originating in Singapore (NMB Italia Srl), *O.J.*, 4 July 1992, No L 185/44 ; Commission Decision 93/363/EEC of 9 June 1993 concerning applications for refund of anti-dumping duties collected on imports of certain compact disc players originating in Japan (Amroh BV, PIA Hifi, MPI Electronic), *O.J.*, 22 June 1993, No L 150/44 ; Commission Decision 94/132/EC of 8 February 1994 concerning an application for the refund of anti-dumping duties collected on certain imports of certain polyester yarns (man-made staple fibres) originating in Indonesia (Codev Textiles Ltd), *O.J.*, 3 March 1994, No L 59/19 ; Commission Decision 94/133/EC of 8 February 1994 concerning an application for the refund of anti-dumping duties collected on certain imports of certain polyester yarns (man-made staple fibres) originating in Indonesia (Ottoman Pacific Ltd), *O.J.*, 3 March 1994, No L 59/21 ; Commission Decision 94/134/EC of 8 February 1994 concerning an application for the refund of anti-dumping duties collected on certain imports of certain polyester yarns (man-made staple fibres) originating in Indonesia (Pax Yarns Ltd), *O.J.*, 3 March 1994, No L 59/23 ; Commission Decision 94/135/EC of 8 February 1994 concerning an application for the refund of anti-dumping duties collected on

an exporter successfully applies for a refund, there is no guarantee that anti-dumping duties will not be levied on non-dumped imports.

2.2.2. *Ratione personae*

The Regulations imposing anti-dumping duties must indicate the name of the supplier, if practicable (Article 9.2. GATT Anti-dumping Code ; Article 14(2) basic EC Regulation ; Article 13(2) basic ECSC Decision)¹⁶¹³. The scope *ratione personae* of anti-dumping duties is usually defined by a reference to individual producers, whose product is exported to the Community¹⁶¹⁴. Anti-dumping duties are not imposed on exporters, who do not manufacture the product, because such exporters are free to purchase from any source and may change their source of supply whenever convenient¹⁶¹⁵. If such exporters export a product manufactured by a producer subject to an individual duty, that duty will be applied¹⁶¹⁶.

Anti-dumping duties are, in principle, not imposed on importers either, because such duties would be complex, open to circumvention and probably unworkable since specific dumping margins are established for each individual producer¹⁶¹⁷. They will only be imposed on importers when

certain imports of certain polyester yarns (man-made staple fibres) originating in Indonesia (Rowson & Son Ltd), *O.J.*, 3 March 1994, No L 59/25 ; Commission Decision 94/136/EC of 8 February 1994 concerning an application for the refund of anti-dumping duties collected on certain imports of certain polyester yarns (man-made staple fibres) originating in Indonesia (Unicom BVBA/Unitrac), *O.J.*, 3 March 1994, No L 59/27 ; Commission Decision 94/764/EC of 16 November 1994 concerning an application for the refund of anti-dumping duties collected on certain imports of certain magnetic disks (3,5" microdisks) originating in the People's Republic of China, *O.J.*, 29 November 1994, No L 304/38 ; Commission Decision 94/951/EC of 12 December 1994 concerning applications for the refund of anti-dumping duties collected on certain imports of certain ball bearings originating in Thailand (NMB France Sàrl, NMB GmbH, NMB Italia Srl and NMB UK Ltd), *O.J.*, 31 December 1994, No L 371/10.

¹⁶¹³ The European anti-dumping authorities seem not to be aware of this provision, as they think that European anti-dumping law merely requires that anti-dumping regulations specify the country and the product. Their conclusion that individual treatment is not always required, is nevertheless right (Council Regulation (EEC) No 2474/93 of 8 September 1993 imposing a definitive anti-dumping duty on imports into the Community of bicycles originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 9 September 1993, No L 228/1 ; Commission Regulation (EEC) No 2477/93 of 6 September 1993 imposing a provisional anti-dumping duty on imports of certain photo albums originating in the People's Republic of China, *O.J.*, 9 September 1993, No L 228/16).

¹⁶¹⁴ See e.g. : *serial-impact dot-matrix printers from Japan*, where some producers claimed a general anti-dumping duty applicable to all producers. No such general anti-dumping duty was imposed because the amount of the price undercutting of one producer must not be used for the duty calculation of another producer when the price undercutting margins are individually calculable and vary considerably (Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 24 November 1988, No L 317/33).

¹⁶¹⁵ Commission Regulation (EC) No 371/94 of 17 February 1994 imposing a provisional anti-dumping duty on imports into the Community of large aluminium electrolytic capacitors originating in the Republic of Korea and Taiwan, *O.J.*, 19 February 1994, No L 48/10. See also : Commission Regulation (EC) No 892/94 of 21 April 1994 imposing a provisional anti-dumping duty on imports of calcium metal originating in the People's Republic of China and Russia, *O.J.*, 23 April 1994, No L 104/5, where the Commission held that the question of individual treatment did not arise since there was only a single dumping producer.

¹⁶¹⁶ C.J.E.C., case C-136/91, 1 April 1993, *Findling Wälzlager Handelsgesellschaft mbH v Hauptzollamt Karlsruhe*, recital 12 (Opinion of Advocate General VAN GERVEN) and consideration 13 (not yet reported).

¹⁶¹⁷ Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12.

the sole producer authorizes his importers to do whatever is necessary to create normal conditions for the sale of the product concerned on the market and to take appropriate measures¹⁶¹⁸.

According to the European anti-dumping authorities, the wording «if practicable» implies that individual treatment is not legally required. As to them, «practicable» equals «appropriate», *i.e.* when individual treatment produces a more proportionate and effective remedy against injurious dumping¹⁶¹⁹. There seems, however, to be a clear difference in meaning between the notions «practicable» and «appropriate»: «practicable» refers to whether it is possible to name the individual suppliers, whereas «appropriate» rather implies a judgement of whether it is fitted or warranted to name the producers individually. It seems that European anti-dumping law, as well as GATT anti-dumping law require, in principle, individual treatment, unless it is impossible to name the individual suppliers¹⁶²⁰.

There will be such an impossibility in respect of producers who are not known or who have not cooperated. Usually, a general or residual duty is imposed on those producers¹⁶²¹. Their dumping margin is assumed to be equal to the highest individual dumping margin established¹⁶²². As a result, the residual duty can never be lower than the highest individual

¹⁶¹⁸ Commission Decision 80/599/EEC of 19 June 1980 accepting undertakings in connection with the anti-dumping proceeding concerning imports of standardized electric multi-phase motors having an output of more than 0.75 kW but not more than 75 kW, originating in the USSR and terminating that proceeding, *O.J.*, 21 June 1980, No L 153/48. See also: Council Regulation (EEC) No 551/83 of 8 March 1983 imposing a definitive anti-dumping duty on kraftliner paper and board originating in the United States of America and accepting undertakings given in connection with the review of the anti-dumping proceeding on kraftliner paper and board originating in Austria, Canada, Finland, Portugal, the Soviet Union and Sweden, *O.J.*, 10 March 1983, No L 64/25.

¹⁶¹⁹ Commission Regulation (EC) No 1648/94 of 6 July 1994 imposing a provisional anti-dumping duty on imports of furazolidone originating in the People's Republic of China, *O.J.*, 8 July 1994, No L 174/4.

¹⁶²⁰ BOURGEOIS, J.H.J., «EC Anti-dumping Enforcement - Selected Second Generations Issues», in *Antitrust and Trade Policy in the United States and the European Community*, HAWK, B.E. (ed.), New York, Bender, 1986, (563), 595.

¹⁶²¹ BOURGEOIS, J.H.J., «EC Anti-dumping Enforcement - Selected Second Generations Issues», in *Antitrust and Trade Policy in the United States and the European Community*, HAWK, B.E. (ed.), New York, Bender, 1986, (563), 595-596.

¹⁶²² *Supra*, 328-329.

duty¹⁶²³. As it is not actually shown that those producers practise injurious dumping, it might

¹⁶²³ See e.g. : Commission Regulation (EEC) No 757/84 of 22 March 1984 imposing a provisional anti-dumping duty on imports of certain electronic scales originating in Japan, *O.J.*, 24 March 1984, No L 80/9 (corrigendum, *O.J.*, 17 April 1984, No L 104/26); Council Regulation (EEC) No 1877/85 of 4 July 1985 imposing a definitive anti-dumping duty on imports of certain hydraulic excavators originating in Japan, *O.J.*, 6 July 1985, No L 176/1; Commission Regulation (EEC) No 2005/88 of 5 July 1988 imposing a provisional anti-dumping duty on imports of serial impact fully formed character printers originating in Japan, *O.J.*, 8 July 1988, No L 177/1; Council Regulation (EEC) No 2089/88 of 11 July 1988 imposing a definitive anti-dumping duty on imports of oxalic acid originating in Taiwan and South Korea, *O.J.*, 15 July 1988, No L 184/1; Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 24 November 1988, No L 317/33; Council Regulation (EEC) No 34/89 of 5 January 1989 imposing a definitive anti-dumping duty on imports of serial impact fully formed (SIFF) character printers originating in Japan, *O.J.*, 7 January 1989, No L 5/23; Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27); Council Regulation (EEC) No 112/90 of 16 January 1990 imposing a definitive anti-dumping duty on imports of certain compact disc players originating in Japan and the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 17 January 1990, No L 13/21; Commission Regulation (EEC) No 2064/90 of 17 July 1990 imposing a provisional anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 20 July 1990, No L 188/10 (corrigendum, *O.J.*, 21 November 1990, No L 321/19); Council Regulation (EEC) No 2685/90 of 17 September 1990 amending Regulation (EEC) No 2089/84 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 20 September 1990, No L 256/1 (corrigendum, *O.J.*, 10 January 1991, No L 7/38); Commission Regulation (EEC) No 3262/90 of 5 November 1990 imposing a provisional anti-dumping duty on imports of audio tapes in cassettes originating in Japan, the Republic of Korea and Hong Kong, *O.J.*, 13 November 1990, No L 313/5 (corrigendum, *O.J.*, 12 January 1991, No L 9/36); Commission Regulation (EEC) No 3421/90 of 26 November 1990 imposing a provisional anti-dumping duty on imports of aspartame originating in Japan and the United States of America, *O.J.*, 29 November 1990, No L 330/16; Commission Regulation (EEC) No 3617/90 of 11 December 1990 imposing a provisional anti-dumping duty on imports of certain welded tubes of iron or non-alloy steel, originating in Turkey or in Venezuela and accepting undertakings offered in connection with such imports, *O.J.*, 15 December 1990, No L 351/17; Commission Regulation (EEC) No 3798/90 of 21 December 1990 imposing a provisional anti-dumping duty on imports of espadrilles originating in the People's Republic of China, *O.J.*, 28 December 1990, No L 365/25; Council Regulation (EEC) No 577/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as EPROMs (erasable programmable read only memories) originating in Japan, *O.J.*, 12 March 1991, No L 65/1; Council Regulation (EEC) No 1251/91 of 13 May 1991 imposing a definitive anti-dumping duty on imports of audio tapes in cassettes originating in Japan and the Republic of Korea, collecting definitively the provisional duty and terminating the procedure concerning Hong Kong, *O.J.*, 14 May 1991, No L 119/35; Commission Regulation (EEC) No 1386/91 of 23 May 1991 imposing a provisional anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in Japan, the People's Republic of China, the Republic of Korea and Thailand, *O.J.*, 28 May 1991, No L 133/20; Council Regulation (EEC) No 2093/91 of 15 July 1991 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China and collecting definitively the provisional duty, *O.J.*, 18 July 1991, No L 195/1; Commission Regulation (EEC) No 2805/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports into the Community of certain thermal paper originating in Japan, *O.J.*, 26 September 1991, No L 270/15; Council Regulation (EEC) No 2900/91 of 1 October 1991 amending Regulation (EEC) No 1048/90 with regard to the imposition of a definitive anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 2 October 1991, No L 275/24; Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7; Commission Regulation (EEC) No 906/92 of 30 March 1992 imposing a provisional anti-dumping duty on imports of silicon metal originating in Brazil, *O.J.*, 10 April 1992, No L 96/17; Commission Regulation (EEC) No 1956/92 of 7 July 1992 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in India and the Republic of Korea, *O.J.*, 16 July 1992, No L 197/25; Commission Regulation (EEC) No 1994/92 of 14 July 1992 imposing a provisional anti-dumping duty on imports into the Community of outer rings of tapered roller bearings originating in Japan, *O.J.*, 18 July 1992, No L 199/8; Commission Decision No 2297/92/ECSC of 31 July 1992 amending Decision No 2131/88/ECSC, accepting undertakings offered in connection with imports of certain sheets and plates, of iron or steel, originating in the Republic of Slovenia and the Yugoslav republics of Macedonia, Montenegro and Serbia, and terminating the anti-dumping proceeding with regard to the Republic of Croatia and the Republic of Bosnia-Herzegovina, *O.J.*, 6 August 1992, No L 221/36; Council Regulation (EEC) No 2305/92 of 4 August 1992 imposing a definitive anti-dumping duty on imports of silicon metal originating in Brazil and definitively collecting the amounts secured by way of the provisional anti-dumping duty, *O.J.*, 7 August 1992, No L 222/1; Council Regulation (EEC) No 2306/92 of 4 August 1992 imposing a definitive anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in the Republic of Korea, *O.J.*, 7 August 1992, No L 222/8 (corrigendum, *O.J.*, 21 January 1993, No L 13/20); Council Regulation (EEC) No 2849/92 of 28 September 1992 modifying the definitive anti-dumping duty on imports of ball bearings with a greatest external diameter exceeding 30 mm originating in Japan imposed by Regulation (EEC) No 1739/85, *O.J.*, 1 October 1992, No L 286/2 (corrigendum, *O.J.*, 25 March 1993, No L 72/36); Council Regulation (EEC) No 3017/92 of 19 October 1992 modifying the anti-dumping duties following the review of the anti-dumping measures applicable to imports of synthetic polyester fibres originating in Romania, Taiwan, Turkey and the Republics of Serbia and of Montenegro and the former Yugoslav Republic of Macedonia and terminating the said review in respect of imports of synthetic polyester fibres originating in Mexico and the United States of America, *O.J.*, 22 October 1992, No L 306/1 (corrigendum, *O.J.*, 6 February 1993, No L 30/68); Council Regulation (EEC) No 54/93 of 8 January 1993 imposing a definitive duty on imports of synthetic fibres of polyesters originating in India and the

be argued that such a residual duty infringes upon European and GATT anti-dumping law, for they allow anti-dumping relief only against imports which are actually shown to have been dumped during the period of investigation, which, by definition, is prior to the imposition of the anti-dumping duty, and to have caused injury thereby (Article 5.2. GATT Anti-dumping Code ; Article 6(1) basic EC Regulation ; Articles 7(1)(c) and 12 basic ECSC Decision)¹⁶²⁴. It seems that the European anti-dumping authorities will have to choose between this provision and the provision as to the practicability of individual treatment. They have actually chosen to apply a residual duty on unknown or uncooperative producers, on the basis of an appealing argument, which certainly overrules the objection that these producers are not shown to have been practising injurious dumping. The European anti-dumping authorities argue that these producers will quickly make themselves known and cooperate when they can prove that they do not dump and/or injure the Community industry, or dump and/or injure to a lesser extent¹⁶²⁵.

Republic of Korea, *O.J.*, 15 January 1993, No L 9/2 ; Council Regulation (EEC) No 55/93 of 8 January 1993 imposing a definitive anti-dumping duty on imports of outer rings of tapered roller bearings originating in Japan, *O.J.*, 15 January 1993, No L 9/7 ; Council Regulation (EEC) No 2861/93 of 18 October 1993 imposing a definitive anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, and collecting definitively the provisional duty imposed, *O.J.*, 21 October 1993, No L 262/4 ; Council Regulation (EEC) No 2887/93 of 20 October 1993 imposing a definitive anti-dumping duty on imports of certain electronic weighing scales originating in Singapore and the Republic of Korea, *O.J.*, 22 October 1993, No L 263/1 ; Council Regulation (EC) No 3359/93 of 2 December 1993 imposing amended anti-dumping measures on imports of ferro-silicon originating in Russia, Kazakhstan, Ukraine, Iceland, Norway, Sweden, Venezuela and Brazil, *O.J.*, 9 December 1993, No L 302/1 ; Commission Regulation (EC) No 534/94 of 9 March 1994 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, *O.J.*, 11 March 1994, No L 68/5 ; Council Regulation (EC) No 621/94 of 17 March 1994 imposing a definitive anti-dumping duty on imports of ferro-silicon originating in South Africa and in the People's Republic of China, *O.J.*, 19 March 1994, No L 77/48 ; Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/60 ; Commission Regulation (EC) No 3119/94 of 19 December 1994 imposing a provisional anti-dumping duty on imports of ferro-silico-manganese originating in Russia, Ukraine, Brazil and South Africa, *O.J.*, 21 December 1994, No L 330/15.

¹⁶²⁴ Advocate General Sir Gordon SLYNN infers from Article 5.2. GATT Anti-dumping Code and the Articles 7(1)(c) and 12 basic ECSC Decision that the imposition of an anti-dumping duty should be determined on the basis of the dumping and the injury during the period of investigation and not at the time of the imposition of the duty (C.J.E.C., case C-49/88, 27 June 1991, *Al-Jubail Fertilizer Company and Saudi Arabian Fertilizer Company v Council*, E.C.R., 1991, I, (3187), 3212-3216 (Opinion of Advocate General Sir Gordon SLYNN)). *A fortiori*, it cannot be determined on the basis of dumping and injury which will perhaps occur afterwards.

The Court of Justice and even the European anti-dumping authorities have also on several occasions held that the dumping must be established during the period of investigation and that facts which occur afterwards, must be disregarded (C.J.E.C., case 240/84, 7 May 1987, *NTN Toyo Bearing Company Limited a.o. v Council*, E.C.R., 1987, (1809), 1856 ; C.J.E.C., case 258/84, 7 May 1987, *Nippon Seiko KK v Council*, E.C.R., 1987, (1923), 1971 ; C.J.E.C., case C-49/88, 27 June 1991, *Al-Jubail Fertilizer Company and Saudi Arabian Fertilizer Company v Council*, E.C.R., 1991, I, (3187), 3200 (Report for the Hearing : conclusions of the Council) ; Council Regulation (EEC) No 2089/84 of 19 July 1984 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 21 July 1984, No L 193/1 ; Council Regulation (EEC) No 1739/85 of 24 June 1985 imposing a definitive anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan, *O.J.*, 27 June 1985, No L 167/3).

¹⁶²⁵ *Supra*, 332.

However, they cannot rely on such an appealing argument when imposing individual¹⁶²⁶, as well as general¹⁶²⁷ anti-dumping duties on producers who do not (yet) export to the Community. According to the European anti-dumping authorities, such producers cannot «be exonerated from the charge of dumping»¹⁶²⁸. Thus, producers are assumed guilty until the contrary is shown. That assumption may cause a problem, as it goes against GATT and European anti-dumping law which require actual evidence of injurious dumping (Article 5.2. GATT Anti-

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- *video cassettes from Hong Kong*, where a residual anti-dumping duty was imposed. It concerned a variable duty with a minimum price equal to the normal value determined for the producers-exporters. It was noted that the Commission was ready to initiate without delay a review proceeding if a producer was able show that he did not export to the Community during the investigation period, that he only started to export after the said period and that he is not related to or associated with any of the producers subject to the investigation (Council Regulation (EEC) No 1768/89 of 19 June 1989 imposing a definitive anti-dumping duty on imports of video cassettes originating in the Republic of Korea and Hong Kong, collecting definitively the provisional duty and terminating the anti-dumping proceeding with regard to the imports of video tape reels originating in the Republic of Korea, *O.J.*, 22 June 1989, No L 174/1). Two companies had never exported own-produced video cassettes to the Community but were about to begin such exports after the imposition of the residual anti-dumping duty. They requested a review of the residual anti-dumping duty. On the occasion of the review, the Council was unable to establish a dumping margin for these two companies had not yet exported video cassettes to the Community. Nevertheless, individual anti-dumping duties were imposed, taking the form of a variable duty, whereby the minimum price was set equal to the normal value established for these two companies (Council Regulation (EEC) No 3522/90 of 4 December 1990 amending Regulation (EEC) No 1768/89 with regard to the imposition of a definitive anti-dumping duty on imports of video cassettes originating in the Republic of Korea and Hong Kong, *O.J.*, 7 December 1990, No L 343/1);
- *monosodium glutamate from Indonesia*, where the Commission proposed to impose on producers who had not yet exported to the Community an anti-dumping duty amounting to the injury margin, because the rate of that duty was below the amount of a duty guaranteeing that their (future) export prices would not drop below the level of their normal values (Commission Decision 92/493/EEC of 12 October 1992 accepting undertakings offered in connection with the review of anti-dumping measures applicable to certain imports of monosodium glutamate originating in Indonesia and terminating the investigation, *O.J.*, 15 October 1992, No L 299/40);
- *ferro-silicon from Brazil*, where three producers did not export to the Community during the investigation period. For them, a dumping margin equaling the weighted average dumping margin of the other cooperating producers was established and an anti-dumping duty equal to that dumping margin was imposed (Council Regulation (EC) No 3359/93 of 2 December 1993 imposing amended anti-dumping measures on imports of ferro-silicon originating in Russia, Kazakhstan, Ukraine, Iceland, Norway, Sweden, Venezuela and Brazil, *O.J.*, 9 December 1993, No L 302/1).

1627 Council Regulation (EEC) No 2024/83 of 18 July 1983 establishing a definitive anti-dumping duty on 4,4'-isopropylidenediphenol originating in the United States of America, *O.J.*, 22 July 1983, No L 199/4; Commission Regulation (EEC) No 3643/84 of 20 December 1984 imposing a provisional anti-dumping duty on imports of electronic typewriters originating in Japan and terminating the anti-dumping proceeding with regard to Nakajima All Co. Ltd, *O.J.*, 22 December 1984, No L 335/43; Commission Regulation (EEC) No 595/85 of 7 March 1985 imposing a provisional anti-dumping duty on imports of certain hydraulic excavators originating in Japan, *O.J.*, 8 March 1985, No L 68/13; Council Regulation (EEC) No 3433/91 of 25 November 1991 imposing a definitive anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in Japan, the People's Republic of China, the Republic of Korea and Thailand and definitively collecting the provisional anti-dumping duty, *O.J.*, 28 November 1991, No L 326/1; Council Regulation (EEC) No 738/92 of 23 March 1992 imposing a definitive anti-dumping duty on imports of cotton yarn originating in Brazil and Turkey, *O.J.*, 27 March 1992, No L 82/1; Council Regulation (EEC) No 830/92 of 30 March 1992 imposing a definitive anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and collecting definitively the provisional duty, *O.J.*, 3 April 1992, No L 88/1 (corrigendum, *O.J.*, 5 June 1992, No L 153/16); Council Regulation (EEC) No 2966/92 of 12 October 1992 amending Regulation (EEC) No 1798/90 in respect of the definitive anti-dumping duty on certain imports of monosodium glutamate originating, *inter alia*, in Indonesia and the Republic of Korea, *O.J.*, 15 October 1992, No L 299/1; Council Regulation (EEC) No 3642/92 of 14 December 1992 imposing a definitive anti-dumping duty on imports of ferrosilicon originating in Poland and Egypt and authorizing the definitive collection of the provisional anti-dumping duty, *O.J.*, 18 December 1992, No L 369/1; Council Regulation (EEC) No 2455/93 of 2 September 1993 amending Regulation (EEC) No 1798/90 in respect of the definitive anti-dumping duty on imports of monosodium glutamate originating in Indonesia, the Republic of Korea, Taiwan and Thailand, *O.J.*, 4 September 1993, No L 225/1; Council Regulation (EC) No 821/94 of 12 April 1994 imposing a definitive anti-dumping duty on imports of silicon carbide, originating in the People's Republic of China, Poland, the Russian Federation and Ukraine, *O.J.*, 13 April 1994, No L 94/21.

1628 Council Regulation (EEC) No 2024/83 of 18 July 1983 establishing a definitive anti-dumping duty on 4,4'-isopropylidenediphenol originating in the United States of America, *O.J.*, 22 July 1983, No L 199/4; Council Regulation (EEC) No 3433/91 of 25 November 1991 imposing a definitive anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in Japan, the People's Republic of China, the Republic of Korea and Thailand and definitively collecting the provisional anti-dumping duty, *O.J.*, 28 November 1991, No L 326/1.

dumping Code ; Article 6(1) basic EC Regulation ; Articles 7(1)(c) and 12 basic ECSC Decision)¹⁶²⁹. It is being argued that, nonetheless, there is not any violation of GATT and EC anti-dumping law, as GATT and EC anti-dumping law allow to name the dumping country if it is impracticable to name the individual suppliers (Article 9.2. GATT Anti-dumping Code ; Article 14(2) basic EC Regulation)¹⁶³⁰. However, in respect of the cases in which individual duties have been imposed on producers who do not (yet) export to the Community, it cannot be argued that it was impracticable to name the individual exporters. In the cases in which general duties were imposed, it seems that there was no impracticability to name the individual producers who did not (yet) export to the Community (in order to provide an exemption in their respect), as they were well-known to the European anti-dumping authorities. The European anti-dumping authorities, though, do not rely on that argument, but point out that anti-dumping duties will eventually not be levied on non-dumped imports since producers may request a review or a refund proceeding (Article 11 basic EC Regulation ; Articles 14 and 16 basic ECSC Decision) as soon as they start to export to the Community¹⁶³¹. This is, however, a poor excuse : it disregards the chilling effect of anti-dumping proceedings, the costs to initiate such proceedings, including the uncertainty about their outcome¹⁶³², and, more fundamentally, it does not tackle the problem that producers who do not (yet) export can impossibly practise injurious dumping. Since the entry into force of the new GATT Anti-dumping Code and the new EC anti-dumping legislation, another argument is available in favour of the legality of anti-dumping duties imposed on producers who do not (yet) export to the Community. Indeed, the GATT Anti-dumping Code and EC anti-dumping legislation contain explicit provisions on the review of anti-dumping duties in respect of producers who start to export (Article 9.5. GATT Anti-dumping Code ; Article 11(4)

¹⁶²⁹ See also : BELLIS, J.-F., «The EEC Antidumping System», in *Antidumping Law and Practice. A Comparative Study*, JACKSON, J.H., and VERMULST, E.A. (eds.), New York, Harvester Wheatsheaf, 1990, (41), 56.

¹⁶³⁰ BOURGEOIS, J.H.J., «EC Anti-dumping Enforcement - Selected Second Generations Issues», in *Antitrust and Trade Policy in the United States and the European Community*, HAWK, B.E. (ed.), New York, Bender, 1986, (563), 595.

¹⁶³¹ Council Regulation (EEC) No 3337/84 of 27 November 1984 imposing a definitive anti-dumping duty on certain imports of dense sodium carbonate originating in the United States of America, *O.J.*, 29 November 1984, No L 311/26 ; Commission Regulation (EEC) No 3643/84 of 20 December 1984 imposing a provisional anti-dumping duty on imports of electronic typewriters originating in Japan and terminating the anti-dumping proceeding with regard to Nakajima All Co. Ltd, *O.J.*, 22 December 1984, No L 335/43 ; Commission Regulation (EEC) No 595/85 of 7 March 1985 imposing a provisional anti-dumping duty on imports of certain hydraulic excavators originating in Japan, *O.J.*, 8 March 1985, No L 68/13 ; Council Regulation (EEC) No 3433/91 of 25 November 1991 imposing a definitive anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in Japan, the People's Republic of China, the Republic of Korea and Thailand and definitively collecting the provisional anti-dumping duty, *O.J.*, 28 November 1991, No L 326/1 ; Council Regulation (EEC) No 738/92 of 23 March 1992 imposing a definitive anti-dumping duty on imports of cotton yarn originating in Brazil and Turkey, *O.J.*, 27 March 1992, No L 82/1 ; Council Regulation (EEC) No 830/92 of 30 March 1992 imposing a definitive anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and collecting definitively the provisional duty, *O.J.*, 3 April 1992, No L 88/1 (corrigendum, *O.J.*, 5 June 1992, No L 153/16). See also : BOURGEOIS, J.H.J., «EC Anti-dumping Enforcement - Selected Second Generations Issues», in *Antitrust and Trade Policy in the United States and the European Community*, HAWK, B.E. (ed.), New York, Bender, 1986, (563), 597.

¹⁶³² STEGEMANN, K., «EC Anti-Dumping Policy : Are Price Undertakings a Legal Substitute for Illegal Price Fixing», *Weltwirtschaftliches Archiv*, 1990, (268), 289-290 ; *supra*, 679-684.

basic EC Regulation). However, those provisions simultaneously confirm the principle that anti-dumping duties should not apply to imports which are not yet proven to have been dumped.

General instead of individual duties are also imposed if different rates of duty for each producer cannot be calculated¹⁶³³. A general duty is also imposed on associated producers in order to preclude the circumvention of the higher duties through channeling all exports through the producer subjected to the lowest duty¹⁶³⁴. For the same reason, general duties are imposed on producers established in NME countries, unless the producers show that their business decisions are taken independently of the State authorities and that this will also be the case in the future¹⁶³⁵. Both in case of associated producers and in case of NME producers, individual

¹⁶³³ Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12; Commission Decision No 2131/88/ECSC of 18 July 1988 imposing a definitive anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Yugoslavia and definitively collecting the provisional anti-dumping duty imposed on those imports, *O.J.*, 19 July 1988, No L 188/14; Commission Regulation (EEC) No 2818/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports of cotton yarn originating in Brazil, Egypt and Turkey and terminating the anti-dumping proceeding in respect of cotton yarn originating in India and Thailand, *O.J.*, 27 September 1991, No L 271/17.

¹⁶³⁴ Commission Recommendation No 2975/82/ECSC of 8 November 1982 imposing a definitive anti-dumping duty on certain sheets and plates, of iron or steel, originating in Brazil, *O.J.*, 9 November 1982, No L 312/10; Commission Recommendation No 376/83/ECSC of 14 February 1983 imposing a provisional anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Brazil, *O.J.*, 17 February 1983, No L 45/14; Commission Regulation (EEC) No 1613/90 of 13 June 1990 imposing a provisional anti-dumping duty on imports of ball bearings with a greatest external diameter not exceeding 30 mm originating in Thailand, *O.J.*, 16 June 1990, No L 152/24; Council Regulation (EEC) No 2685/90 of 17 September 1990 amending Regulation (EEC) No 2089/84 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 20 September 1990, No L 256/1 (corrigendum, *O.J.*, 10 January 1991, No L 7/38); Council Regulation (EEC) No 2093/91 of 15 July 1991 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China and collecting definitively the provisional duty, *O.J.*, 18 July 1991, No L 195/1; Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7; Council Regulation (EEC) No 3836/91 of 19 December 1991 imposing a definitive anti-dumping duty on imports of dihydrostreptomycin originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty, *O.J.*, 31 December 1991, No 362/1.

¹⁶³⁵ Council Regulation (EEC) No 830/92 of 30 March 1992 imposing a definitive anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and collecting definitively the provisional duty, *O.J.*, 3 April 1992, No L 88/1 (corrigendum, *O.J.*, 5 June 1992, No L 153/16); Commission Regulation (EEC) No 2799/92 of 25 September 1992 imposing a provisional anti-dumping duty on imports of deadburned (sintered) magnesia originating in the People's Republic of China, *O.J.*, 26 September 1992, No L 282/15; Commission Regulation (EEC) No 2800/92 of 25 September 1992 imposing a provisional anti-dumping duty on imports of magnesium oxide originating in the People's Republic of China, *O.J.*, 26 September 1992, No L 282/23; Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5; Commission Decision 93/377/EEC of 22 June 1993 terminating the proceeding to review anti-dumping measures applicable to certain imports of gas-fuelled, non-refillable pocket flint lighters originating in the People's Republic of China, *O.J.*, 30 June 1993, No L 158/43; Commission Regulation (EEC) No 2463/93 of 1 September 1993 imposing a provisional anti-dumping duty on imports of fluorspar originating in the People's Republic of China, *O.J.*, 7 September 1993, No L 226/3; Council Regulation (EEC) No 2474/93 of 8 September 1993 imposing a definitive anti-dumping duty on imports into the Community of bicycles originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 9 September 1993, No L 228/1; Council Regulation (EEC) No 2861/93 of 18 October 1993 imposing a definitive anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, and collecting definitively the provisional duty imposed, *O.J.*, 21 October 1993, No L 262/4; Council Regulation (EC) No 3664/93 of 22 December 1993 imposing a definitive anti-dumping duty on imports into the Community of photo albums in bookbound form originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 31 December 1993, No L 333/67; Commission Decision 94/82/EC of 10 January 1994 terminating the anti-dumping proceeding concerning imports of gum rosin originating in the People's Republic of China, *O.J.*, 12 February 1994, No L 41/50; Commission Regulation (EC) No 1648/94 of 6 July 1994 imposing a provisional anti-dumping duty on imports of furazolidone originating in the People's Republic of China, *O.J.*, 8 July 1994, No L 174/4; Commission Decision 94/389/EC of 6 June 1994 terminating the anti-dumping proceeding regarding imports of refined antimony trioxide originating in the People's Republic of China, *O.J.*, 9 July 1994, No L 176/41; Commission

treatment would be impracticable ; indeed, as they are economically interconnected, it is practically impossible to make a distinction between them.

The case in which a general duty was imposed on two ME producers, though they were not associated and individual duties could be calculated, seems to raise more problems. The producer with the lowest dumping margin argued that the imposition of such a general duty would be discriminatory because it would allow the producer with the higher dumping margin and a lower export price to sell at prices ultimately lower than those of the producer with the lowest dumping margin. The European anti-dumping authorities did not agree because the price disparity was created by the producers themselves and would remain the same under a general duty, unless the producers would decide to alter their pricing policies. Moreover, the European anti-dumping authorities held that it is not an objective of European anti-dumping law to bring about an alignment of the prices for export to the Community. Such an alignment was considered not to be in the Community interests because it would reduce competition in a market where only a limited number of companies (three) are competing¹⁶³⁶.

Though individual treatment was possible, this case was nevertheless legal. Indeed, the European anti-dumping authorities did not refuse individual treatment because of its being impracticable (*i.e.*, they did not rely on Article 14(2) basic EC Regulation and Article 13(2) basic ECSC Decision), but explained that the general duty was more in the Community interests (*i.e.*, they relied on Article 9(4) basic EC Regulation and Article 12(1) basic ECSC Decision). In terms of Community interests, the decision of the European anti-dumping authorities may be endorsed, from a legal point of view : price disparity between dumping producers cannot be said to be an objective criterion to base a differentiated treatment on. It is not objective because it may be influenced by the parties concerned. Indeed, producers in an oligopolistic market (in this anti-dumping case, there are only three competitors and a homogeneous product) are price-makers and, thus, influence their prices. From an economic point of view, the anti-dumping case is even more important. The European anti-dumping authorities rightly admit that differentiated individual duties may result in price alignments, thereby reducing competition. Higher dumping margins result from a combination of higher normal values and lower export prices ; higher injury margins result from lower export prices, since those margins are usually determined by the margin by

Regulation (EC) No 1783/94 of 18 July 1994 imposing a provisional anti-dumping duty on imports of furfuraldehyde originating in the People's Republic of China, *O.J.*, 21 July 1994, No L 186/11 ; Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50.

¹⁶³⁶ Council Regulation (EEC) No 2322/85 of 12 August 1985 imposing a definitive anti-dumping duty on imports of glycine originating in Japan, *O.J.*, 15 August 1985, No L 218/1.

which the dumping prices undercut the Community producers' prices¹⁶³⁷. Since higher dumping and injury margins lead to higher duties, lower export prices entail higher duties. As a result, the export prices will be aligned through the use of individual duties¹⁶³⁸. Unless the price differences are caused by predatory dumping, there is, however, no reason to align prices. Except for predatory dumping, price differences result from differences in efficiency of the different competitors on the market whereby the most efficient competitors able to charge the lowest price will eventually remain in the market. Individual duties prevent this result of competition, namely that the most efficient competitors charge lower prices. Instead, individual anti-dumping duties result in higher prices, the less efficient producers being guaranteed that the prices of the most efficient producers will undercut their own prices. Thus, individual duties lead to a general price increase and price alignment. General duties also increase prices, but they do not guarantee a price alignment. Under general duties, a price alignment requires that the dumping producers decide by themselves to align their prices. As a consequence, general duties do not distort competition between dumping producers. They should, therefore, be preferred to individual duties, contrary to what is provided under European anti-dumping law.

2.2.3. *Ratione loci* ^{2/20}

2.2.3.1. Destination

Anti-dumping duties must be imposed with respect to the whole Community, even when, pursuant to GATT and European anti-dumping law (Article 4.1.(ii) GATT Anti-dumping Code ; Article 4(1)(ii) basic EC Regulation ; Article 4(5) basic ECSC Decision), the Community is divided in several regional markets. In the latter case, however, the dumping exporters must be given the opportunity to offer undertakings in respect of the regional market concerned. If an adequate undertaking is not offered promptly or is not met, an anti-dumping duty may be imposed in respect of Community as a whole (Article 4.2. GATT Anti-dumping Code ; Article 4(3) basic EC Regulation ; Article 13(6) basic ECSC Decision). No formal reason is provided for a general anti-dumping duty, applicable to the whole of the Community, to be preferred to a regional anti-dumping duty, applicable to the regional market in which dumping occurs. In view of the different effects of a general and a regional anti-dumping duty, the reason is probably twofold.

¹⁶³⁷ Under European anti-dumping law, the amount of anti-dumping duty must not exceed the injury margin, i.e., the amount adequate to remove the injury caused by the dumping to the Community industry (Article 9(4) basic EC Regulation ; Article 13(3) basic ECSC Decision) (see : *infra*, 707-708).

¹⁶³⁸ VERMULST, E., and WAER, P., «The Calculation of Injury Margins in EC Anti-Dumping Proceedings», *Journal of World Trade*, 1991/6, (5), 30.

Figure 18 examines the effects of a general and of a regional anti-dumping duty¹⁶³⁹. The conditions under GATT and European anti-dumping law for dividing the Community in two competitive markets, a regional market and the rest of the Community, are assumed to be fulfilled. The Community producers within the regional market are assumed to sell their production in that market and the demand in that market is assumed to be supplied only by the Community producers established in that market and by the dumping exporters. The Community producers established in the rest of the Community do not export to the regional market. It is furthermore assumed that the rest of the Community is self-sufficient, for GATT and European anti-dumping law require that the dumped imports are concentrated in the regional market. That situation is twice represented in figure 18 : the regional market in figure 18(b) and (d) and the rest of the Community in figure 18(a) and (c). Figure 18(a) and (b) examine the effects of a general anti-dumping duty ; figure 18(c) and (d) look into the effects of a regional anti-dumping duty.

D_c and S_c represent demand and supply for the rest of the Community ; D_r and S_r represent demand and supply for the regional market. World supply is assumed to be perfectly elastic and the price of the imports is OP_W ¹⁶⁴⁰. It is assumed that, within the framework of the Community's common external tariff, a customs duty of $P_W P_C$ is levied on all imports into the Community. Thus, originally a general price OP_C prevails in both markets. At that price the rest of the Community is self-sufficient : the same quantity Oq_2 is produced and consumed. In the regional market a quantity Oq_{10} is consumed, of which Oq_5 is produced by the Community producers established in the regional market, the rest, $q_5 q_{10}$, being imported.

The imports into the regional market are dumped. As the dumping exporters do not offer an undertaking, a general anti-dumping duty is imposed (Article 4.2. GATT Anti-dumping Code ; Article 4(3) basic EC Regulation ; Article 13(6) basic ECSC Decision). The general anti-dumping duty is assumed to be $P_C P_{GA}$. Consequently, the price of the dumped imports will rise to OP_{GA} . The Community producers established in the rest of the Community are not subjected to the anti-dumping duty. Like the Community producers established in the regional market, they will also benefit from the price increase. As soon as the price rises above OP_C , the Community producers established in the rest of the Community will export to the regional market. Their willingness to export to the regional market amounts to M_c which is the difference between their supply S_c and the demand on their local market D_c . Thus, the effective supply of all the Community producers on the regional market amounts to $abS_r + M_c$ in figure 18(b). At the price OP_{GA} the effective supply curve cuts the demand curve D_r on the regional market. On that market a quantity Oq_8 will be consumed of which the Community producers in the regional market will supply Oq_7 and the other Community producers $q_7 q_8$. As the general anti-dumping duty applies also to possible imports into the rest of the Community, the Community producers may there also raise their price up to OP_{GA} in the rest of the Community. At that price, consumption in the rest of the Community will drop to Oq_1 . That quantity will be supplied by the Community producers established there. In total, these Community producers supply a quantity Oq_4 .

A general anti-dumping duty causes welfare effects on both the regional market and the rest of the Community. In the regional market it causes a fall in consumption with a welfare cost equal to the area def in figure 18(b). The increase in production by the Community producers established in the regional market entails a welfare cost of bcd in figure 18(b), for more efficient world suppliers are replaced by less efficient Community producers. The general anti-dumping duty also causes trade diversion : more efficient world supplies are replaced by less efficient intra-Community trade. The welfare cost equals the areas beih (loss in income from the customs duty $P_W P_C$) and cdfg (loss in income from the anti-dumping duty $P_C P_{GA}$) in figure 18(b). Thus, there is a total welfare loss for the regional market amounting to the total area bcdeih in figure 18(b). In the rest of the Community, however, the welfare effect is positive. The loss in welfare caused by lower consumption (area ade in figure 18(a)) and by the use of extra and, therefore, less efficient production resources (area bce in figure 18(a)) are more than outweighed by the extra-income which the Community producers gain from their exports to the regional market (area abdc in figure 18(a), equaling the area cdfg in figure 18(b)). The net welfare rise in the rest of the Community, thus, amounts to the area abe in figure 18(a). Figure 18(a) and (b) clearly show that the welfare rise in the rest of the Community is lower than the welfare cost in the regional market. Thus, for the whole Community a general anti-dumping duty results in a serious welfare cost.

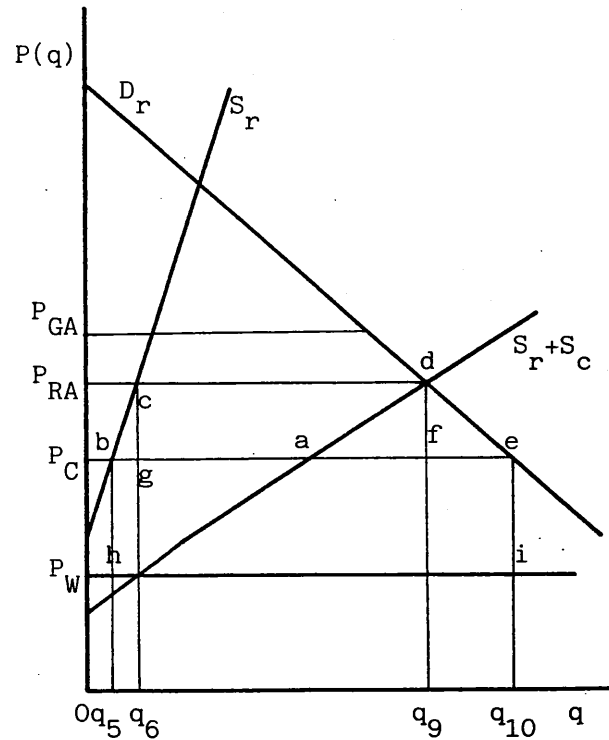
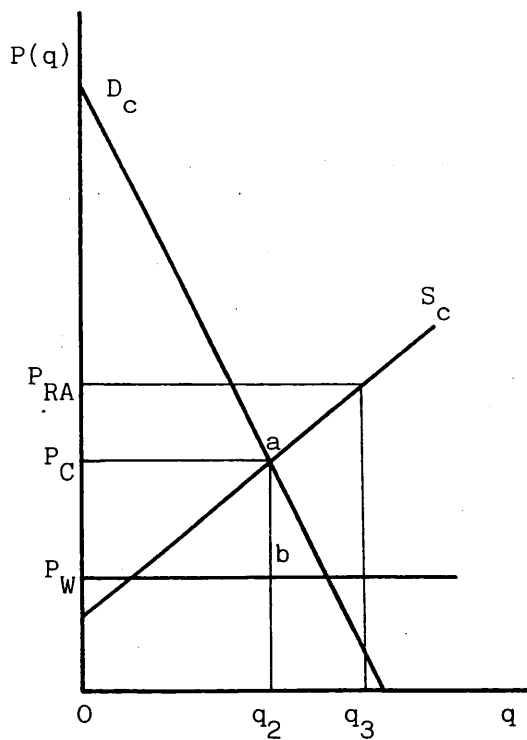
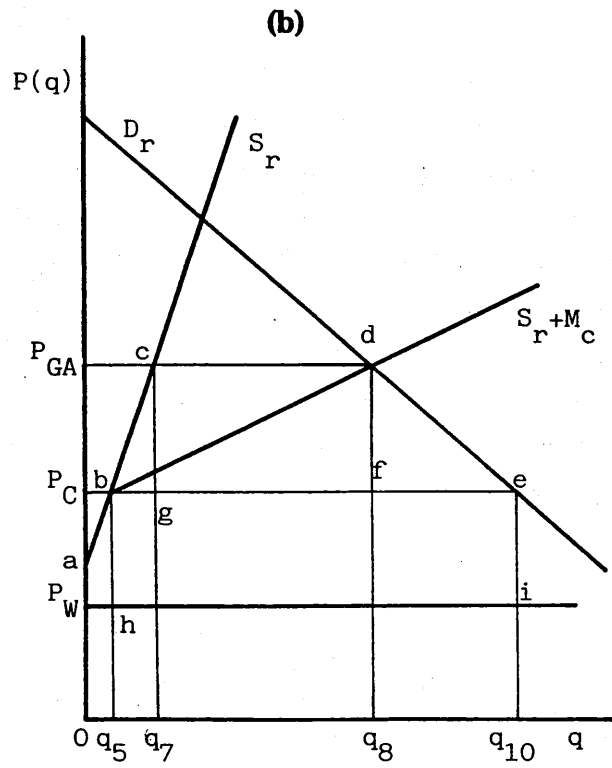
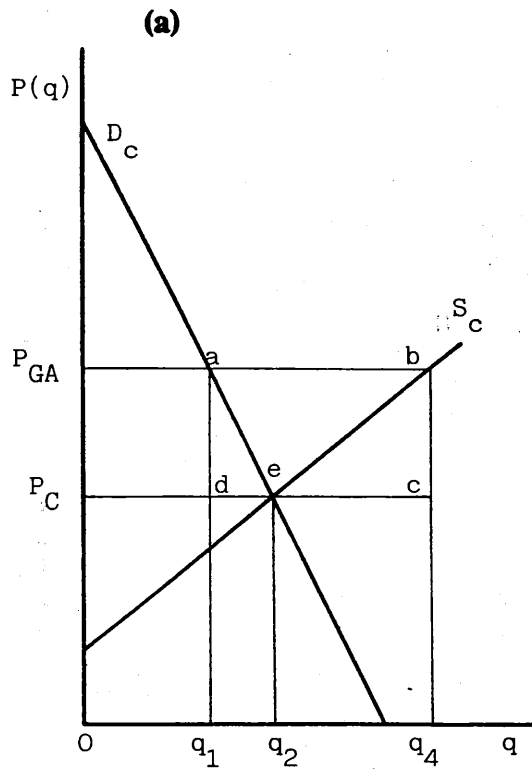
¹⁶³⁹ The analysis in figure 19 is based on the economics of international integration, see : ROBSON, P., *The Economics of International Integration*, in *Studies in Economics*, CARTER, C. (ed.), London, Allen & Unwin, 1984, 11-30.

¹⁶⁴⁰ For the sake of simplicity, a perfectly elastic world supply is assumed, especially because the assumption of price-makership (an imperfectly elastic world supply) would not alter the conclusions.

If, however, a regional rather than a general anti-dumping duty is imposed, the welfare effects will be lower. The amount of the regional anti-dumping duty is assumed to equal the amount of the general anti-dumping duty, *i.e.*, $P_C P_{GA}$. The price on the regional market can, thus, at most, go up to OP_{GA} . Since the regional anti-dumping duty does not apply to the rest of the Community, the price there will remain OP_C . As a consequence, it will be profitable for the Community producers to export toward the regional market insofar as the price on the regional market does not drop below OP_C , which is the price they can get in the rest of the Community. Consequently, effective Community supply on the regional market is the curve $P_C a S_r + S_c$ in figure 18(d). At the price OP_{RA} the demand curve D_r intersects the effective supply curve. At that price a quantity Oq_9 will be consumed. The Community producers in the regional market produce a quantity Oq_6 . The Community producers in the rest of the Community export a quantity $q_6 q_9$ into the regional market, which is equal to their production. As a consequence, they are not able to produce themselves the quantity demanded by the consumers in the rest of the Community. However, it will be profitable to import that quantity from the rest of the world. As in the rest of the Community, the regional anti-dumping duty will not apply, the price of the imports will be equal to OP_C and at that price a quantity Oq_2 will be consumed in the rest of the Community.

Figure 18(c) and (d) show that the negative welfare effects of a regional anti-dumping duty are lower than those of a general anti-dumping duty. In the regional market the regional anti-dumping duty of $P_C P_{GA}$ causes a decline in consumption, the welfare cost being the area *def* in figure 18(d). It causes the less efficient Community producers in the regional market to increase their production entailing thereby a welfare loss of *bcg* in figure 18(d). Furthermore, the welfare cost of trade diversion is equal to the areas *cdfg* and *beih* in figure 18(d). Thus, the regional market suffers a total welfare loss of *bcdeih* in figure 18(b). That total welfare loss is lower than under the general anti-dumping duty because the price increase is lower, namely $P_C P_{RA}$ is smaller than $P_C P_{GA}$. Moreover, in the rest of the Community welfare is increased by the income from the customs duty $P_W P_C$ levied on the imported quantity of Oq_2 , represented by the area $P_C ab P_W$ in figure 18(c). That area is larger than the welfare gain for the rest of the Community under a general anti-dumping duty (the area *abe* in figure 18(a)). As a result, the total welfare loss of a regional anti-dumping duty is lower than that of a general anti-dumping duty.

Figure 18



(c)

(d)

The preference of a general anti-dumping duty to a regional anti-dumping duty, thus, cannot be explained by their respective welfare effects since the welfare loss of a general duty is larger than that of a regional one. Figure 18 reveals the twofold reason underlying the preference for a general duty. First, contrary to a general duty, a regional duty does not correspond with the idea of the European common market in which only one price prevails and where a common external tariff is applied to imports¹⁶⁴¹. Indeed, under a regional duty the price in the regional market increases, whereas the price in the rest of the Community remains the same. Under a general anti-dumping duty, the prices in both markets increase by the same amount. Second, a regional duty does not offer the Community producers established in the regional market as much protection as a general duty. Indeed, the price increase caused by a general duty will be the same, irrespective of whether the Community producers established in the rest of the Community or the dumping exporters supply the regional market. Thus, the increase in production by the Community producers established in the regional market is not affected, even if trade is diverted in favour of the Community producers established in the rest of the Community. As under a regional duty, however, the price in the regional market does not increase as much as under a general duty, the Community producers in the regional market cannot increase their production as much as under a general duty.

2.2.3.2. Origin

Anti-dumping duties apply to the imports from the countries indicated by the Regulation imposing the anti-dumping duties (Article 9.2. GATT Anti-dumping Code ; Article 14(2) basic EC Regulation ; Article 13(2) basic ECSC Decision). There is no guarantee that they apply to all countries whose dumped imports cause injury to the Community industry. The scope of anti-dumping duties follows the scope of the anti-dumping proceeding which, in its turn, is determined by the complaint filed on behalf of the Community industry (Article 5.1. GATT Anti-dumping

¹⁶⁴¹ See : Answer of the Commission to written question No 658/80, *O.J.*, 23 October 1980, No C 275/18, where the Commission argued that anti-dumping duties must apply uniformly to the whole of the Community territory, in view of the uniform character of the common customs tariff.

Code ; Article 5(1) basic EC legislation)¹⁶⁴². Thus, the scope *ratione loci* of anti-dumping duties depends on the scope of the anti-dumping complaint. However, if imports from other countries which, at first sight, seem to be dumped, are not yet subject to an anti-dumping proceeding, an anti-dumping proceeding is usually initiated against them¹⁶⁴³, or the anti-

¹⁶⁴² Council Regulation (EEC) No 3308/90 of 15 November 1990 imposing a definitive anti-dumping duty on imports of woven polyolefin sacks originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty on such imports, *O.J.*, 17 November 1990, No L 318/2.

According to Article 5(1)(b) basic EC Regulation and Article 5(6) basic ECSC Decision, the Commission may initiate an anti-dumping proceeding, when a Member State communicates sufficient evidence to the Commission both of dumping and of injury. Those Articles have not yet been applied.

In pursuance of the new GATT Anti-dumping Code (Article 5.6.), EC anti-dumping law takes explicitly account of the possibility of anti-dumping proceedings being initiated by the Commission, without having received a complaint by or on behalf of the Community industry (Article 5(6) basic EC Regulation). ECSC anti-dumping law does not explicitly grant the Commission the authority to start an anti-dumping proceeding on its own initiative. However, it may be argued that Article 7(1) basic ECSC Decision might provide a basis for such an action since, according to that Article, the Commission has to start the investigation if it is apparent that there is sufficient evidence to justify the initiation of a proceeding (see : BELLIS, J.-F., «The EEC Antidumping System», in *Antidumping Law and Practice. A Comparative Study*, JACKSON, J.H., and VERMULST, E.A. (eds.), New York, Harvester Wheatsheaf, 1990, (41), 47 ; BOURGEOIS, J.H.J., «EC Anti-dumping Enforcement - Selected Second Generations Issues», in *Antitrust and Trade Policy in the United States and the European Community*, HAWK, B.E. (ed.), New York, Bender, 1986, (563), 590 ; VAN BAEL, L. and BELLIS, J.-F., *Anti-Dumping and other Trade Protection Laws of the EEC*, Bicester, CCH Editions, 1990, 181). With regard to ECSC anti-dumping law, the Commission, however, has held that it «can only carry out such investigations if it has received an adequately documented complaint from the Community industry concerned» (Answer of the Commission to written question No 253/92, *O.J.*, 19 October 1992, No C 269/34 ; Answer of the Commission to written question No 1502/92, *O.J.*, 18 October 1993, No C 290/8).

¹⁶⁴³ C.J.E.C., case C-323/88, 11 July 1990, *SA Sermes v Directeur des services des douanes de Strasbourg*, *E.C.R.*, 1990, I, (3027), 3037 ; Commission Decision 80/564/EEC of 4 June 1980 accepting undertakings in connection with the anti-dumping proceedings concerning imports of fibre building board originating in Czechoslovakia, Finland, Norway, Poland, Romania, Spain, the Soviet Union and Sweden and determining those proceedings, *O.J.*, 11 June 1980, No L 145/39 ; Council Regulation (EEC) No 864/87 of 23 March 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union, and definitively collecting the amounts secured as provisional duties, *O.J.*, 27 March 1987, No L 83/1 ; Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1 ; Commission Regulation (EEC) No 699/88 of 15 March 1988 imposing a provisional anti-dumping duty on imports of oxalic acid originating in Taiwan and South Korea, *O.J.*, 18 March 1988, No L 72/12 ; Commission Regulation (EEC) No 3074/89 of 11 October 1989 imposing a provisional anti-dumping duty on imports of welded tubes originating in Yugoslavia and Romania, *O.J.*, 13 October 1989, No L 294/10 ; Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1 ; Council Regulation (EEC) No 385/90 of 12 February 1990 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in Czechoslovakia and definitively collecting the provisional anti-dumping duty imposed on those imports, *O.J.*, 16 February 1990, No L 42/1 ; Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5 ; Council Regulation (EEC) No 993/93 of 26 April 1993 imposing a definitive anti-dumping duty on imports of certain electronic weighing scales originating in Japan, *O.J.*, 29 April 1993, No L 104/4.

When potential complainants unofficially seek the advice of the Commission before lodging their anti-dumping complaint, the Commission normally draws their attention to the need to include dumping from all sources (BOURGEOIS, J.H.J., «EC Anti-dumping Enforcement - Selected Second Generations Issues», in *Antitrust and Trade Policy in the United States and the European Community*, HAWK, B.E. (ed.), New York, Bender, 1986, (563), 594).

See also :

- woven polyolefin bags from the People's Republic of China and radio-broadcast receivers of a kind used in motor vehicles from South Korea, where the scope *ratione loci* was not extended because no evidence of dumping by other exporters was provided for (Council Regulation (EEC) No 3308/90 of 15 November 1990 imposing a definitive anti-dumping duty on imports of woven polyolefin sacks originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty on such imports, *O.J.*, 17 November 1990, No L 318/2 ; Commission Regulation (EEC) No 313/92 of 4 February 1992 imposing a

dumping proceeding is terminated without anti-dumping relief being granted¹⁶⁴⁴. Similarly, an anti-dumping review proceeding is initiated against dumped imports from other producers established in the same country of origin not subject to adequate anti-dumping measures¹⁶⁴⁵. The principle of non-discrimination, as laid down in GATT and European anti-dumping law with regard to the imposition of anti-dumping duties (Article 9.2. GATT Anti-dumping Code ; Article 9(5) basic EC Regulation ; Article 13(5) basic ECSC Decision), is underlying both outcomes¹⁶⁴⁶, though it only guarantees non-discrimination between countries. European anti-dumping case law, however, extends its scope to exporters established in the same country. Thus, the principle of non-discrimination necessitates that anti-dumping duties are imposed on all dumping exporters established within the same country¹⁶⁴⁷.

The application of the principle of non-discrimination is unequivocal in this respect. Countries and exporters should be treated the same if their dumping causes material injury to the

provisional anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in South Korea, *O.J.*, 11 February 1992, No L 34/8) ;

- urea from the German Democratic Republic, Czechoslovakia, Kuwait, Libya, Saudi Arabia, the Soviet Union, Trinidad and Tobago and Yugoslavia, where the scope *ratione loci* was not extended to urea from Canada, because the Canadian market shares on the Community market were negligible (C.J.E.C., case C-49/88, 27 June 1991, *Al-Jubail Fertilizer Company and Saudi Arabian Fertilizer Company v Council, E.C.R.*, 1991, I, (3187), 3211 (Opinion of Advocate General DARMON)) ;

- deadburned (sintered) magnesia from the People's Republic of China and magnesium oxide from the People's Republic of China, where no anti-dumping proceeding was initiated against North Korea as no trade diversion of Chinese by North Korean imports was expected and no complaint had been lodged against North Korea. The Commission, though, promised to monitor the situation closely and to initiate an anti-dumping proceeding against North Korean imports when, due to trade diversion, the Community industry would remain suffering injury (Commission Regulation (EEC) No 2799/92 of 25 September 1992 imposing a provisional anti-dumping duty on imports of deadburned (sintered) magnesia originating in the People's Republic of China, *O.J.*, 26 September 1992, No L 282/15 ; Commission Regulation (EEC) No 2800/92 of 25 September 1992 imposing a provisional anti-dumping duty on imports of magnesium oxide originating in the People's Republic of China, *O.J.*, 26 September 1992, No L 282/23).

¹⁶⁴⁴ Council Regulation (EEC) No 2907/83 of 17 October 1983 terminating the anti-dumping proceeding concerning imports of unwrought nickel, not alloyed, in the form of cathodes produced by electrolysis, either uncut or cut into squares, originating in the Soviet Union, *O.J.*, 19 October 1983, No L 286/29 ; BOURGEOIS, J.H.J., «EC Anti-dumping Enforcement - Selected Second Generations Issues», in *Antitrust and Trade Policy in the United States and the European Community*, HAWK, B.E. (ed.), New York, Bender, 1986, (563), 594 .

¹⁶⁴⁵ Council Regulation (EEC) No 101/83 of 17 January 1983 imposing a definitive anti-dumping duty on certain chemical fertilizer originating in the United States of America, *O.J.*, 19 January 1983, No L 15/1.

¹⁶⁴⁶ See also : Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia, *O.J.*, 9 May 1987, No L 121/11 ; Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1 ; Commission Regulation (EEC) No 2623/88 of 24 August 1988 imposing a provisional anti-dumping duty on imports of urea originating in Austria, Hungary, Malaysia, Romania, the USA and Venezuela, *O.J.*, 25 August 1988, No L 235/5 ; Commission Regulation (EEC) No 3617/90 of 11 December 1990 imposing a provisional anti-dumping duty on imports of certain welded tubes of iron or non-alloy steel, originating in Turkey or in Venezuela and accepting undertakings offered in connection with such imports, *O.J.*, 15 December 1990, No L 351/17.

¹⁶⁴⁷ Commission Regulation (EEC) No 1682/78 of 17 July 1978 extending the provisional anti-dumping duty on ferrochromium originating in Sweden, *O.J.*, 18 July 1978, No L 193/14. See also : C.J.E.C., case C-216/91, 7 December 1993, *Rima Electrometallurgia SA v Council*, recital 58 (Opinion of Advocate General LENZ) (not yet reported).

Community industry. Two anti-dumping cases, however, do not comply with the principle of non-discrimination. In one case, anti-dumping duties were imposed, but no anti-dumping proceeding was initiated against imports from third countries, though there were grounds for assuming that these imports were also dumped¹⁶⁴⁸. In the other case, the anti-dumping proceeding was initiated against only two exporters, although a larger number of exporters was established in the same country¹⁶⁴⁹. Neither of those cases paid attention to the principle of non-discrimination. The formal argument advanced by the European anti-dumping authorities in the second case that the anti-dumping proceeding was initiated against and, therefore, limited to two exporters, does not allow to disregard the principle of non-discrimination. For, in practice, the European anti-dumping authorities usually face complainants with the choice of either requesting an extension of the proceeding or witnessing the termination of the case on the ground of no injury¹⁶⁵⁰. The principle of non-discrimination appears, therefore, to be raised arbitrarily. It is probably only invoked to serve the political goals of the European anti-dumping authorities. For example, it would not serve their political goals in respect of countries or exporters which have concluded an export restraint agreement under the threat of being subjected to an anti-dumping proceeding¹⁶⁵¹. Such an improper use of European anti-dumping law is all the worse because such forced export restraint agreements may be concluded without proof of injurious dumping or without evidence that the Community interests call for anti-dumping relief.

¹⁶⁴⁸ Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79; corrigendum, *O.J.*, 10 February 1990, No L 38/44).

¹⁶⁴⁹ Commission Regulation (EEC) No 2684/88 of 26 August 1988 imposing a provisional anti-dumping duty on certain imports of video cassette recorders originating in Japan and the Republic of Korea, *O.J.*, 31 August 1988, No L 240/5; Council Regulation (EEC) No 501/89 of 27 February 1989 imposing a definitive anti-dumping duty on imports of certain video cassette recorders originating in Japan and the Republic of Korea and definitively collecting the provisional duty, *O.J.*, 28 February 1989, No L 57/55.

¹⁶⁵⁰ VAN BAELE, I., and BELLIS, J.-F., *Anti-Dumping and other Trade Protection Laws of the EEC*, Bicester, CCH Editions Ltd., 1990, 143.

¹⁶⁵¹ BOURGEOIS, J.H.J., «EC Anti-dumping Enforcement - Selected Second Generation Issues», in *Antitrust and Trade Policy in the United States and the European Community*, HAWK, B.E., (ed.), New York, Bender, 1986, (563), 594. See also: DAVENPORT, M.W.S., «The External Policy of the Community and its Effects upon Manufactured Exports of the Developing Countries», *Journal of Common Market Studies*, 1990-1991, (181), 195, according to whom anti-dumping actions often lead to voluntary export restraints.

Things are even worse, as the Court of Justice has refused to annul an anti-dumping duty imposed on an exporter because of positive discrimination of other exporters¹⁶⁵². This case renders the principle of non-discrimination unenforceable. The positively discriminated exporters will have no interest in attacking their favourable treatment and the other exporters will have no standing before the Court as the anti-dumping determination in respect of the positively discriminated exporters is not addressed to the other exporters and is neither of direct and individual concern to the latter.

2.2.4. *Ratione materiae*

Anti-dumping duties apply to the imports of the product indicated by the Regulation imposing the anti-dumping duties (Article 14(2) basic EC Regulation ; Article 13(2) basic ECSC Decision). The product is generally identified by its common name, by reference to the combined nomenclature and coding system (CN code)¹⁶⁵³, and, if necessary, by an additional description. Sometimes, the description of the product is then still too broad so that certain types or models must be excluded explicitly¹⁶⁵⁴. Each of these elements is decisive¹⁶⁵⁵.

Anti-dumping duties should apply only to the products mentioned in the anti-dumping complaint or to a limited number of them insofar as the conditions for granting anti-dumping relief against each

¹⁶⁵² C.J.E.C., case 301/85, 5 October 1988, *Sharp Corporation v Council*, E.C.R., 1988, (5813), 5844 (Opinion of Advocate General Sir Gordon SLYNN) and 5852 ; C.J.E.C., joined cases 260/85 and 106/86, 5 October 1988, *Tokyo Electric Company Ltd (TEC) a.o. v Council*, E.C.R., 1988, (5855), 5894 (Opinion of Advocate General Sir Gordon SLYNN) ; C.J.E.C., joined cases 273/85 and 107/86, 5 October 1988, *Silver Seiko Limited a.o. v Council*, E.C.R., 1988, (5927), 5983 ; C.J.E.C., case C-49/88, 27 June 1991, *Al-Jubail Fertilizer Company and Saudi Arabian Fertilizer Company v Council*, E.C.R., 1991, I, (3187), 3210-3211 (Opinion of Advocate General DARMON).

¹⁶⁵³ Since 1988 the CN code has replaced the Common Customs Tariff subheading and the NIMEXE code number.

¹⁶⁵⁴ An appropriate example in this respect is the description of the dumped product subject to the definitive anti-dumping duty in *electronic typewriters from Japan* :

- *common name* : «electronic typewriters, whether or not incorporating calculating mechanisms» ;
- *reference to the combined nomenclature code* : «falling within subheadings ex 84.51 A or ex 84.52 B of the Common Customs Tariff and corresponding to NIMEXE codes 84.51 ex 12, ex 14, ex 19, ex 20 or 84.52 ex 95» ;
- *additional description* : «an electronic typewriter is a machine which is steered by microprocessor(s) and which initiates, implements and/or controls its relevant functions by means of software programs. Its main application is printing of text derived from a keyboard, even if an electronic typewriter can be used for additional functions (e.g. computing, communication and storage)» ;
- *models excluded* :
 - « Brother : EP 20, EP 22, EP 41, EP 44, TC 600,
 - Canon : S 50 (Typestar 5), S 50 R (Typestar 5 R), S 60 (Typestar 6),
 - Casio : CW 10, CW 20, CW 25,
 - Silver Seiko : EXD 10, EXD 15»

(Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, O.J., 22 June 1985, No L 163/1).

¹⁶⁵⁵ In respect of the CN code, see : C.J.E.C., joined cases C-305/86 and C-160/87, 11 July 1990, *Neotype Techmaslexport GmbH v Commission and Council*, E.C.R., 1990, I, (2945), 2989-2990 (Opinion of Advocate General VAN GERVEN) ; C.J.E.C., case C-90/92, 24 June 1993, *Dr Treter GmbH & Co. v Hauptzollamt Baden-Württemberg*, considerations 13-16 (not yet reported).

type or model of the product are fulfilled¹⁶⁵⁶. Sometimes, however, the scope *ratione*

1656 See e.g. :

- *polyester yarn from the United States of America :*

- provisional anti-dumping duty : «certain polyester yarn originating in the United States of America falling within subheading 51.01 A of the Common Customs Tariff, corresponding to NIMEXE code 51.01-23, 25, 26 and 28» ; as a result, the provisional anti-dumping duty was applicable to sewing thread (Commission Regulation (EEC) No 2297/80 of 29 August 1980 imposing a provisional anti-dumping duty on imports of certain polyester yarn originating in the United States of America, *O.J.*, 2 September 1980, No L 231/5) ;
- amended provisional and definitive anti-dumping duty : explicit exception for sewing thread because the complaint did not relate to sewing thread (Commission Regulation (EEC) No 2843/80 of 30 October 1980 amending Regulation (EEC) No 2297/80 imposing a provisional anti-dumping duty on imports of certain polyester yarn originating in the United States of America, *O.J.*, 4 November 1980, No L 294/5 ; Council Regulation (EEC) No 3439/80 of 22 December 1980 imposing a definitive anti-dumping duty on imports of certain polyester yarn originating in the United States of America, *O.J.*, 31 December 1980, No L 358/91) ;
- amended definitive anti-dumping duty : explicit exception for yarn specifically manufactured for the woven label trade, synthetic absorbable surgical sutures and unfinished sewing thread because these products were not envisaged by the complaint (Council Regulation (EEC) No 3198/81 of 9 November 1981 amending Regulation (EEC) No 3439/80 imposing a definitive anti-dumping duty on imports of certain polyester yarn originating in the United States of America, *O.J.*, 11 November 1981, No L 322/2) ;

- *ethanolamine from the United States of America :*

- initiation and provisional anti-dumping duty : «ethanolamines falling within CN codes 2922 11 00, 2922 12 00 and 2922 13 00» (Notice of initiation of an anti-dumping proceeding concerning imports of ethanolamine originating in the United States of America, *O.J.*, 8 August 1992, No C 201/12 ; Commission Regulation (EEC) No 2172/93 of 30 July 1993 imposing provisional anti-dumping duties on imports of ethanolamine originating in the United States of America, *O.J.*, 4 August 1993, No L 195/5) ;
- definitive anti-dumping duty : «ethanolamine, with the exclusion of salt of ethanolamine, falling within CN codes ex 2922 11 00, ex 2922 12 00 and ex 2922 13 00» since salts made from ethanolamine are not covered by the complaint and the proceeding (Council Regulation (EC) No 229/94 of 1 February 1994 imposing definitive anti-dumping duties on imports into the Community of ethanolamine originating in the United States of America, and collecting definitively the provisional anti-dumping duties, *O.J.*, 2 February 1994, No L 28/40)

See also : Council Regulation (EEC) No 3002/85 of 28 October 1985 amending Regulation (EEC) No 1698/85 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 30 October 1985, No L 288/5 ; Commission Regulation (EEC) No 3475/85 of 9 December 1985 amending Commission Regulation (EEC) No 2823/85 imposing a provisional anti-dumping duty on imports of certain clogs originating in Sweden, *O.J.*, 11 December 1985, No L 333/18 ; Council Regulation (EEC) No 113/86 of 20 January 1986 amending Regulation (EEC) No 1698/85 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 23 January 1986, No L 17/2 ; Council Regulation (EEC) No 2127/86 of 7 July 1986 amending Regulation (EEC) No 1698/85 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 9 July 1986, No L 187/3 ; Council Regulation (EEC) No 547/87 of 23 February 1987 amending Regulation (EEC) No 1698/85 imposing a definitive duty on imports of electronic typewriters originating in Japan, *O.J.*, 26 February 1987, No L 56/1 (corrigendum, *O.J.*, 11 March 1987, No L 66/21) ; Council Regulation (EEC) No 154/88 of 18 January 1988 amending Regulation (EEC) No 1698/85 imposing a definitive duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 January 1988, No L 18/4 ; Commission Decision No 1324/89/ECSC of 12 May 1989 amending Decision No 708/89/ECSC imposing a provisional anti-dumping duty on imports of certain flat-rolled products of iron or non-alloy steel, cold-rolled, originating in Yugoslavia, *O.J.*, 17 May 1989, No L 133/5 ; Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7 ; Commission Regulation (EEC) No 2800/92 of 25 September 1992 imposing a provisional anti-dumping duty on imports of magnesium oxide originating in the People's Republic of China, *O.J.*, 26 September 1992, No L 282/23 ; Commission Decision No 67/94/ECSC of 12 January 1994 imposing a provisional anti-dumping duty on imports into the Community of hematite pig iron, originating in Brazil, Poland, Russia and Ukraine, *O.J.*, 15 January 1994, No L 12/5.

materiae of anti-dumping duties is extended¹⁶⁵⁷ beyond the scope of the anti-dumping

¹⁶⁵⁷ In many cases the scope *ratione materiae* has been modified during the anti-dumping proceeding. In principle, a modification of the scope *ratione materiae* is illegal when it implies that anti-dumping relief is granted against products for which no anti-dumping proceeding is initiated.

Sometimes, however, those modifications are not illegal, namely when :

- they are misprints which are not noticed and therefore not rectified

See e.g. : *cotton yarn from Brazil and Turkey* :

- initiation : HS codes 5205 and 5206 (Notice of initiation of an anti-dumping proceeding concerning imports of cotton yarn not put up for retail sale originating in Brazil, Egypt, India, Thailand and Turkey, *O.J.*, 22 March 1990, No C 72/3) ;
- provisional anti-dumping duty : CN codes 5205 11 00 to 5205 45 90 and 5206 11 00 to 5206 45 90 (Commission Regulation (EEC) No 2818/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports of cotton yarn originating in Brazil, Egypt and Turkey and terminating the anti-dumping proceeding in respect of cotton yarn originating in India and Thailand, *O.J.*, 27 September 1991, No L 271/17) ;
- definitive anti-dumping duty : CN codes 5205 11 00 to 5205 45 90 and 5211 00 to 5206 45 90 (Council Regulation (EEC) No 830/92 of 30 March 1992 imposing a definitive anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and collecting definitively the provisional duty, *O.J.*, 3 April 1992, No L 88/1 (corrigendum, *O.J.*, 5 June 1992, No L 153/16)), where CN code 5211 00 probably should be read as CN code 5206 11 00 ;
- reviews and amended definitive anti-dumping duty : CN codes 5205 11 00 to 5205 45 90 and 5206 11 00 to 5206 45 90 (Notice of initiation of a review of anti-dumping measures concerning imports of cotton yarn, originating in Brazil and Turkey, *O.J.*, 23 September 1992, No C 244/14 ; Notice of initiation of a review of Regulation (EEC) No 738/92 imposing a definitive anti-dumping duty on imports of cotton yarn, originating in Brazil and Turkey, *O.J.*, 11 May 1993, No C 131/2 ; Council Regulation (EC) No 3203/93 of 22 November 1993 amending Regulation (EEC) No 738/92 imposing a definitive anti-dumping duty on imports of cotton yarn, originating in Brazil and Turkey, *O.J.*, 24 November 1993, No L 289/1), where the misprint in the definitive anti-dumping duty was not copied ;

- they are in fact rectifications of misprints

See e.g. : *upright pianos originating in the USSR* :

- initiation and provisional anti-dumping duty (before rectification) : tariff subheading 92.01 A1 and Nimexe code 92.01-11 (Notice of extension of the anti-dumping proceeding concerning imports of upright pianos, initiated against the German Democratic Republic and Poland, in order to include the imports of upright pianos originating in Czechoslovakia and the USSR, *O.J.*, 23 July 1981, No C 181/3 ; Commission Regulation (EEC) No 871/82 of 14 April 1982 imposing a provisional anti-dumping duty on upright pianos originating in the USSR, *O.J.*, 16 April 1982, No L 101/30) ;
- provisional and definitive anti-dumping duty (after rectification) : tariff subheading ex 92.01 A I and Nimexe code 92.01-12 (Commission Regulation (EEC) No 871/82 of 14 April 1982 imposing a provisional anti-dumping duty on upright pianos originating in the USSR, *O.J.*, 16 April 1982, No L 101/30 (corrigendum, *O.J.*, 29 April 1982, No L 115/22) ; Council Regulation (EEC) No 2236/82 of 11 August 1982 imposing a definitive anti-dumping duty on upright pianos originating in the USSR, *O.J.*, 13 August 1982, No L 238/1 (corrigendum, *O.J.*, 21 September 1982, No L 271/20)) ;

- they are adaptations in respect of modifications in the CN codes

See e.g. : *DRAMs from Japan* (see : C.J.E.C., case C-30/93, 2 June 1994, *AC-ATEL Electronics Vertriebs GmbH v Hauptzollamt München-Mitte*, E.C.R., 1994, I, (2305), 2325-2326) :

- initiation : DRAMs falling within CN codes ex 8542 11 10 (wafers), ex 8542 11 30 (dice) and ex 8542 11 71 (finished DRAMs) (Notice of initiation of an anti-dumping proceeding concerning imports of certain types of electronic microcircuits known as DRAMs (Dynamic Random Access Memories) originating in Japan, *O.J.*, 9 July 1987, No C 181/3) ;
- provisional and definitive anti-dumping duty : DRAMs falling within CN codes 8542 11 41, 8542 11 43, 8542 11 45, ex 8542 11 10, ex 8542 11 30, ex 8473 30 00 and ex 8548 00 00 (Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79 ; corrigendum, *O.J.*, 10 February 1990, No L 38/44) ; Council Regulation (EEC) No 2112/90 of 23 July 1990 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan and collecting definitively the provisional duty, *O.J.*, 25 July 1990, No L 193/1) ;

(See also : Notice of initiation of a partial review of anti-dumping measures applicable to imports of certain types of electronic microcircuits known as EPROMs (erasable programmable read only memories) originating in Japan, *O.J.*, 17 July 1992, No C 181/7).

complaint¹⁶⁵⁸. The prevention of circumvention¹⁶⁵⁹, the impossibility to make a

1658 The scope *ratione materiae* has been extended in :

- *photographic enlargers from Poland and the USSR :*

- initiation : photographic enlargers for amateur use falling under subheading ex 90.09 of the Common Customs Tariff corresponding to NIMEXE code ex 90.09-30 (O.J., 23 October 1981, No C 271/4) ;
- provisional anti-dumping duty : «photographic enlargers, falling under subheading ex 90.09 of the Common Customs Tariff (NIMEXE code ex 90.09-30)» (Commission Regulation (EEC) No 1958/82 of 16 July 1982 imposing a provisional anti-dumping duty on imports of photographic enlargers originating in Poland and the USSR, accepting an undertaking and terminating the proceeding in respect of imports of photographic enlargers originating in Czechoslovakia, O.J., 21 July 1982, No L 212/32) ;

- *light sodium carbonate from Bulgaria, the German Democratic Republic, Poland, Romania and the Soviet Union :*

- initiation and provisional and definitive anti-dumping duty : products «falling within subheading 28.42 A ex II of the Common Customs Tariff, corresponding to NIMEXE code ex 28.42-31» (see e.g. : Council Regulation (EEC) No 273/83 of 1 February 1983 imposing a definitive anti-dumping duty on imports of light sodium carbonate originating in Bulgaria, the German Democratic Republic, Poland, Romania and the Soviet Union, O.J., 3 February 1983, No L 32/1) ;
- amended definitive anti-dumping duty : products «falling within subheading 28.42 A ex II of the Common Customs Tariff, with or without the addition of sand, falling within subheading 38.19 ex X - corresponding to NIMEXE code ex 28.42-31 or ex 38.19-99» because mixing the product with small quantities of sand does not give rise to any change in the use to which it is put (Council Regulation (EEC) No 1946/86 of 24 June 1986 amending Regulation (EEC) No 273/83 imposing a definitive anti-dumping duty on imports of light sodium carbonate originating in Bulgaria, the German Democratic Republic, Poland, Romania and the Soviet Union, O.J., 26 June 1986, No L 169/1) ;

- *electronic typewriters from Japan :*

- initiation and provisional anti-dumping duty : products falling within subheadings ex 84.51 A of the Common Customs Tariff and corresponding to NIMEXE codes 84.51 ex 14, ex 19, ex 20 (Notice of initiation of an anti-dumping proceeding concerning imports of electronic typewriters originating in Japan, O.J., 24 March 1984, No C 83/4 ; Commission Regulation (EEC) No 3643/84 of 20 December 1984 imposing a provisional anti-dumping duty on imports of electronic typewriters originating in Japan and terminating the anti-dumping proceeding with regard to Nakajima All Co. Ltd, O.J., 22 December 1984, No L 335/43) ;
- definitive anti-dumping duty : products falling within subheadings ex 84.51 A or ex 84.52 B of the Common Customs Tariff and corresponding to NIMEXE codes 84.51 ex 12, ex 14, ex 19, ex 20 or 84.52 ex 95, in order to comprise electronic typewriters with a calculating mechanism (Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, O.J., 22 June 1985, No L 163/1) ;

- *compact disc players from Japan and the Republic of Korea :*

- initiation : certain compact disc players falling under subheading ex 92.11 A II a) of the Common Customs Tariff and Nimexe code ex 92.11-20, i.e., stand-alone sound reproducers, including sound reproducers which may be incorporated in a «rack» system, but can nevertheless operate alone separately from the «rack» system (Notice of initiation of an anti-dumping proceeding concerning imports of compact disc players originating in South Korea and Japan, O.J., 7 July 1987, No C 178/7) ;
- provisional and definitive anti-dumping duty, initiation of review proceeding and initiation about an additional anti-dumping duty : certain compact disc players falling within CN code ex 8519 99 10, i.e., stand-alone sound reproducers, including sound reproducers which may be incorporated in a «rack» system, but can nevertheless operate alone separately from the «rack» system (Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, O.J., 18 July 1989, No L 205/5 (corrigendum, O.J., 2 September 1989, No L 257/27) ; Council Regulation (EEC) No 112/90 of 16 January 1990 imposing a definitive anti-dumping duty on imports of certain compact disc players originating in Japan and the Republic of Korea and collecting definitively the provisional duty, O.J., 17 January 1990, No L 13/21 ; Notice of initiation of a partial review of anti-dumping measures concerning imports of certain compact disc players originating in Japan and the Republic of Korea (Accuphase Laboratory Inc.), O.J., 4 July 1991, No C 173/3 ; Notice of initiation of an investigation provided for in Article 13(11) of anti-dumping Regulation (EEC) No 2423/88 concerning imports of compact disc players originating in Japan and the Republic of Korea, O.J., 5 July 1991, No C 174/15) ;
- amended definitive anti-dumping duty : certain compact disc players falling within CN codes ex 8519 31 00, ex 8519 39 00, ex 8519 99 10, ex 8520 31 90, ex 8520 39 10, ex 8520 39 90 and ex 8527 31 91, i.e., stand-alone sound reproducers, including sound reproducers which may be incorporated in a «rack» system, but can nevertheless operate alone separately from the «rack» system. This extension was necessary in order to include also compact disc players incorporated in a «rack» system where another apparatus gives the «rack» system its essential characteristics (Council Regulation (EEC) No 819/92 of 30 March 1992 amending Regulation (EEC) No 112/90 imposing a definitive anti-dumping duty on imports of certain compact disc players originating in Japan and the Republic of Korea and collecting definitively the provisional duty, O.J., 2 April 1992, No L 87/1) ;

- *thermal paper from Japan :*

- initiation : thermal paper falling within CN code ex 4810 11 90. But the Notice of initiation also reads that «a divergence of opinion exists among certain Community customs authorities concerning the tariff classification of this product as in some Member States it is classified within CN code ex 3703 90 90» (Notice of initiation of an anti-dumping proceeding concerning imports into the European Community of certain thermal paper originating in Japan,

O.J., 24 January 1991, No C 16/3);

- provisional anti-dumping duty : thermal paper falling within CN codes ex 3703 90 90 and ex 4810 11 90 (Commission Regulation (EEC) No 2805/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports into the Community of certain thermal paper originating in Japan, *O.J.*, 26 September 1991, No L 270/15);
- adaptation of the CN codes and definitive anti-dumping duty : thermal paper falling within CN codes ex 3703 10 00, ex 3703 90 90, ex 4809 90 00, ex 4810 11 90, ex 4811 90 10, ex 4811 90 90, ex 4823 59 10 and ex 4823 59 90 (Notice relating to the anti-dumping proceeding concerning imports into the European Community of certain thermal paper originating in Japan, *O.J.*, 28 December 1991, No C 334/7; Council Regulation (EEC) No 729/92 of 16 March 1992 imposing a definitive anti-dumping duty on imports of certain thermal paper originating in Japan and definitively collecting the provisional anti-dumping duty, *O.J.*, 26 March 1992, No L 81/1 (corrigendum, *O.J.*, 21 May 1992, No L 138/40));

fluorspar from the People's Republic of China :

- initiation : fluorspar presented in filter cake form which is alleged to fall within CN codes 2529 21 00 and 2529 22 00 (Notice of initiation of an Anti-dumping proceeding concerning imports of fluorspar originating in the People's Republic of China, *O.J.*, 25 April 1992, No C 105/23);
- extension of the anti-dumping proceeding : fluorspar presented in filter cake form and in powder form (Notice relating to the anti-dumping proceeding concerning imports of fluorspar originating in the People's Republic of China, *O.J.*, 4 August 1993, No C 210/6);
- provisional and definitive anti-dumping duty : fluorspar presented in filter cake form and in powder form falling within CN codes ex 2529 21 00 and ex 2529 22 00 (Commission Regulation (EEC) No 2463/93 of 1 September 1993 imposing a provisional anti-dumping duty on imports of fluorspar originating in the People's Republic of China, *O.J.*, 7 September 1993, No L 226/3; Council Regulation (EC) No 486/94 of 4 March 1994 imposing definitive anti-dumping duties on imports of fluorspar originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 5 March 1994, No L 62/1);

television camera systems from Japan :

- initiation : television camera systems which are alleged to fall within CN codes ex 8525 30 99, ex 8537 10 91, ex 8537 10 99, ex 8529 90 98 and ex 8543 80 80 (Notice of initiation of an anti-dumping proceeding concerning imports of certain television camera systems originating in Japan, *O.J.*, 10 March 1993, No C 67/8);
- provisional anti-dumping duty : television camera systems falling within CN codes ex 8525 30 99, ex 8537 10 91, ex 8537 10 99, ex 8529 90 98, ex 8543 80 80, ex 8528 10 31, ex 8528 10 41 and ex 8528 10 49 (Commission Regulation (EEC) No 3029/93 of 29 October 1993 imposing provisional anti-dumping duties on imports of television camera systems originating in Japan, *O.J.*, 30 October 1993, No L 271/1).

See also :

ball bearings from Japan :

- initiation and provisional and definitive anti-dumping duty : «single-row deep-groove radial ball bearings with an outside diameter of up to 30 mm falling within CN-code ex 8482 10 10» (Notice of initiation of an anti-dumping proceeding concerning imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 14 July 1983, No C 188/8; Commission Regulation (EEC) No 744/84 of 19 March 1984 imposing a provisional anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 23 March 1984, No L 79/8 (corrigendum, *O.J.*, 29 March 1984, No L 86/31); Council Regulation (EEC) No 2089/84 of 19 July 1984 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 21 July 1984, No L 193/1, as amended by Commission Regulation (EEC) No 486/88 of 22 February 1988 amending the regulations, recommendations and decisions imposing anti-dumping duties, *O.J.*, 24 February 1988, No L 50/5);
- initiation of review proceeding : «all ball bearings with greatest external diameter not exceeding 30 mm, i.e. including angular contact, thrust ball bearings etc.» (*O.J.*, 18 June 1988, No C 159/2), though the scope of a review proceeding cannot be broader than the anti-dumping measures to be reviewed for otherwise it would be a new proceeding;

hydraulic excavators from Japan :

- initiation and provisional and definitive anti-dumping duty : «self-propelled hydraulic excavators, track-laying or wheeled, of a total operating weight exceeding six tonnes but not exceeding 35 tonnes, equipped with a single bucket mounted on a boom capable of pivoting through 360°, or intended to be so equipped, falling within CN code ex 8429 52 00» (Notice of initiation of an anti-dumping proceeding concerning imports of hydraulic excavators originating in Japan, *O.J.*, 31 July 1984, No C 201/3; Commission Regulation (EEC) No 595/85 of 7 March 1985 imposing a provisional anti-dumping duty on imports of certain hydraulic excavators originating in Japan, *O.J.*, 8 March 1985, No L 68/13; Council Regulation (EEC) No 1877/85 of 4 July 1985 imposing a definitive anti-dumping duty on imports of certain hydraulic excavators originating in Japan, *O.J.*, 6 July 1985, No L 176/1, as amended by Commission Regulation (EEC) No 486/88 of 22 February 1988 amending the regulations, recommendations and decisions imposing anti-dumping duties, *O.J.*, 24 February 1988, No L 50/5);
- proceeding concerning the assembly of the dumped product within the Community : hydraulic excavators falling within not only CN code ex 8429 52 00, but also CN code ex 8429 59 00 (Commission Decision 88/225/EEC of 18 April 1988 terminating the investigation under Article 13 (10) of Regulation (EEC) No 2176/84 concerning certain hydraulic excavators assembled or produced in the Community, *O.J.*, 20 April 1988, No L 101/24), though the proceeding concerning the assembly of the dumped product within the Community (Article 13(10) former basic EC Regulation) is only possible with regard to products subject of definitive anti-dumping duties (see : *infra*, 722);

urea from Trinidad and Tobago and Venezuela :

distinction between the different products¹⁶⁶⁰, the almost identical character of the products¹⁶⁶¹, and the different interpretations placed by the customs authorities of the different

- initiation, provisional anti-dumping duty and undertaking in respect of Trinidad and Tobago : urea falling within subheadings ex 31.02 B and ex 31.02 C of the Common Customs Tariff and Nimexe codes ex 31.02-15 and ex 31.02-80 (Notice of initiation of an anti-dumping proceeding concerning imports of urea originating in the German Democratic Republic, Yugoslavia, Kuwait, Libya, Saudi Arabia, the Soviet Union, Trinidad and Tobago and Czechoslovakia, *O.J.*, 11 October 1986, No C 254/3 ; Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia, *O.J.*, 9 May 1987, No L 121/11 ; Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1) ;
- initiation in respect of Venezuela : urea falling within subheadings 31.02 B and ex 31.02 C of the Common Customs Tariff and Nimexe codes 31.02-15 and 31.02-80 (Notice of extension of the anti-dumping proceeding concerning imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the Soviet Union, Trinidad and Tobago and Yugoslavia, in order to include the imports of the said product originating in Austria, Hungary, Malaysia, Romania, the United States of America and Venezuela, *O.J.*, 9 October 1987, No C 271/4) ;
- provisional and definitive anti-dumping duty in respect of Venezuela : urea falling within CN codes 3102 10 10 and 3102 10 99 (Commission Regulation (EEC) No 2623/88 of 24 August 1988 imposing a provisional anti-dumping duty on imports of urea originating in Austria, Hungary, Malaysia, Romania, the USA and Venezuela, *O.J.*, 25 August 1988, No L 235/5 ; Council Regulation (EEC) No 450/89 of 20 February 1989 imposing a definitive anti-dumping duty on imports of urea originating in the United States of America or Venezuela and adjusting the definitive anti-dumping duty for Saudi Arabia laid down by Regulation (EEC) No 3339/87, *O.J.*, 24 February 1989, No L 52/1) ;
- initiation of review proceeding in respect of Trinidad and Tobago and Venezuela : urea falling within CN codes 3102 10 10, 3102 10 99 and 3102 10 91 (Notice of review of anti-dumping measures concerning imports of urea originating in Trinidad and Tobago or in Venezuela, *O.J.*, 2 March 1991, No C 55/4), though the review proceeding (Article 11.2. GATT Anti-dumping Code ; Article 11(2) up to (7) basic EC Regulation ; Article 14 basic ECSC Decision) is only possible with regard to products subject of the original anti-dumping proceeding (see : *infra*, 722) ;
- amended undertaking in respect of Trinidad and Tobago and amended definitive anti-dumping duty in respect of Venezuela : urea falling within CN codes 3102 10 10 and 3102 10 99 (Council Regulation (EEC) No 2835/91 of 23 September 1991 amending a definitive anti-dumping duty following a partial review of anti-dumping measures concerning imports of urea originating in Venezuela and terminating the review of anti-dumping measures concerning imports of urea originating in Trinidad and Tobago, *O.J.*, 28 September 1991, No L 272/10 (corrigendum, *O.J.*, 22 October 1991, No L 290/44)).

¹⁶⁵⁹ Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1 ; *O.J.*, 18 June 1988, No C 159/2 ; Council Regulation (EEC) No 1946/86 of 24 June 1986 amending Regulation (EEC) No 273/83 imposing a definitive anti-dumping duty on imports of light sodium carbonate originating in Bulgaria, the German Democratic Republic, Poland, Romania and the Soviet Union, *O.J.*, 26 June 1986, No L 169/1.

¹⁶⁶⁰ See : *photographic enlargers from Poland and the USSR*, where the anti-dumping duty was imposed on all photographic enlargers, though the anti-dumping complaint and proceeding concerned only photographic enlargers for amateur use ; the anti-dumping duty was imposed on all photographic enlargers because it was difficult to define for customs purposes the term «amateur use» since all enlargers imported from the dumping country are used for amateur use (Commission Regulation (EEC) No 1958/82 of 16 July 1982 imposing a provisional anti-dumping duty on imports of photographic enlargers originating in Poland and the USSR, accepting an undertaking and terminating the proceeding in respect of imports of photographic enlargers originating in Czechoslovakia, *O.J.*, 21 July 1982, No L 212/32).

¹⁶⁶¹ Notice relating to the anti-dumping proceeding concerning imports of fluorspar originating in the People's Republic of China, *O.J.*, 4 August 1993, No C 210/6.

Member States on the combined nomenclature and coding system¹⁶⁶² are invoked as a justification of the extension of the scope *ratione materiae*. Whatever the reason may be, this extension of the scope *ratione materiae* is illegal¹⁶⁶³ as it entails the imposition of anti-dumping duties on products against which no anti-dumping proceeding is initiated¹⁶⁶⁴. Furthermore, when the scope *ratione materiae* is extended, it occurs not during the anti-dumping investigation, but when the anti-dumping duty is imposed¹⁶⁶⁵. Thus, the products to which the scope *ratione materiae* is extended, are not subjected to the anti-dumping investigation. Consequently, they are not shown to have been dumped, nor has it been assessed whether their dumping caused injury. The extension of the scope *ratione materiae* implies that anti-dumping duties are imposed on products in respect of which it is not shown that the conditions for imposing anti-dumping duties are fulfilled. This is at variance with GATT and European anti-dumping law which only allow an anti-dumping duty to be imposed on products which are shown to have been dumped and to have been causing injury to the Community industry (Article VI(2) GATT ; Articles 7.1. and 9.2. GATT Anti-dumping Code ; Articles 7(1) and 9(4) basic EC Regulation ; Articles 2(1), 11(1) and 12(1) basic ECSC Decision)¹⁶⁶⁶.

¹⁶⁶² Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79 ; corrigendum, *O.J.*, 10 February 1990, No L 38/44) ; Notice relating to the anti-dumping proceeding concerning imports into the European Community of certain thermal paper originating in Japan, *O.J.*, 28 December 1991, No C 334/7 ; Commission Regulation (EEC) No 3029/93 of 29 October 1993 imposing provisional anti-dumping duties on imports of television camera systems originating in Japan, *O.J.*, 30 October 1993, No L 271/1.

¹⁶⁶³ In *ball bearings from Japan*, the European anti-dumping authorities did not pronounce on the legality of the extension of the scope *ratione materiae* of the review proceeding because the extension was in fact not justified (Council Regulation (EEC) No 2685/90 of 17 September 1990 amending Regulation (EEC) No 2089/84 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 20 September 1990, No L 256/1 (corrigendum, *O.J.*, 10 January 1991, No L 7/38)).

¹⁶⁶⁴ Since 1992, the notices of initiation of new anti-dumping proceedings are less affirmative than before in respect of the delimitation of the proceeding in terms of the CN code. Instead of stating that the product is «falling within CN codes ...», it is now being asserted that «it is alleged that the product falls within CN codes ...», which leaves more room for adapting the CN codes and is certainly aimed at precluding that a modification or extension of the CN codes during the proceeding are said to be at variance with GATT and European anti-dumping law.

¹⁶⁶⁵ See, however : *fluorspar from the People's Republic of China*, where the extension of the scope *ratione materiae* took place during the anti-dumping investigation (Notice relating to the anti-dumping proceeding concerning imports of fluorspar originating in the People's Republic of China, *O.J.*, 4 August 1993, No C 210/6). Strictly legally speaking, this extension does not cause a problem. In practice, it does not constitute such a great difference with the other cases in which the extension incurred on the occasion of the imposition of the anti-dumping duty. Indeed, the investigation as to the products newly included took less than one month (the extension dates from 4 August 1993 and the provisional anti-dumping duty was imposed on 1 September 1993 (Commission Regulation (EEC) No 2463/93 of 1 September 1993 (imposing a provisional anti-dumping duty on imports of fluorspar originating in the People's Republic of China, *O.J.*, 7 September 1993, No L 226/3), whereas it took one year and five months to examine the products which fell from the start under the anti-dumping proceeding (the notice of initiation dates from 25 April 1992 (Notice of initiation of an Anti-dumping proceeding concerning imports of fluorspar originating the People's Republic of China, *O.J.*, 25 April 1992, No C 105/23)). Even more so, the Commission had only twelve days to investigate the newly included products since the interested parties had fifteen days to submit their view on the extension of the proceeding to the Commission (Notice relating to the anti-dumping proceeding concerning imports of fluorspar originating in the People's Republic of China, *O.J.*, 4 August 1993, No C 210/6).

¹⁶⁶⁶ C.J.E.C., case C-90/92, 24 June 1993, *Dr Tretter GmbH & Co. v Hauptzollamt Baden-Württemberg*, recital 5 (Opinion of Advocate General Gulmann) and consideration 9 (not yet reported).

2.3. AMOUNT OF DUTY

The amount of anti-dumping duty must not exceed the dumping margin¹⁶⁶⁷. The «desire» expressed in GATT anti-dumping law that the amount of duty be less than the dumping margin, if such lesser duty would be adequate to remove the injury to the Community industry, is translated into a legal obligation¹⁶⁶⁸ in European anti-dumping law (Article 9.1. GATT Anti-dumping Code ; Articles 7(1) and 9(4) basic EC Regulation ; Article 13(3) basic ECSC Decision)¹⁶⁶⁹. Thus, the amount of anti-dumping duty depends on the injury margin (also called «injury

¹⁶⁶⁷ In one anti-dumping case, however, the amount of duty exceeded the dumping margin : the dumping margin of R & M International Sales Co. amounted to 2.5 %, whereas an anti-dumping duty of 5.6 % was imposed (Commission Regulation (EEC) No 1696/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 June 1988, No L 151/47). Of course, this case is illegal, unless the difference between the dumping margin and the amount of anti-dumping duty is due to some misprint or perhaps a miscalculation of the dumping margin. Indeed, the relevant dumping margin is the real dumping margin : if errors are made in the computation of the dumping margin, the anti-dumping duty remains valid as long as it does not exceed the real dumping margin (C.J.E.C., case 250/85, 5 October 1988, *Brother Industries Ltd v Council*, *E.C.R.*, 1988, (5683), 5724 ; C.J.E.C., joined cases 260/85 and 106/86, 5 October 1988, *Tokyo Electric Company Ltd (TEC) a.o. v Council*, *E.C.R.*, 1988, (5855), 5922).

¹⁶⁶⁸ C.J.E.C., case 53/83, 23 May 1985, *Allied Corporation a.o. v Council*, *E.C.R.*, 1985, (1621), 1659.

The European anti-dumping authorities, however, do not consider it to be a legal obligation. Instead, they interpret Articles 7(1) and 9(4) basic EC Regulation and Article 13(3) basic ECSC Decision, especially the wordings «should be less», as conferring onto them the responsibility to avoid anti-dumping measures which may have excessive consequences, such as the elimination of the dumping exporters from the Community market (Council Regulation (EEC) No 1251/91 of 13 May 1991 imposing a definitive anti-dumping duty on imports of audio tapes in cassettes originating in Japan and the Republic of Korea, collecting definitively the provisional duty and terminating the procedure concerning Hong Kong, *O.J.*, 14 May 1991, No L 119/35). In their view, it would be excessive to fix the anti-dumping duty at a level exceeding the injury margin (Commission Regulation (EEC) No 2054/91 of 11 July 1991 imposing a provisional anti-dumping duty on imports of dihydrostreptomycin originating in the People's Republic of China, *O.J.*, 13 July 1991, No L 187/23).

¹⁶⁶⁹ The same holds with regard to countervailing duties (Articles 9(2) and 11(6) of Council Regulation (EC) No 3284/94 of 22 December 1994 on protection against subsidized imports from countries not members of the European Community (*O.J.*, 31 December 1994, No L 349/22 ; Article 13(3) basic ECSC Decision). Article 14(1) basic EC Regulation and Article 13(9) basic EC legislation also prohibit that the same injury is remedied both by anti-dumping and countervailing duties. It follows from the combination of those Articles, that, when both anti-dumping and countervailing duties are imposed, their combined amount cannot exceed the amount necessary to remove the injury suffered by the Community industry from the dumping of countervailably subsidized products (Commission Regulation (EEC) No 1613/90 of 13 June 1990 imposing a provisional anti-dumping duty on imports of ball bearings with a greatest external diameter not exceeding 30 mm originating in Thailand, *O.J.*, 16 June 1990, No L 152/24).

threshold»), i.e., the amount by which the dumping prices must increase in order to remedy the injury caused by the dumping¹⁶⁷⁰, unless the injury margin exceeds the dumping margin¹⁶⁷¹.

¹⁶⁷⁰ C.J.E.C., case 53/83, 23 May 1985, *Allied Corporation e.a. v. Council, E.C.R.*, 1985, (1621), 1659. See also: Council Regulation (EEC) No 1812/91 of 24 June 1991 imposing a definitive anti-dumping duty on imports of espadrilles originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty, *O.J.*, 28 June 1991, No L 166/1.

This rule may even result in the exemption of certain dumping exporters from the anti-dumping duty. See e.g.:

- sensitized paper for colour photographs from Japan :
 - dumping margin of Mitsubishi Paper Mills Co : 12.2 %
 - injury margin of Mitsubishi Paper Mills Co : 0.54 %
 - anti-dumping duty for Mitsubishi Paper Mills Co : none since the injury margin is *de minimis*
 Commission Decision 84/259/EEC of 10 May 1984 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain sensitized paper for colour photographs originating in Japan and terminating that proceeding, *O.J.*, 11 May 1984, No L 124/45
- serial impact fully formed (SIFF) character printers from Japan :
 - dumping margin :
 - Tokyo Electric Co. Ltd : 21.05 %
 - Juki Corporation : 22.01 %
 - other exporters : 58 %
 - injury margin :
 - Tokyo Electric Co. Ltd and Juki Corporation : 0 %
 - other exporters : 23.5 %
 - anti-dumping duty :
 - Tokyo Electric Co. Ltd and Juki Corporation : exemption (i.e., 0 %)
 - other exporters : 23.5 %
 (Council Regulation (EEC) No 34/89 of 5 January 1989 imposing a definitive anti-dumping duty on imports of serial impact fully formed (SIFF) character printers originating in Japan, *O.J.*, 7 January 1989, No L 5/23).

¹⁶⁷¹ If the injury margin exceeds the dumping margin, the amount of the anti-dumping duty will be equal to the dumping margin because the dumping margin is the upper limit of the amount of anti-dumping duty, see e.g.:

- photocopiers from Japan :
 - injury margin = 20 % ;
 - dumping margin and anti-dumping duty for three Japanese exporters = respectively, 7.2 %, 10.0 % and 12.6 %
 (Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12) ;
- serial-impact dot-matrix printers from Japan :
 - injury margin = 33.4 % ;
 - dumping margin and anti-dumping duty for 8 Japanese exporters = respectively 4.8 %, 7.4 %, 9.2 %, 10.5 %, 12.3 %, 13.6 %, 18.6 % and 22.4 % ;
 (Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12) ;
- video cassette recorders from Japan and the Republic of Korea :
 - injury margin = 46.7 % ;
 - dumping margin and anti-dumping duty for four exporters = respectively 18.0 %, 25.2 %, 26.4 % and 29.2 % ;
 (Commission Regulation (EEC) No 2684/88 of 26 August 1988 imposing a provisional anti-dumping duty on certain imports of video cassette recorders originating in Japan and the Republic of Korea, *O.J.*, 31 August 1988, No L 240/5) ;
- ferroboron alloy from Japan :
 - injury margin = 34.3 % for Nippon and 42.3 % for Yahagi ;
 - dumping margin and anti-dumping duty = 23.3 % for Nippon and 11.4 % for Yahagi ;
 (Commission Regulation (EEC) No 665/90 of 16 March 1990 imposing a provisional anti-dumping duty on imports of ferroboron alloy originating in Japan, *O.J.*, 20 March 1990, No L 73/6) ;
- ball bearings from Thailand :
 - injury margin = 34.8 % ;
 - dumping margin and anti-dumping duty = 6.7 % ;
 (Commission Regulation (EEC) No 1613/90 of 13 June 1990 imposing a provisional anti-dumping duty on imports of ball bearings with a greatest external diameter not exceeding 30 mm originating in Thailand, *O.J.*, 16 June 1990, No L 152/24) ;
- gas-fuelled, non-refillable pocket flint lighters from Japan, the People's Republic of China, the Republic of Korea and Thailand :
 - injury margin = 45.54 % for Gao Yao, 36.18 % for Thai Merry and 31.32 % for Politop ;
 - dumping margin and anti-dumping duty = 17.8 % for Gao Yao, 15.0 % for Thai Merry and 5.8 % for Politop ;
 (Commission Regulation (EEC) No 1386/91 of 23 May 1991 imposing a provisional anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in Japan, the People's Republic of China, the Republic of Korea and Thailand) ;

Thailand, *O.J.*, 28 May 1991, No L 133/20);

silicon metal from Brazil:

- injury margin for 3 Brazilian exporters = 43.8 %, 24.2 % and 51.0 %;
- respective dumping margin and anti-dumping duty for those 3 Brazilian exporters = 26.4 %, 20.4 % and 18.3 %;

(Council Regulation (EEC) No 2305/92 of 4 August 1992 imposing a definitive anti-dumping duty on imports of silicon metal originating in Brazil and definitively collecting the amounts secured by way of the provisional anti-dumping duty, *O.J.*, 7 August 1992, No L 222/1);

silicon carbide from Poland, the Russian Federation and Ukraine:

- injury margin = 27 % for Poland and 51.1 % for the Russian Federation and Ukraine;
- dumping margin and anti-dumping duty = 8.3 % for Poland and 23.3 % for the Russian Federation and Ukraine;

(Council Regulation (EC) No 821/94 of 12 April 1994 imposing a definitive anti-dumping duty on imports of silicon carbide, originating in the People's Republic of China, Poland, the Russian Federation and Ukraine, *O.J.*, 13 April 1994, No L 94/21);

ferro-silico-manganese from Russia, Ukraine, Brazil and South Africa:

- injury margin = 82.8 % for Russia, 70.7 % for Ukraine, 70.9 % for Brazil and 55.6 % for one South-African exporter;
- dumping margin and anti-dumping duty = 57.4 % for Russia, 52.8 % for Ukraine, 40.6 % for Brazil and 45.3 % for the South-African exporter;

(Commission Regulation (EC) No 3119/94 of 19 December 1994 imposing a provisional anti-dumping duty on imports of ferro-silico-manganese originating in Russia, Ukraine, Brazil and South Africa, *O.J.*, 21 December 1994, No L 330/15).

See also: Commission Regulation (EEC) No 4062/88 of 23 December 1988 imposing a provisional anti-dumping duty on imports of video cassettes and video tape reels originating in the Republic of Korea and Hong Kong, *O.J.*, 24 December 1988, No L 356/47; Council Regulation (EEC) No 501/89 of 27 February 1989 imposing a definitive anti-dumping duty on imports of certain video cassette recorders originating in Japan and the Republic of Korea and definitively collecting the provisional duty, *O.J.*, 28 February 1989, No L 57/55; Council Regulation (EEC) No 1768/89 of 19 June 1989 imposing a definitive anti-dumping duty on imports of video cassettes originating in the Republic of Korea and Hong Kong, collecting definitively the provisional duty and terminating the anti-dumping proceeding with regard to the imports of video tape reels originating in the Republic of Korea, *O.J.*, 22 June 1989, No L 174/1; Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27); Council Regulation (EEC) No 112/90 of 16 January 1990 imposing a definitive anti-dumping duty on imports of certain compact disc players originating in Japan and the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 17 January 1990, No L 13/21; Council Regulation (EEC) No 341/90 of 5 February 1990 accepting undertakings and imposing a definitive anti-dumping duty on imports of ferro-silicon originating in Iceland, Norway, Sweden, Venezuela or Yugoslavia, except those sold for export to the Community by companies whose undertakings have been accepted, *O.J.*, 10 February 1990, No L 38/1; Council Regulation (EEC) No 385/90 of 12 February 1990 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in Czechoslovakia and definitively collecting the provisional anti-dumping duty imposed on those imports, *O.J.*, 16 February 1990, No L 42/1; Council Regulation (EEC) No 1048/90 of 25 April 1990 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in the Republic of Korea and collecting definitively the provisional duty, *O.J.*, 27 April 1990, No L 107/56 (corrigendum, *O.J.*, 24 May 1990, No L 133/92); Commission Regulation (EEC) No 1537/90 of 28 May 1990 imposing a provisional anti-dumping duty on imports of potassium permanganate originating in the USSR, *O.J.*, 8 June 1990, No L 145/9; Commission Regulation (EEC) No 3798/90 of 21 December 1990 imposing a provisional anti-dumping duty on imports of espadrilles originating in the People's Republic of China, *O.J.*, 28 December 1990, No L 365/25; Commission Regulation (EEC) No 129/91 of 11 January 1991 imposing a provisional anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China, *O.J.*, 19 January 1991, No L 14/31; Council Regulation (EEC) No 577/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as EPROMs (erasable programmable read only memories) originating in Japan, *O.J.*, 12 March 1991, No L 65/1; Council Regulation (EEC) No 1251/91 of 13 May 1991 imposing a definitive anti-dumping duty on imports of audio tapes in cassettes originating in Japan and the Republic of Korea, collecting definitively the provisional duty and terminating the procedure concerning Hong Kong, *O.J.*, 14 May 1991, No L 119/35; Commission Regulation (EEC) No 2054/91 of 11 July 1991 imposing a provisional anti-dumping duty on imports of dihydrostreptomycin originating in the People's Republic of China, *O.J.*, 13 July 1991, No L 187/23; Council Regulation (EEC) No 2093/91 of 15 July 1991 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China and collecting definitively the provisional duty, *O.J.*, 18 July 1991, No L 195/1; Commission Decision 91/392/EEC of 21 June 1991 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain asbestos cement pipes originating in Turkey, and terminating the investigation, *O.J.*, 31 July 1991, No L 209/37; Commission Regulation (EEC) No 2805/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports into the Community of certain thermal paper originating in Japan, *O.J.*, 26 September 1991, No L 270/15; Commission Decision 91/512/EEC of 25 July 1991 accepting undertakings given in connection with the review of anti-dumping measures concerning imports of artificial corundum originating in the Soviet Union, Hungary, Poland, Czechoslovakia and the People's Republic of China and in connection with the anti-dumping proceeding concerning imports of artificial corundum originating in Brazil and Yugoslavia, and terminating the investigation, *O.J.*, 2 October 1991, No L 275/27; Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7; Council Regulation (EEC) No 3091/91 of 21 October 1991 imposing a definitive anti-dumping duty on imports of video tapes in cassettes originating in the People's Republic of China and definitively collecting the provisional duty, *O.J.*, 24 October 1991, No L 293/2; Council Regulation (EEC) No 729/92 of 16 March 1992 imposing a definitive anti-dumping duty on imports of certain thermal paper originating in Japan and definitively collecting

the provisional anti-dumping duty, *O.J.*, 26 March 1992, No L 81/1 (corrigendum, *O.J.*, 21 May 1992, No L 138/40); Commission Regulation (EEC) No 906/92 of 30 March 1992 imposing a provisional anti-dumping duty on imports of silicon metal originating in Brazil, *O.J.*, 10 April 1992, No L 96/17; Commission Regulation (EEC) No 1031/92 of 23 April 1992 imposing a provisional anti-dumping duty on imports of potassium chloride (potash) originating in Belarus, Russia or Ukraine, *O.J.*, 28 April 1992, No L 110/5; Council Regulation (EEC) No 1292/92 of 18 May 1992 amending Regulation (EEC) No 1768/89 with regard to a definitive anti-dumping duty on imports of video cassettes originating in Hong Kong, *O.J.*, 22 May 1992, No L 139/1; Commission Regulation (EEC) No 1451/92 of 2 June 1992 imposing a provisional anti-dumping duty on imports into the Community of certain large electrolytic aluminium capacitors originating in Japan, *O.J.*, 4 June 1992, No L 152/22 (corrigendum, *O.J.*, 17 June 1992, No L 163/27); Commission Decision No 1775/92/ECSC of 30 June 1992 imposing a definitive anti-dumping duty on imports of certain semi-finished products of alloy steel, originating in Turkey and Brazil, definitively collecting the provisional anti-dumping duty imposed on such imports and accepting an undertaking offered in connection with the anti-dumping proceeding concerning imports of these products, *O.J.*, 2 July 1992, No L 182/23; Commission Regulation (EEC) No 1956/92 of 7 July 1992 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in India and the Republic of Korea, *O.J.*, 16 July 1992, No L 197/25; Commission Regulation (EEC) No 1994/92 of 14 July 1992 imposing a provisional anti-dumping duty on imports into the Community of outer rings of tapered roller bearings originating in Japan, *O.J.*, 18 July 1992, No L 199/8; Council Regulation (EEC) No 2306/92 of 4 August 1992 imposing a definitive anti-dumping duty on imports of radio-broadcast receivers of a kind used in motor vehicles, originating in the Republic of Korea, *O.J.*, 7 August 1992, No L 222/8 (corrigendum, *O.J.*, 21 January 1993, No L 13/20); Council Regulation (EEC) No 3017/92 of 19 October 1992 modifying the anti-dumping duties following the review of the anti-dumping measures applicable to imports of synthetic polyester fibres originating in Romania, Taiwan, Turkey and the Republics of Serbia and of Montenegro and the former Yugoslav Republic of Macedonia and terminating the said review in respect of imports of synthetic polyester fibres originating in Mexico and the United States of America, *O.J.*, 22 October 1992, No L 306/1 (corrigendum, *O.J.*, 6 February 1993, No L 30/68); Council Regulation (EEC) No 55/93 of 8 January 1993 imposing a definitive anti-dumping duty on imports of outer rings of tapered roller bearings originating in Japan, *O.J.*, 15 January 1993, No L 9/7; Commission Regulation (EEC) No 550/93 of 5 March 1993 imposing a provisional anti-dumping duty on imports of bicycles originating in the People's Republic of China, *O.J.*, 11 March 1993, No L 58/12; Commission Regulation (EEC) No 797/93 of 30 March 1993 imposing a provisional anti-dumping duty on imports of ferro-chrome with a carbon content by weight of max. 0.5 % (low carbon ferro-chrome) originating in Kazakhstan, Russia and Ukraine, *O.J.*, 2 April 1993, No L 80/8; Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5; Council Regulation (EEC) No 993/93 of 26 April 1993 imposing a definitive anti-dumping duty on imports of certain electronic weighing scales originating in Japan, *O.J.*, 29 April 1993, No L 104/4; Commission Regulation (EEC) No 1103/93 of 30 April 1993 imposing a provisional anti-dumping duty on imports into the Community of certain electronic weighing scales originating in Singapore and the Republic of Korea, *O.J.*, 6 May 1993, No L 112/20; Commission Regulation (EEC) No 2463/93 of 1 September 1993 imposing a provisional anti-dumping duty on imports of fluorspar originating in the People's Republic of China, *O.J.*, 7 September 1993, No L 226/3; Commission Regulation (EEC) No 2477/93 of 6 September 1993 imposing a provisional anti-dumping duty on imports of certain photo albums originating in the People's Republic of China, *O.J.*, 9 September 1993, No L 228/16; Commission Regulation (EEC) No 2581/93 of 20 September 1993 imposing provisional anti-dumping duties on imports of ferro-silicon originating in South Africa and the People's Republic of China, *O.J.*, 22 September 1993, No L 237/2; Commission Regulation (EEC) No 2720/93 of 28 September 1993 imposing a provisional anti-dumping duty on imports of isobutanol originating in the Russian Federation, *O.J.*, 2 October 1993, No L 246/12; Council Regulation (EEC) No 2887/93 of 20 October 1993 imposing a definitive anti-dumping duty on imports of certain electronic weighing scales originating in Singapore and the Republic of Korea, *O.J.*, 22 October 1993, No L 263/1; Commission Regulation (EEC) No 2957/93 of 26 October 1993 imposing a provisional anti-dumping duty on certain imports of gas-fuelled, non-refillable pocket flint lighters originating in Thailand, *O.J.*, 28 October 1993, No L 267/2; Commission Regulation (EEC) No 3029/93 of 29 October 1993 imposing provisional antidumping duties on imports of television camera systems originating in Japan, *O.J.*, 30 October 1993, No L 271/1; Council Regulation (EC) No 3203/93 of 22 November 1993 amending Regulation (EEC) No 738/92 imposing a definitive anti-dumping duty on imports of cotton yarn, originating in Brazil and Turkey, *O.J.*, 24 November 1993, No L 289/1; Council Regulation (EC) No 3359/93 of 2 December 1993 imposing amended anti-dumping measures on imports of ferro-silicon originating in Russia, Kazakhstan, Ukraine, Iceland, Norway, Sweden, Venezuela and Brazil, *O.J.*, 9 December 1993, No L 302/1; Commission Regulation (EC) No 371/94 of 17 February 1994 imposing a provisional anti-dumping duty on imports into the Community of large aluminium electrolytic capacitors originating in the Republic of Korea and Taiwan, *O.J.*, 19 February 1994, No L 48/10; Council Regulation (EC) No 486/94 of 4 March 1994 imposing definitive anti-dumping duties on imports of fluorspar originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty, *O.J.*, 5 March 1994, No L 62/1; Commission Regulation (EC) No 534/94 of 9 March 1994 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Hong Kong and the Republic of Korea, *O.J.*, 11 March 1994, No L 68/5; Council Regulation (EC) No 643/94 of 21 March 1994 amending Regulation (EEC) No 3068/92 in respect of definitive anti-dumping duties on imports of potassium chloride originating in Belarus, Russia and Ukraine, *O.J.*, 24 March 1994, No L 80/1; Commission Regulation (EC) No 1783/94 of 18 July 1994 imposing a provisional anti-dumping duty on imports of furfuraldehyde originating in the People's Republic of China, *O.J.*, 21 July 1994, No L 186/11; Council Regulation (EC) No 1828/94 of 25 July 1994 amending Regulation (EEC) No 738/92 imposing a definitive anti-dumping duty on imports of cotton yarn, originating in Brazil and Turkey, *O.J.*, 27 July 1994, No L 191/3; Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50; Council Regulation (EC) No 2674/94 of 31 October 1994 imposing a definitive anti-dumping duty on imports of furazolidone originating in the People's Republic of China and collecting definitively the provisional duty imposed, *O.J.*, 4 November 1994, No L 285/1; Council Regulation (EC) No 2819/94 of 17 November 1994 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in the

GATT nor European anti-dumping law provide guidelines to calculate the injury margin. As a result, the European anti-dumping authorities have a broad discretionary power to determine the level of the anti-dumping duties¹⁶⁷². Nevertheless, they have adopted a consistent practice to calculate the injury margin : they calculate it on the basis of the price increase of the dumped products required to guarantee the Community industry prices which cover the Community producers' production costs (including a reasonable amount for selling, administrative and other general expenses), plus a reasonable profit margin¹⁶⁷³. In case of monopolistic non-price competition, this method may imply that a positive injury margin is found even when the dumping prices exceed the actual Community producers' prices. This result may seem to prove «one-way flexibility». However, on the condition that the general method applied to calculate the injury margin is economically justified, this result, from an economic point of view, is correct insofar as prices have not been adjusted for differences in non-price elements, such as differences in physical characteristics, on which competition is based. Indeed, such differences should be taken into account either by adjusting the Community producers' prices and the dumping prices, or by

People's Republic of China, *O.J.*, 19 November 1994, No L 298/32.

¹⁶⁷² C.J.E.C., joined cases 133/87 and 150/87, 14 March 1990, *Nashua Corporation v Commission and Council*, *E.C.R.*, 1990, I, (719), 760-762 and 777 ; C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, *E.C.R.*, 1992, I, (1335), 1406 ; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, *E.C.R.*, 1992, I, (1409), 1489 ; C.J.E.C., case C-176/87, 10 March 1992, *Konishiroku Photo Industry Co. Ltd v Council*, *E.C.R.*, 1992, I, (1493), 1533 ; C.J.E.C., case C-177/87, 10 March 1992, *Sanyo Electric Co. Ltd v Council*, *E.C.R.*, 1992, I, (1535), 1574 ; C.J.E.C., case C-179/87, 10 March 1992, *Sharp Corporation v Council*, *E.C.R.*, 1992, I, (1635), 1686-1687 ; VERMULST, E.A., and GRAAFSMA, F., «A Decade of European Community Anti-Dumping Law and Practice Applicable to Imports from China», *Journal of World Trade*, 1992/3, (5), 30 ; VERMULST, E., and WAER, P., «The Calculation of Injury Margins in EC Anti-Dumping Proceedings», *Journal of World Trade*, 1991/6, (5), 5-6 and 26.

¹⁶⁷³ VERMULST, E.A., and GRAAFSMA, F., «A Decade of European Community Anti-Dumping Law and Practice Applicable to Imports from China», *Journal of World Trade*, 1992/3, (5), 29. See e.g. : Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, *O.J.*, 24 February 1987, No L 54/12 ; Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 26 May 1988, No L 130/12 ; Commission Regulation (EEC) No 2005/88 of 5 July 1988 imposing a provisional anti-dumping duty on imports of serial impact fully formed character printers originating in Japan, *O.J.*, 8 July 1988, No L 177/1 ; Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 24 November 1988, No L 317/33 ; Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea, *O.J.*, 18 July 1989, No L 205/5 (corrigendum, *O.J.*, 2 September 1989, No L 257/27). Sometimes individual injury margins are calculated for each dumping exporter (Council Regulation (EEC) No 1251/91 of 13 May 1991 imposing a definitive anti-dumping duty on imports of audio tapes in cassettes originating in Japan and the Republic of Korea, collecting definitively the provisional duty and terminating the procedure concerning Hong Kong, *O.J.*, 14 May 1991, No L 119/35). See also : C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, *E.C.R.*, 1991, I, (2069), 2106-2107 (Report for the Hearing : conclusions of the Commission), 2167 (Opinion of Advocate General LENZ) and 2196.

As a consequence, if the Community producers' production costs decline, a downward adjustment of the amount of anti-dumping duty will be carried out (Council Regulation (EEC) No 2879/87 of 28 September 1987 amending Regulation (EEC) No 1826/84 imposing a definitive anti-dumping duty on imports of vinyl acetate monomer originating in Canada, *O.J.*, 29 September 1987, No L 275/1 ; Council Regulation (EEC) No 3366/87 of 9 November 1987 amending Regulation (EEC) No 96/85 imposing a definitive anti-dumping duty on imports of pentaerythritol originating in Canada, *O.J.*, 11 November 1987, No L 321/1 ; Commission Regulation (EEC) No 2684/88 of 26 August 1988 imposing a provisional anti-dumping duty on certain imports of video cassette recorders originating in Japan and the Republic of Korea, *O.J.*, 31 August 1988, No L 240/5 ; Council Regulation (EEC) No 450/89 of 20 February 1989 imposing a definitive anti-dumping duty on imports of urea originating in the United States of America or Venezuela and adjusting the definitive anti-dumping duty for Saudi Arabia laid down by Regulation (EEC) No 3339/87, *O.J.*, 24 February 1989, No L 52/1).

allowing positive injury margins to be found even if the dumping prices exceed the Community producers' prices¹⁶⁷⁴.

The problem, however, is that the general method applied to calculate the injury margin, though approved by the Court of Justice¹⁶⁷⁵, cannot be accepted as such from an economic point of view. Indeed, as for the constructed value, the method to calculate the injury margin assumes full cost pricing. Hence, calculating the injury margin may only be accepted, if it is applied in a flexible way so that not only production costs, but also demand and competitive forces are taken into account¹⁶⁷⁶. However, European anti-dumping case law can only be said to be «one-way flexible». First, an interpretation is placed on the «reasonable profit margin» inflating the injury margin : it refers either to the profit margin realised by the Community producers before they had to compete with the dumping exporters¹⁶⁷⁷, or to the profit margin increased by an amount which should make up for the past loss of sales due to the dumping practices¹⁶⁷⁸. There is only one exception, *i.e.*, a lower (but still non-negligible) profit margin has been used, as the Community industry, being at an early stage of development, could not expect to achieve profit

¹⁶⁷⁴ *Contra* : VERMULST, E., and WAER, P., «The Calculation of Injury Margins in EC Anti-Dumping Proceedings», *Journal of World Trade*, 1991/6, (5), 22-23 and 27.

¹⁶⁷⁵ C.J.E.C., case C-69/89, 7 May 1991, *Nakajima All Precision Co. Ltd v Council*, E.C.R., 1991, I, (2069), 2196 ; C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, E.C.R., 1992, I, (1335), 1406 ; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, E.C.R., 1992, I, (1409), 1489 ; C.J.E.C., case C-176/87, 10 March 1992, *Konishiroku Photo Industry Co. Ltd v Council*, E.C.R., 1992, I, (1493), 1533 ; C.J.E.C., case C-177/87, 10 March 1992, *Sanyo Electric Co. Ltd v Council*, E.C.R., 1992, I, (1535), 1574.

¹⁶⁷⁶ *Supra*, 161-162.

¹⁶⁷⁷ The reasonable profit margin is not necessarily the actual profit margin realised by the Community producers (*cf.* the determination of the constructed value : *infra*, 173-180). In order to take account of the price-depressive and price-suppressive effects of the dumping on the Community producers' prices, the profit margin realised before increased penetration of dumped imports is used as reasonable profit margin (Council Regulation (EEC) No 541/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of barium chloride originating in the People's Republic of China, *O.J.*, 7 March 1991, No L 60/1 ; Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea, *O.J.*, 3 October 1991, No L 276/7 ; Commission Regulation (EEC) No 1451/92 of 2 June 1992 imposing a provisional anti-dumping duty on imports into the Community of certain large electrolytic aluminium capacitors originating in Japan, *O.J.*, 4 June 1992, No L 152/22 (corrigendum, *O.J.*, 17 June 1992, No L 163/27)). See also : *ferro-silicon from South Africa and the People's Republic of China*, where the profit margin was based on past performances of the Community industry and was considered reasonable in order to guarantee the industry productive investment on a long-term basis (Commission Regulation (EEC) No 2581/93 of 20 September 1993 imposing provisional anti-dumping duties on imports of ferro-silicon originating in South Africa and the People's Republic of China, *O.J.*, 22 September 1993, No L 237/2).

¹⁶⁷⁸ Commission Regulation (EEC) No 3262/90 of 5 November 1990 imposing a provisional anti-dumping duty on imports of audio tapes in cassettes originating in Japan, the Republic of Korea and Hong Kong, *O.J.*, 13 November 1990, No L 313/5 (corrigendum, *O.J.*, 12 January 1991, No L9/36) ; Commission Regulation (EEC) No 1034/91 of 23 April 1991 imposing a provisional anti-dumping duty on imports of video tapes in cassettes originating in the People's Republic of China, *O.J.*, 26 April 1991, No L 106/15 ; Council Regulation (EEC) No 1251/91 of 13 May 1991 imposing a definitive anti-dumping duty on imports of audio tapes in cassettes originating in Japan and the Republic of Korea, collecting definitively the provisional duty and terminating the procedure concerning Hong Kong, *O.J.*, 14 May 1991, No L 119/35. See : VERMULST, E., and WAER, P., «The Calculation of Injury Margins in EC Anti-Dumping Proceedings», *Journal of World Trade*, 1991/6, (5), 23-25 and 28.

levels in line with those realized by already well-established producers in third countries¹⁶⁷⁹. Second, the method to calculate the injury margin is applied strictly. In only four cases, the injury margin was based on the price just sufficient to cover the Community producers' production costs (thus, excluding a profit margin). In two of these cases, the competitive situation on the market, namely the existing worldwide unused production capacity and the excess of production over consumption, has justified the deviation from the strict cost-full pricing method in order to explain why the Community industry should be enabled to reach only break-even level¹⁶⁸⁰. The third case does not provide any explanation¹⁶⁸¹, whereas, in the fourth case, the injury margin did not include a reasonable profit margin because, even without a reasonable profit margin, it would have exceeded the dumping margin¹⁶⁸².

This fourth case does not show a flexible approach. Instead, it shows a «one-way flexible» and possibly illegal approach, since the real injury margin is not calculated. In several anti-dumping cases, the injury margin is not calculated because it is assumed to be higher than the dumping

¹⁶⁷⁹ Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5.

¹⁶⁸⁰ Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia, *O.J.*, 9 May 1987, No L 121/11; Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50.

¹⁶⁸¹ Commission Regulation (EEC) No 1129/84 of 18 April 1984 imposing a provisional anti-dumping duty on imports of certain angles, shapes and sections, of iron or steel, originating in the German Democratic Republic, *O.J.*, 26 April 1984, No L 109/11.

There may be two similar cases in which, without any explanation being offered, the injury margin was calculated on the basis of the production costs, excluding a profit margin. Indeed, in *trichloroethylene from the German Democratic Republic, Poland, Czechoslovakia, Romania, Spain and the United States of America* and *perchloroethylene from Czechoslovakia, Romania, Spain and the United States of America* anti-dumping duties based on the price required to ensure that the Community producers no longer had to sell their products at a loss, were considered sufficient to eliminate the injury. If a strict interpretation is adopted, such an anti-dumping duty does not guarantee the Community producers a reasonable profit margin (Commission Regulation (EEC) No 2127/82 of 28 July 1982 imposing a provisional anti-dumping duty on trichloroethylene originating in the German Democratic Republic and Poland and terminating the anti-dumping proceeding in respect of trichloroethylene originating in Czechoslovakia, Romania, Spain and the United States of America, *O.J.*, 31 July 1982, No L 223/76; Commission Decision 82/881/EEC of 23 December 1982 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of perchloroethylene originating in Czechoslovakia, Romania, Spain and the United States of America and terminating that proceeding, *O.J.*, 30 December 1982, No L 371/47).

¹⁶⁸² Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79; corrigendum, *O.J.*, 10 February 1990, No L 38/44); Council Regulation (EEC) No 55/93 of 8 January 1993 imposing a definitive anti-dumping duty on imports of outer rings of tapered roller bearings originating in Japan, *O.J.*, 15 January 1993, No L 9/7.

margin when the margin of price undercutting of the dumped imports exceeds the dumping margin¹⁶⁸³. The margin of price undercutting is, thus, considered to measure the injury caused by the dumping. Indeed, in cases where the dumping is not the sole cause of the injury suffered by the Community industry, the margin of price undercutting is used for determining that part of the injury caused by the dumping and, as a consequence, the anti-dumping duty is set equal to the margin of price undercutting insofar as that margin does not exceed the dumping margin¹⁶⁸⁴. However, the assumption that the margin of price undercutting amounts exactly to the injury margin does not always hold. For example, the price undercutting may be caused by the fact that the dumping exporters are more efficient than the Community producers. As a result, the injury margin may be overestimated, when it is equated to the margin of price undercutting. Consequently, contrary to European anti-dumping law, the anti-dumping duty may exceed the amount necessary to remedy the injury caused by the dumping.

The method to calculate the injury margin holds the same deficiency, since it is determined on the basis of the difference between the production costs of the Community producers, including a profit margin, and the dumping prices¹⁶⁸⁵. In view of this method, it is important to know which Community producers are taken as standard to determine the injury margin. In order to

¹⁶⁸³ See e.g. : Council Regulation (EEC) No 2717/93 of 28 September 1993 imposing a definitive anti-dumping duty on imports of ferro-chrome with a carbon content by weight of maximum 0,5 % (low carbon ferro-chrome), originating in Kazakhstan, Russia and Ukraine, *O.J.*, 2 October 1993, No L 246/1.

In *artificial corundum from the Soviet Union, Hungary, Poland, Czechoslovakia, the People's Republic of China and Brazil and Yugoslavia*, the margin of price undercutting was used as injury margin, because the price undercutting was considered to be the main cause of the injury suffered by the Community industry (Commission Decision 91/512/EEC of 25 July 1991 accepting undertakings given in connection with the review of anti-dumping measures concerning imports of artificial corundum originating in the Soviet Union, Hungary, Poland, Czechoslovakia and the People's Republic of China and in connection with the anti-dumping proceeding concerning imports of artificial corundum originating in Brazil and Yugoslavia, and terminating the investigation, *O.J.*, 2 October 1991, No L 275/27).

See also : *cotton yarns from Turkey*, where «for technical reasons» the anti-dumping duty had to correspond to the lowest of dumping margins established (Council Regulation (EEC) No 789/82 of 2 April 1982 imposing a definitive anti-dumping duty on imports of certain cotton yarns originating in Turkey, *O.J.*, 3 March 1982, No L 90/1). However, it was not explained what these technical reasons were. These technical reasons are only legal insofar as the injury margin exceeded the dumping margin or if it was in the Community interests to impose an anti-dumping duty the amount of which is not high enough to remove the injury (see : *infra*, 718). But even if the technical reasons are legal, the anti-dumping decision remains illegal for lack of motivation which is contrary to Article 190 EC Treaty.

¹⁶⁸⁴ Commission Regulation (EEC) No 129/91 of 11 January 1991 imposing a provisional anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China, *O.J.*, 19 January 1991, No L 14/31 ; Commission Decision 91/392/EEC of 21 June 1991 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain asbestos cement pipes originating in Turkey, and terminating the investigation, *O.J.*, 31 July 1991, No L 209/37 ; Commission Decision No 891/92/ECSC of 30 March 1992 imposing a provisional anti-dumping duty on imports of certain semi-finished products of alloy steel, originating in Turkey and Brazil, *O.J.*, 9 April 1992, No L 95/28 ; Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand, *O.J.*, 1 October 1994, No L 255/50.

¹⁶⁸⁵ *Contra* : Council Regulation (EEC) No 2861/93 of 18 October 1993 imposing a definitive anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, and collecting definitively the provisional duty imposed, *O.J.*, 21 October 1993, No L 262/4.

calculate the exact injury margin, *i.e.*, without the injury suffered by the Community producers because of their relative inefficiency, only the production costs of the Community producers which are as efficient as the dumping exporters should be maintained as standard to calculate the injury margin. European anti-dumping case law, however, does not guarantee that the injury margin does not include the injury suffered by the Community industry from their relative inefficiency. First, Community producers are assumed to be efficient, unless the dumping exporters are able to prove the contrary¹⁶⁸⁶. Since the European anti-dumping authorities hold that «(i)t is in fact extremely difficult to measure precisely the efficiency and/or inefficiency of the different (Community) producers and to make comparison as between these and with the (dumping) exporters»¹⁶⁸⁷, it will be extremely difficult to convince the European anti-dumping authorities that the Community producers are less efficient than the dumping exporters. Indeed, there has been but one case in which the European anti-dumping authorities have adjusted the Community producers' production costs in order to exclude the increase in unit production costs due to the combination of overcapacity and low rates of capacity utilization¹⁶⁸⁸. Moreover, the European anti-dumping authorities consider the efficiency of the dumping exporters relevant only insofar as it is reflected in export as well as in domestic market prices without any discrimination. If the dumping is established on the basis of a comparison between export and domestic market prices, it involves price discrimination. As, in such a case, the efficiency of the dumping exporter will not be reflected equally in export and in domestic market prices, the

1686 See :

- *video cassette recorders from Japan and the Republic of Korea*, where the allegation made by the dumping exporters that the technical design and production methods of the Community producers were out of date, was rejected for lack of evidence (Council Regulation (EEC) No 501/89 of 27 February 1989 imposing a definitive anti-dumping duty on imports of certain video cassette recorders originating in Japan and the Republic of Korea and definitively collecting the provisional duty, *O.J.*, 28 February 1989, No L 57/55) ;
- *linear tungsten halogen lamps from Japan*, where the Commission reacted to claims of the dumping exporters about their greater productivity by stating that «there was no evidence to cast doubt on the efficiency of the Community LTH lamp industry» (Council Regulation (EEC) No 117/91 of 16 January 1991 imposing a definitive anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 19 January 1991, No L 14/1) ;
- *gas-fuelled, non-refillable pocket flint lighters from Japan, the People's Republic of China, the Republic of Korea and Thailand*, where the dumping exporters' allegation that the productivity of the Community industry is lower, was rejected because of lack of evidence. The Commission relied on its experience to adopt the assumption that the productivity of the Japanese exporters and the Community industry is not different (Commission Regulation (EEC) No 1386/91 of 23 May 1991 imposing a provisional anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in Japan, the People's Republic of China, the Republic of Korea and Thailand, *O.J.*, 28 May 1991, No L 133/20).

1687 Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1.

1688 Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries ; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24.

efficiency of the dumping exporters will not be taken into account¹⁶⁸⁹. Furthermore, the inefficiency of the Community producers will also be disregarded if the downward pressure of the dumped prices on the Community producers' prices prevented them from making the investment needed to improve productivity¹⁶⁹⁰.

Second, according to the European anti-dumping authorities, the Community industry as a whole must be taken into account to determine the injury margin, since European anti-dumping law defines the Community industry as referring to the Community producers as a whole (or, at least, to the Community producers whose collective output represents a major proportion of the total Community output) and the Community may only under exceptional circumstances be divided into two or more markets (Article 4.1.(ii) GATT Anti-dumping Code ; Article 4(1)(ii) basic EC Regulation ; Article 4(5) basic ECSC Decision)¹⁶⁹¹. Their point of view, however, disregards the legal definition of the concept «injury», according to which injury caused by other factors must not be attributed to the dumping (Article 3.5. GATT Anti-dumping Code ; Article 3(7) basic EC Regulation ; Article 4(1) basic ECSC Decision). Such other factor may be the relative inefficiency of Community producers. Since this definition of the concept «injury» also prevails for the injury margin¹⁶⁹², the injury margin must not incorporate the effects of the Community producers' inefficiency. Otherwise, the injury margin will be overestimated and the amount of the anti-dumping duty will exceed the margin of injury actually caused by the dumping.

¹⁶⁸⁹ Commission Regulation (EEC) No 2064/90 of 17 July 1990 imposing a provisional anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 20 July 1990, No L 188/10 (corrigendum, *O.J.*, 21 November 1990, No L 321/19) ; Commission Regulation (EEC) No 1386/91 of 23 May 1991 imposing a provisional anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in Japan, the People's Republic of China, the Republic of Korea and Thailand, *O.J.*, 28 May 1991, No L 133/20 ; Commission Regulation (EEC) No 2805/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports into the Community of certain thermal paper originating in Japan, *O.J.*, 26 September 1991, No L 270/15.

¹⁶⁹⁰ Council Regulation (EEC) No 117/91 of 16 January 1991 imposing a definitive anti-dumping duty on imports of linear tungsten halogen lamps originating in Japan, *O.J.*, 19 January 1991, No L 14/1.

¹⁶⁹¹ Council Regulation (EEC) No 34/89 of 5 January 1989 imposing a definitive anti-dumping duty on imports of serial impact fully formed (SIFF) character printers originating in Japan, *O.J.*, 7 January 1989, No L 5/23.

¹⁶⁹² The concept «injury» used in Articles 7(2) and 9(4) basic EC Regulation and in Article 13(3) basic ECSC Decision, under which the anti-dumping duty must not exceed the injury margin, refers to the concept «injury» as defined by Article 3 basic EC Regulation and Article 4(1) basic ECSC Decision (Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea, *O.J.*, 28 October 1989, No L 314/1).

In several anti-dumping cases, however, the injury margin is determined on the basis of the production costs and profit margins of representative Community producers¹⁶⁹³, the Community producers with the highest rate of capacity utilization¹⁶⁹⁴, or even (the most) efficient Community producers¹⁶⁹⁵. However, the rate of capacity utilization, though easily to

1693 Commission Regulation (EEC) No 3578/83 of 15 December 1983 imposing a provisional anti-dumping duty on imports of choline chloride originating in the German Democratic Republic and Romania, *O.J.*, 20 December 1983, No L 356/12; Commission Regulation (EEC) No 1129/84 of 18 April 1984 imposing a provisional anti-dumping duty on imports of certain angles, shapes and sections, of iron or steel, originating in the German Democratic Republic, *O.J.*, 26 April 1984, No L 109/11; Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia, *O.J.*, 9 May 1987, No L 121/11; Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1; Commission Regulation (EEC) No 1695/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of polyester yarn originating in Mexico, South Korea, Taiwan and Turkey, *O.J.*, 17 June 1988, No L 151/39 (corrigendum, *O.J.*, 18 June 1988, No L 152/58); Commission Regulation (EEC) No 1696/88 of 14 June 1988 imposing a provisional anti-dumping duty on imports of synthetic fibres of polyesters originating in Mexico, Romania, Taiwan, Turkey, the United States of America or Yugoslavia, *O.J.*, 17 June 1988, No L 151/47; Commission Regulation (EEC) No 2623/88 of 24 August 1988 imposing a provisional anti-dumping duty on imports of urea originating in Austria, Hungary, Malaysia, Romania, the USA and Venezuela, *O.J.*, 25 August 1988, No L 235/5; Commission Regulation (EEC) No 720/90 of 22 March 1990 imposing a provisional anti-dumping duty on imports of silicon metal originating in the People's Republic of China, *O.J.*, 27 March 1990, No L 80/9; Commission Regulation (EEC) No 762/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungstic oxide and tungstic acid originating in the People's Republic of China, *O.J.*, 30 March 1990, No L 83/29; Commission Regulation (EEC) No 763/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungsten carbide and fused tungsten carbide originating in the People's Republic of China and terminating the anti-dumping proceeding concerning imports of those products from the Republic of Korea, *O.J.*, 30 March 1990, No L 83/36.

1694 Commission Regulation (EEC) No 920/93 of 15 April 1993 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China, *O.J.*, 21 April 1993, No L 95/5.

1695 Commission Regulation (EEC) No 2127/82 of 28 July 1982 imposing a provisional anti-dumping duty on trichloroethylene originating in the German Democratic Republic and Poland and terminating the anti-dumping proceeding in respect of trichloroethylene originating in Czechoslovakia, Romania, Spain and the United States of America, *O.J.*, 31 July 1982, No L 223/76; Commission Regulation (EEC) No 2243/82 of 12 August 1982 imposing a provisional anti-dumping duty on imports of methylamine, dimethylamine and trimethylamine originating in the German Democratic Republic and accepting an undertaking and terminating the procedure in respect of imports of methylamine, dimethylamine and trimethylamine originating in Romania, *O.J.*, 13 August 1982, No L 238/35; Commission Regulation (EEC) No 2317/85 of 12 August 1985 imposing a provisional anti-dumping duty on imports of roller chains for cycles originating in the USSR and the People's Republic of China, *O.J.*, 14 August 1985, No L 217/7; Council Regulation (EEC) No 1244/86 of 28 April 1986 imposing a definitive anti-dumping duty on imports of copper sulphate originating in Yugoslavia, *O.J.*, 30 April 1986, No L 113/4; Commission Regulation (EEC) No 2800/86 of 9 September 1986 imposing a provisional anti-dumping duty on imports of certain deep freezers originating in the USSR, accepting the undertakings in connection with the investigation of imports of certain deep freezers originating in Yugoslavia or in the German Democratic Republic and terminating the investigation, and terminating the proceeding concerning imports of certain deep freezers, *O.J.*, 11 September 1986, No L 259/14; Council Regulation (EEC) No 29/87 of 22 December 1986 imposing a definitive anti-dumping duty on imports of certain deep freezers originating in the Soviet Union, *O.J.*, 8 January 1987, No L 6/1; Council Regulation (EEC) No 864/87 of 23 March 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union, and definitively collecting the amounts secured as provisional duties, *O.J.*, 27 March 1987, No L 83/1; Commission Regulation (EEC) No 1043/87 of 10 April 1987 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Yugoslavia, *O.J.*, 14 April 1987, No L 102/5; Council Regulation (EEC) No 2382/87 of 5 August 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Yugoslavia, *O.J.*, 7 August 1987, No L 218/2; Commission Regulation (EEC) No 699/88 of 15 March 1988 imposing a provisional anti-dumping duty on imports of oxalic acid originating in Taiwan and South Korea, *O.J.*, 18 March 1988, No L 72/12; Council Regulation (EEC) No 1198/88 of 25 April 1988 imposing a definitive anti-dumping duty on imports of roller chains for cycles originating in the People's Republic of China and providing for the definitive collection of the provisional anti-dumping duty on the said imports, *O.J.*, 3 May 1988, No L 115/1; Council Regulation (EEC) No 341/90 of 5 February 1990 accepting undertakings and imposing a definitive anti-dumping duty on imports of ferro-silicon originating in Iceland, Norway, Sweden, Venezuela or Yugoslavia, except those sold for export to the Community by companies whose undertakings have been accepted, *O.J.*, 10 February 1990, No L 38/1; Commission Regulation (EEC) No 547/90 of 2 March

measure, does not guarantee the injury margin to be assessed correctly : such Community producers may incur high (low) production costs because their production technology is less (more) efficient than the one of the other Community producers or because there are negative (positive) economies of scale ; in both cases, the injury margin will be too high (too low). Insofar as the representative Community producers are really representative of the Community industry as a whole, the injury margin thus determined will, seemingly, correspond to the injury margin of the Community industry as a whole. However, if it is true that it is extremely difficult to measure the efficiency/inefficiency of the Community producers, it will be as extremely difficult to measure their representativity. As a result, so-called representative Community producers, in terms of efficiency, will probably not resemble the rest of the Community industry. If they are less efficient, the injury margin will be overestimated and, from a legal point of view, the amount of the anti-dumping duty will be too high. If they are more efficient, the injury margin will be underestimated. That underestimated injury margin may, however, also result in the amount of the anti-dumping duty which is not in keeping with European anti-dumping law. The most efficient Community producer is not necessarily at least as efficient as the dumping exporters. If he is more efficient, the injury margin will be underestimated. If he is less efficient, the injury margin will be overestimated. In both cases, European anti-dumping law will be violated. The first case will be at variance with European anti-dumping law because the amount of the anti-dumping duty will not be adequate to remove the injury, unless the Community interests require only an anti-dumping duty the amount of which is lower than the one needed for removing the full injury caused by the dumping¹⁶⁹⁶. The second case is illegal as the injury margin comprises

1990 imposing a provisional anti-dumping duty on imports of certain glutamic acid and its salts originating in Indonesia, the Republic of Korea, Taiwan and Thailand, and accepting undertakings in connection with imports of certain glutamic acid and its salts originating in these countries, *O.J.*, 3 March 1990, No L 56/23.

¹⁶⁹⁶ See e.g. : *standardized multi-phase electric motors from Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, the Soviet Union and Yugoslavia*, where the level of anti-dumping relief was determined on the basis of the cost prices of the most efficient industrial-scale manufacturers in order to maintain as far as possible the competitiveness of the downstream industries (Council Regulation (EEC) No 864/87 of 23 March 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union, and definitively collecting the amounts secured as provisional duties, *O.J.*, 27 March 1987, No L 83/1 ; Council Regulation (EEC) No 2382/87 of 5 August 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Yugoslavia, *O.J.*, 7 August 1987, No L 218/2). See also : Commission Regulation (EEC) No 1613/83 of 15 June 1983 imposing a provisional anti-dumping duty on imports of unwrought nickel, not alloyed, in the form of cathodes produced by electrolysis, either uncut or cut into squares, originating in the Soviet Union, *O.J.*, 17 June 1983, No L 159/43 ; Commission Regulation (EEC) No 997/85 of 18 April 1985 imposing a provisional anti-dumping duty on imports of glycine originating in Japan, *O.J.*, 19 April 1985, No L 107/8 ; Council Regulation (EEC) No 2322/85 of 12 August 1985 imposing a definitive anti-dumping duty on imports of glycine originating in Japan, *O.J.*, 15 August 1985, No L 218/1 ; Commission Regulation (EEC) No 2800/86 of 9 September 1986 imposing a provisional anti-dumping duty on imports of certain deep freezers originating in the USSR, accepting the undertakings in connection with the investigation of imports of certain deep freezers originating in Yugoslavia or in the German Democratic Republic and terminating the investigation, and terminating the proceeding concerning imports of certain deep freezers, *O.J.*, 11 September 1986, No L 259/14 ; Council Decision 87/66/EEC of 19 January 1987 accepting undertakings given in connection with imports of binder and baler twine originating in Brazil and Mexico, and terminating the investigations, *O.J.*, 5 February 1987, No L 34/55 ; Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan, *O.J.*, 24 November 1988, No L 317/33 ; Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan,

also the injury the Community producer suffers because of his lower efficiency in respect to the dumping exporters.

2.4. ANTI-CIRCUMVENTION MEASURES

2.4.1. Rules of origin

Anti-dumping duties, contrary to customs duties, do not apply to exports regardless of their origin. The scope of the anti-dumping duties is limited to exports originating in certain countries. The impact which anti-dumping duties have on the dumping exporters' profits, may be so important that the dumping exporters may change their production location to remove their products from the anti-dumping duties¹⁶⁹⁷.

Though such a change in production location is an economically justified decision based on profit maximization, European anti-dumping law, under certain conditions, considers it to be an unlawful evasion of anti-dumping duties. According to European anti-dumping law, the rules on

accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79; corrigendum, *O.J.*, 10 February 1990, No L 38/44); Commission Regulation (EEC) No 762/90 of 26 March 1990 imposing a provisional anti-dumping duty on imports of tungstic oxide and tungstic acid originating in the People's Republic of China, *O.J.*, 30 March 1990, No L 83/29; Council Regulation (EEC) No 2112/90 of 23 July 1990 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan and collecting definitively the provisional duty, *O.J.*, 25 July 1990, No L 193/1; Commission Regulation (EEC) No 3798/90 of 21 December 1990 imposing a provisional anti-dumping duty on imports of espadrilles originating in the People's Republic of China, *O.J.*, 28 December 1990, No L 365/25). *Contra*: STANBROOK, C., «The Impact of Community Interest and Injury Determination on Antidumping Measures in the EEC», in *Antitrust and Trade Policy in the United States and the European Community*, HAWK, B.E. (ed.), New York, Bender, 1986, (623), 630-631 and 634; VAN BAEL, I., and BELLIS, J.-F., *Anti-Dumping and other Trade Protection Laws of the EEC*, Bicester, CCH Editions, 1990, 152.

See also: *electronic typewriters from Japan*, where «the Council (was) not convinced that Community interest necessarily requires that the specific situation of an allegedly less efficient producer when confronted with unfair trade practices be disregarded; the Council considers that by setting the injury elimination level (i.e., the injury margin) by including all three Community producers rather than having regard to the allegedly less efficient one alone, Community interest is appropriately reflected» (Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, *O.J.*, 22 June 1985, No L 163/1). Thus, if the Council was convinced, it would have disregarded the situation of the less efficient Community producer.

Conversely, it is illegal that for reasons of Community interests the amount of anti-dumping duty would be determined higher than the injury margin. As the concept «Community interests» was introduced into European anti-dumping law in order to translate the «desire» of GATT anti-dumping law to make the imposition of anti-dumping duties permissive (Article 9.1. GATT Anti-dumping Code), it can have only a moderating effect on the anti-dumping relief to be granted. It cannot be used to grant more anti-dumping protection than allowed by European anti-dumping law.

¹⁶⁹⁷ See: WEBB, M.A., «Anti-Dumping Laws, Production Location and Prices», *Journal of International Economics*, 1987/22, (363), 363-368. The imposition of an anti-dumping duty does not always result in foreign direct investments by the dumping exporters in the Community; it may also cause a shift away from foreign direct investment that would have been made in case of free trade (see: MOTTA, M., «Multinational firms and the tariff-jumping argument. A game-theoretic analysis with some unconventional conclusions», *European Economic Review*, 1992, (1557), 1557-1571.

the common definition of the concept of origin and the relevant common implementing provisions apply to anti-dumping duties (Article 14(3) basic EC Regulation ; Article 13(7) basic ECSC Decision)¹⁶⁹⁸. Under the common rules, «any processing or working in respect of which it is established, or in respect of which the facts as ascertained justify the presumption, that its *sole object* was to circumvent the provisions applicable in the Community to goods from specific countries shall under no circumstances be deemed to confer on the goods thus produced the origin of the country where it is carried out» (Article 25 Council Regulation No 2913/92 establishing the Community Customs Code) (emphasis added)¹⁶⁹⁹. As exception to the general rule (see : Article 24 Regulation (EEC) No 2913/92¹⁷⁰⁰), this provision must be interpreted strictly. Such a strict interpretation of the already narrow definition implies that circumvention will only be found when the operation's sole object is to circumvent origin rules. Thus, if the operations are economically justified, there will be no circumvention since it is not the sole object of these operations¹⁷⁰¹. Consequently, changes in production locations made after the imposition of anti-dumping duties cannot be considered as circumvention if they are grounded on considerations of profit maximization. The Court of Justice, however, presumes that such changes are made in order to circumvent origin rules when they coincide with the entry into force of anti-dumping duties. The onus of proof thus shifts onto the exporter who must prove that he has changed his production locations for reasons other than the evasion of anti-dumping duties¹⁷⁰². By shifting the onus of proof, the Court of Justice increases the chances of finding circumvention. For the exporter will not always be able to prove that the change of his production locations was not (solely) grounded on his intention to circumvent origin rules. As a result, the Court of Justice supports the European anti-dumping authorities in their «one-way flexibility». The Court of Justice, though, does not go against the rules on the common definition of the concept of origin, since those rules allow to create presumptions if the facts ascertained justify them. It may well be argued that the coincidence with the entry into force of anti-dumping duties may justify the presumption that the exporter's sole object was the circumvention of origin rules and, thus, of the anti-dumping duties.

¹⁶⁹⁸ This complies with the GATT Agreement on Rules of Origin, according to which the common definition of the concept of origin applies to anti-dumping law (except for the definition of the Community industry) (Article 1.2.).

¹⁶⁹⁹ O.J., 19 October 1992, No L 302/1.

¹⁷⁰⁰ *Supra*, 118-120.

¹⁷⁰¹ C.J.E.C., case 93/83, 23 February 1984, *Zentralgenossenschaft des Fleisergewerbes e.G. (Zentrag) v Hauptzollamt Bochum*, E.C.R., 1984, (1095), 1110 (opinion of Advocate General S. ROZES); C.J.E.C., case 26/88, 13 December 1989, *Brother International GmbH v Hauptzollamt Gießen*, E.C.R., 1989, (4253), 4273 (opinion of Advocate General VAN GERVEN).

¹⁷⁰² C.J.E.C., case 26/88, 13 December 1989, *Brother International GmbH v Hauptzollamt Gießen*, E.C.R., 1989, (4253), 4282.

Besides the application of the rules on the common definition of the concept of origin, EC anti-dumping law further provides that anti-dumping duties may be extended to apply to imports from third countries of like products, or parts thereof, when circumvention of the anti-dumping measures in force is taking place. Such circumvention is defined as a change in the pattern of trade between third countries and the Community which stems from a practice, process or work for which there is insufficient due cause or economic justification, other than the imposition of the duty, and there is evidence that the remedial effects of the duty are being undermined in terms of the prices and/or quantities of the like products and there is evidence of dumping in relation to the normal values previously established for the like or similar products (Article 13(1) basic EC Regulation). As this new anti-circumvention rule has not yet been applied, it is unclear how it relates to the common definition of the concept of origin. It seems safe to assume that the new anti-circumvention rule, as a special provision applicable to anti-dumping duties, will prevail over the general common definition of the concept of origin, insofar of course as it deviates from this common definition. Hence, as the new anti-circumvention rule does not define the notion «change in the pattern of trade», that notion should be interpreted on the basis of the common definition of the concept of origin : there will be only a change in the pattern of trade, if the origin has been shifted from one country to another. Indeed, if the origin of the product has not changed, the anti-dumping duty will remain applicable since the scope *ratione loci* of anti-dumping duties is defined by the origin of the dumped products¹⁷⁰³. Moreover, under the new anti-circumvention rule, for there not being circumvention, it must be shown that there was insufficient due cause or economic justification (other than the imposition of the anti-dumping duty), rather than that the sole object was to circumvent the anti-dumping duty. This new rule makes the proof that the change in the pattern of trade is intended to circumvent the anti-dumping duty easier. Moreover, it may be expected that the case law of the Court of Justice on the onus of proof will be applied here too : if the change in the pattern of trade coincides with the imposition of the anti-dumping duty, the exporter will probably have to show that there was sufficient due cause or economic justification for this change. On the other hand, the new circumvention rule seems more exacting than the common definition of the concept of origin, as it imposes two additional conditions : first, there must be evidence that the remedial effects of the anti-dumping duty are being undermined in terms of the prices and/or quantities of the like products ; second, there must be evidence of dumping in relation to the normal values previously established for the like or similar products. With regard to the first additional condition, the new anti-circumvention rule probably requires that the Community industry is suffering injury caused by massive and low-priced imports originating in the country to which the production of the originally dumping country has been relocated. The second condition seems to imply that those «relocated» imports must be made at export prices below the normal value established in respect of the originally

¹⁷⁰³ *Supra*, 696-698.

dumping country. Finally, the scope of the new anti-circumvention rule is restricted to the circumvention of anti-dumping duties, whereas the common definition of the concept of origin equally applies to undertakings.

2.4.2. *Assembly within the Community*

2.4.2.1. The legislation and its application

Another method for evading anti-dumping duties is to import parts and materials into the Community in order to assemble them into the product subject to the anti-dumping duty. The products imported are not covered by the anti-dumping duty. Under EC anti-dumping law, though, the scope of definitive anti-dumping duties may be extended to apply to imports from third countries of parts of like products if three conditions are fulfilled (Article 13(1) and (2) basic EC Regulation) (hereinafter called «the screwdriver factory provision»). GATT does not provide any remedy against such evasion of anti-dumping duties (see: preamble to basic EC Regulation)¹⁷⁰⁴. The original EC rules on assembly¹⁷⁰⁵, however, have been found illegal under GATT¹⁷⁰⁶. This conviction has not resulted in the EC rules on assembly being repealed. Rather they have been replaced by new rules, which closely resemble the old ones. There are two major differences: first, contrary to the old rules, it is not required that the assembly operations are carried out by a party related or associated with the dumping exporters subject to the anti-dumping duty; second, the new rules do not impose to take account of the circumstances of each case, such as the variable costs incurred in the assembly operation and the research and development carried out and the technology applied within the Community. It seems that the disappearance of those requirements will have but a minor effect. Usually, the dumping exporter will only relocate his production activities in favour of a party to which he is related or associated. This is especially so in view of the fact that the terms «related» and «associated» did

¹⁷⁰⁴ *Supra*, 96-97.

¹⁷⁰⁵ Article 13(10) of Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community, *O.J.*, 2 August 1988, No L 209/1.

¹⁷⁰⁶ GATT Doc. No. L/6657, 22 March 1990. See: *infra*, 731-733.

not only comprise corporate links¹⁷⁰⁷, but also contractual arrangements¹⁷⁰⁸. Moreover, the circumstances of the case which had to be taken into account have never prevented the extension of the anti-dumping duty. The major innovation is the new condition that the remedial effects of the anti-dumping duties must be undermined by the assembly and that the assembled products are sold at prices below the normal value of the dumped product. Another difference is

1707 Corporate links falling within the terms «related» and «associated» are :

- wholly owned subsidiaries of the dumping exporters (Council Regulation (EEC) No 1021/88 of 18 April 1988 extending the anti-dumping duty imposed by Regulation (EEC) No 1058/86 to certain electronic scales assembled in the Community, *O.J.*, 20 April 1988, No L 101/1 ; Council Regulation (EEC) No 1022/88 of 18 April 1988 extending the anti-dumping duty imposed by Regulation (EEC) No 1698/85 to certain electronic typewriters assembled in the Community, *O.J.*, 20 April 1988, No L 101/4 ; Commission Decision 88/225/EEC of 18 April 1988 terminating the investigation under Article 13 (10) of Regulation (EEC) No 2176/84 concerning certain hydraulic excavators assembled or produced in the Community, *O.J.*, 20 April 1988, No L 101/24 ; Commission Decision 88/226/EEC of 18 April 1988 terminating the investigation under Article 13 (10) of Regulation (EEC) No 2176/84 concerning certain typewriters assembled or produced in the Community with regard to TEC Elektronik-Werk GmbH and Brother Industries (UK) Ltd, *O.J.*, 20 April 1988, No L 101/26 ; Commission Decision 88/227/EEC of 18 April 1988 terminating the investigation under Article 13 (10) of Regulation (EEC) No 2176/84 concerning certain electronic scales assembled or produced in the Community with regard to TEC-Keylard Weegschalen Nederland BV, *O.J.*, 20 April 1988, No L 101/28 ; Council Regulation (EEC) No 3205/88 of 17 October 1988 extending the anti-dumping duty imposed by Regulation (EEC) No 535/87 to certain plain paper photocopiers assembled in the Community, *O.J.*, 19 October 1988, No L 284/36 ; Commission Decision 88/519/EEC of 17 October 1988 accepting undertakings and terminating the investigation under Article 13 (10) of Regulation (EEC) No 2423/88 concerning certain plain paper photocopiers assembled in the Community, *O.J.*, 19 October 1988, No L 284/60 ; Commission Decision 89/57/EEC of 20 January 1989 terminating the proceedings under Article 13 (10) of Regulation (EEC) No 2423/88 concerning certain ball bearings assembled in the Community, *O.J.*, 28 January 1989, No L 25/90 ; Council Regulation (EEC) No 3042/89 of 6 October 1989 extending the anti-dumping duty imposed by Regulation (EEC) No 3651/88 to certain serial-impact dot-matrix printers assembled in the Community, *O.J.*, 10 October 1989, No L 291/52 ; Commission Decision 89/543/EEC of 6 October 1989 accepting undertakings and terminating the investigation under Article 13 (10) of Regulation (EEC) No 2423/88 concerning certain serial-impact dot-matrix printers assembled in the Community, *O.J.*, 10 October 1989, No L 291/57 ; Commission Decision 90/47/EEC of 1 February 1990 terminating the proceeding under Article 13 (10) of Regulation (EEC) No 2423/88 concerning plain paper photocopiers assembled or produced in the Community by Ricoh Industrie France SA, *O.J.*, 6 February 1990, No L 34/28) ;
- partially owned subsidiaries of the dumping exporters (Council Regulation (EEC) No 3042/89 of 6 October 1989 extending the anti-dumping duty imposed by Regulation (EEC) No 3651/88 to certain serial-impact dot-matrix printers assembled in the Community, *O.J.*, 10 October 1989, No L 291/52 ; Commission Decision 89/543/EEC of 6 October 1989 accepting undertakings and terminating the investigation under Article 13 (10) of Regulation (EEC) No 2423/88 concerning certain serial-impact dot-matrix printers assembled in the Community, *O.J.*, 10 October 1989, No L 291/57) ;
- a 50 % plus one shareholding or a majority shareholding held by the dumping firm (Council Regulation (EEC) No 3205/88 of 17 October 1988 extending the anti-dumping duty imposed by Regulation (EEC) No 535/87 to certain plain paper photocopiers assembled in the Community, *O.J.*, 19 October 1988, No L 284/36 ; Commission Decision 88/519/EEC of 17 October 1988 accepting undertakings and terminating the investigation under Article 13 (10) of Regulation (EEC) No 2423/88 concerning certain plain paper photocopiers assembled in the Community, *O.J.*, 19 October 1988, No L 284/60).

1708 Contractual arrangements falling within the terms «related» and «associated» are :

- a joint venture between the firm established in the Community and the dumping exporter (Council Regulation (EEC) No 3205/88 of 17 October 1988 extending the anti-dumping duty imposed by Regulation (EEC) No 535/87 to certain plain paper photocopiers assembled in the Community, *O.J.*, 19 October 1988, No L 284/36 ; Commission Decision 88/519/EEC of 17 October 1988 accepting undertakings and terminating the investigation under Article 13 (10) of Regulation (EEC) No 2423/88 concerning certain plain paper photocopiers assembled in the Community, *O.J.*, 19 October 1988, No L 284/60) ;
- substantial capital links and close economic and commercial relations with the dumping exporter (Council Regulation (EEC) No 1021/88 of 18 April 1988 extending the anti-dumping duty imposed by Regulation (EEC) No 1058/86 to certain electronic scales assembled in the Community, *O.J.*, 20 April 1988, No L 101/1 ; Commission Decision 88/227/EEC of 18 April 1988 terminating the investigation under Article 13 (10) of Regulation (EEC) No 2176/84 concerning certain electronic scales assembled or produced in the Community with regard to TEC-Keylard Weegschalen Nederland BV, *O.J.*, 20 April 1988, No L 101/28) ;
- the arrangement that the mere assembly of all parts which are imported and delivered at its premises by the dumping exporter is the sole activity of the company established in the Community, whereas the finished product is exclusively sold in the Community by the dumping exporter who bears all costs incurred between importation of the parts and the sale of the finished products the assembly fee of which paid to the assembly firm constitutes only a small percentage (Council Regulation (EEC) No 1022/88 of 18 April 1988 extending the anti-dumping duty imposed by Regulation (EEC) No 1698/85 to certain electronic typewriters assembled in the Community, *O.J.*, 20 April 1988, No L 101/4).

See also : VAN GERVEN, G., «New Anti-Circumvention Rules in EEC Anti-Dumping Law», *International Lawyer*, 1988, (809), 819.

that the application of the rule on assembly cannot result in the acceptance of an undertaking ; if there is anti-circumvention, the only sanction will be the extension of the scope of the anti-dumping duty to the imports of the parts assembled in the Community¹⁷⁰⁹.

- (i) *The assembly operation must have been started or substantially increased since, or just prior to, the initiation of the anti-dumping investigation and the parts must be from the country subject to anti-dumping measures*

Whereas the commencement of the assembly and production activities does not raise questions of interpretation, the term «substantial increase» leaves some room for interpretation, though small, normal and cyclical increases seem *a priori* to be excluded¹⁷¹⁰. The European anti-dumping authorities usually compare the development in assembly or production before and after the opening of the anti-dumping investigation, in order to determine whether there has been a substantial increase in

¹⁷⁰⁹ Under the old screwdriver factory rule, it was possible to accept undertakings in order to stop the circumvention (see : Article 13(10)(d) of Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community, *O.J.*, 2 August 1988, No L 209/1). Such undertakings involved the obligation to attain a certain proportion of Community parts for the assembly or production in the Community of the finished product by a party which is related or associated to a manufacturer whose exports of the like product are subject to a definitive anti-dumping duty (Council Regulation (EEC) No 1329/88 of 16 May 1988 amending Regulation (EEC) No 1022/88 with regard to certain electronic typewriters assembled in the Community by Kyushu Matsushita (UK) Ltd, *O.J.*, 17 May 1988, No L 123/31 ; Council Regulation (EEC) No 2076/88 of 11 July 1988 amending Regulation (EEC) No 1022/88 with regard to certain electronic typewriters assembled in the Community by Canon Bretagne SA, *O.J.*, 14 July 1988, No L 183/1 ; Commission Decision 88/387/EEC of 11 July 1988 accepting undertakings concerning certain electronic typewriters assembled or produced in the Community by Canon Bretagne SA, *O.J.*, 14 July 1988, No L 183/39 ; Commission Decision 88/398/EEC of 15 July 1988 accepting an undertaking concerning certain electronic weighing scales assembled or produced in the Community, *O.J.*, 20 July 1988, No L 189/27 ; Council Regulation (EEC) No 2329/88 of 25 July 1988 amending Regulation (EEC) No 1022/88 insofar as it concerns certain electronic typewriters assembled in the Community by Sharp Manufacturing (UK) Ltd, *O.J.*, 28 July 1988, No L 203/1 ; Commission Decision 88/424/EEC of 25 July 1988 accepting an undertaking relating to the anti-dumping proceeding concerning certain electronic typewriters assembled or produced in the Community by Sharp Manufacturing (UK) Ltd, *O.J.*, 28 July 1988, No L 203/25 ; Council Regulation (EEC) No 3205/88 of 17 October 1988 extending the anti-dumping duty imposed by Regulation (EEC) No 535/87 to certain plain paper photocopiers assembled in the Community, *O.J.*, 19 October 1988, No L 284/36 ; Commission Decision 88/519/EEC of 17 October 1988 accepting undertakings and terminating the investigation under Article 13 (10) of Regulation (EEC) No 2423/88 concerning certain plain paper photocopiers assembled in the Community, *O.J.*, 19 October 1988, No L 284/60 ; Council Regulation (EEC) No 4017/88 of 19 December 1988 amending Regulation (EEC) No 3205/88 as regards certain plain paper photocopiers assembled in the Community by Matsushita Business Machine (Europe) GmbH and Toshiba Systèmes (France) SA, *O.J.*, 23 December 1988, No L 355/1 ; Commission Decision 88/638/EEC of 16 November 1988 accepting undertakings relating to the anti-dumping proceeding concerning certain plain paper photocopiers assembled in the Community by Matsushita Business Machine (Europe) GmbH and Toshiba Systèmes (France) SA, *O.J.*, 23 December 1988, No L 355/66 ; Council Regulation (EEC) No 359/89 of 13 February 1989 repealing Regulation (EEC) No 3205/88 in respect of certain plain paper photocopiers assembled in the Community by Konica Business Machines Manufacturing GmbH, *O.J.*, 15 February 1989, No L 43/1 ; Commission Decision 89/116/EEC of 23 December 1988 accepting an undertaking relating to the anti-dumping proceeding concerning certain plain paper photocopiers assembled or produced in the Community by Konica Business Machines Manufacturing GmbH, *O.J.*, 15 February 1989, No L 43/54 ; Commission Decision 89/309/EEC of 28 April 1989 accepting an undertaking relating to the anti-dumping proceeding concerning certain plain paper photocopiers assembled or produced in the Community by Sharp Manufacturing (UK) Ltd, *O.J.*, 9 May 1989, No L 126/38 ; Council Regulation (EEC) No 3042/89 of 6 October 1989 extending the anti-dumping duty imposed by Regulation (EEC) No 3651/88 to certain serial-impact dot-matrix printers assembled in the Community, *O.J.*, 10 October 1989, No L 291/52 ; Commission Decision 89/543/EEC of 6 October 1989 accepting undertakings and terminating the investigation under Article 13 (10) of Regulation (EEC) No 2423/88 concerning certain serial-impact dot-matrix printers assembled in the Community, *O.J.*, 10 October 1989, No L 291/57 ; Council Regulation (EEC) No 3490/89 of 21 November 1989 repealing Regulation (EEC) No 3042/89 extending the anti-dumping duty imposed by Regulation (EEC) No 3651/88 to certain serial-impact dot-matrix printers assembled in the Community, *O.J.*, 23 November 1989, No L 340/5 ; Commission Decision 89/596/EEC of 13 October 1989 accepting undertakings relating to the anti-dumping proceeding concerning certain serial-impact dot-matrix printers assembled in the Community by NEC Technology Ltd and Star Micronics Manufacturing Ltd, *O.J.*, 23 November 1989, No L 340/25.

¹⁷¹⁰ Thus, no substantial increase was found in *electronic typewriters from Japan* where the firm had ceased assembling electronic typewriters in the Community before the beginning of the investigation (Commission Decision 88/226/EEC of 18 April 1988 terminating the investigation under Article 13 (10) of Regulation (EEC) No 2176/84 concerning certain typewriters assembled or produced in the Community with regard to TEC Elektronik-Werk GmbH and Brother Industries (UK) Ltd, *O.J.*, 20 April 1988, No L 101/26).

assembly or production¹⁷¹¹. Only when the increase is substantial, a comparison with the period before the opening of the anti-dumping investigation is held superfluous¹⁷¹². Through this interpretation it will be difficult to distinguish increases which are merely the consequence of the imposition of anti-dumping duties, on the one hand, and increases which, on the other hand, are the implementation of decisions to start and increase assembly activities within the Community, which were taken or planned long before anti-dumping proceedings were initiated¹⁷¹³. Moreover, the relocation of assembly and production facilities into the Community may result from pure profit maximization¹⁷¹⁴ and producers may hardly be reproached to maximize profits.

¹⁷¹¹ A substantial increase has been found in :

- in *plain paper photocopiers from Japan*, namely an increase of 30 % in the year following the opening of the original investigation, because during the five year period prior to the opening of the original investigation production increased by a mere 4.6 % and because a 30 % increase from a large basis is greater, in absolute terms, than from a smaller basis (Council Regulation (EEC) No 3205/88 of 17 October 1988 extending the anti-dumping duty imposed by Regulation (EEC) No 535/87 to certain plain paper photocopiers assembled in the Community, *O.J.*, 19 October 1988, No L 284/36 ; Commission Decision 88/519/EEC of 17 October 1988 accepting undertakings and terminating the investigation under Article 13 (10) of Regulation (EEC) No 2423/88 concerning certain plain paper photocopiers assembled in the Community, *O.J.*, 19 October 1988, No L 284/60) ;
- in *ball bearings from Japan*, namely an increase of more than 24 % in the year following the opening of the original investigation and of more than 40 % in the two year period following the opening of the original investigation, in view of the fact that during the four year period before the opening of the original investigation production increased by only between 0 and 2.3 % (Commission Decision 89/57/EEC of 20 January 1989 terminating the proceedings under Article 13 (10) of Regulation (EEC) No 2423/88 concerning certain ball bearings assembled in the Community, *O.J.*, 28 January 1989, No L 25/90).

¹⁷¹² In *plain paper photocopiers from Japan*, the output of the assembly facility increased by 74 % in the first year and by 38 % in the second year after the opening of the investigation. During those years, the Japanese models - the firm assembling Japanese photocopiers produced also own models - comprised 48 and 65 %, respectively, of the total units produced and assembled. Thus, the increase in the production of Japanese models exceeded 38 % in the second year (Council Regulation (EEC) No 3205/88 of 17 October 1988 extending the anti-dumping duty imposed by Regulation (EEC) No 535/87 to certain plain paper photocopiers assembled in the Community, *O.J.*, 19 October 1988, No L 284/36 ; Commission Decision 88/519/EEC of 17 October 1988 accepting undertakings and terminating the investigation under Article 13 (10) of Regulation (EEC) No 2423/88 concerning certain plain paper photocopiers assembled in the Community, *O.J.*, 19 October 1988, No L 284/60).

¹⁷¹³ VAN GERVEN, G., «New Anti-Circumvention Rules in EEC Anti-Dumping Law», *International Lawyer*, 1988, (809), 821.

¹⁷¹⁴ See : WEBB, M.A., «Anti-Dumping Laws, Production Location and Prices», *Journal of International Economics*, 1987/22, (363), 363-368.

In principle, the origin of the parts must be determined in accordance with Council Regulation (EEC) No 2913/92 establishing the Community Customs Code¹⁷¹⁵ (Article 14(3) basic EC Regulation ; Article 13(7) basic EC Decision). The European anti-dumping authorities sometimes choose to ignore the actual composition of the finished product. Thus, they have assumed that the parts bought first were used first for the production of the finished products, even if the parts bought last were actually used¹⁷¹⁶. It should be pointed out that the parts bought first originated in the dumping country, whereas the parts bought last did not.

(ii) *The parts must constitute 60 % or more of the total value of the parts of the assembled product (the so-called 60/40 provision)*

At first sight, the 60/40 provision seems to exclude any «one-way flexibility» : it seems only to require that the value of the parts originating in the dumping country are added and are compared with the value of the assembled product. Nevertheless, there is room for «one-way flexibility» because the application of the 60/40 provision requires the determination of the value of the various parts.

The value of the parts is usually determined on an into-factory, duty paid basis, *i.e.*, on the basis of the companies purchase prices of parts when delivered to factories in the Community. If, however, such purchase prices do not cover all production and export costs, the value of the parts will be assessed on the basis of a kind of constructed value, *i.e.*, on the basis of adjusted sales prices reflecting the dumping firm's purchase price of the parts manufactured by third parties, or on the basis of the dumping firm's own total

¹⁷¹⁵ *O.J.*, 19 October 1992, No L 302/1.

Thus, if a sufficient degree of parts and materials originating in the Community are used, the sub-assembly within the Community of parts and materials into parts or materials used for the production of the finished product can confer Community origin to the assembled parts and materials (Council Regulation (EEC) No 1021/88 of 18 April 1988 extending the anti-dumping duty imposed by Regulation (EEC) No 1058/86 to certain electronic scales assembled in the Community, *O.J.*, 20 April 1988, No L 101/1 ; Commission Decision 88/226/EEC of 18 April 1988 terminating the investigation under Article 13 (10) of Regulation (EEC) No 2176/84 concerning certain typewriters assembled or produced in the Community with regard to TEC Elektronik-Werk GmbH and Brother Industries (UK) Ltd, *O.J.*, 20 April 1988, No L 101/26 ; Commission Decision 88/227/EEC of 18 April 1988 terminating the investigation under Article 13 (10) of Regulation (EEC) No 2176/84 concerning certain electronic scales assembled or produced in the Community with regard to TEC-Keylard Weegschalen Nederland BV, *O.J.*, 20 April 1988, No L 101/28). On the other hand, the mere sub-assembly within the Community of parts and materials all originating in the dumping country into parts and materials used for producing the finished product does not alter the origin (Council Regulation (EEC) No 1022/88 of 18 April 1988 extending the anti-dumping duty imposed by Regulation (EEC) No 1698/85 to certain electronic typewriters assembled in the Community, *O.J.*, 20 April 1988, No L 101/4 ; Council Regulation (EEC) No 3205/88 of 17 October 1988 extending the anti-dumping duty imposed by Regulation (EEC) No 535/87 to certain plain paper photocopiers assembled in the Community, *O.J.*, 19 October 1988, No L 284/36 ; Commission Decision 88/519/EEC of 17 October 1988 accepting undertakings and terminating the investigation under Article 13 (10) of Regulation (EEC) No 2423/88 concerning certain plain paper photocopiers assembled in the Community, *O.J.*, 19 October 1988, No L 284/60).

¹⁷¹⁶ Commission Decision 88/227/EEC of 18 April 1988 terminating the investigation under Article 13 (10) of Regulation (EEC) No 2176/84 concerning certain electronic scales assembled or produced in the Community with regard to TEC-Keylard Weegschalen Nederland BV, *O.J.*, 20 April 1988, No L 101/28.

production costs plus its sales, general and administrative expenses¹⁷¹⁷. The use of such a constructed value must be criticized because it relies on the method of full-cost pricing which does not pay attention to the demand side and the competitive forces on the market¹⁷¹⁸. Furthermore, the constructed value of parts is determined differently, according to the origin of the parts. If the price for parts of Community origin is unknown or unreliable, the parts will be valued at their production costs¹⁷¹⁹. Selling, general and administrative expenses are not considered. Moreover, insofar as the production costs in the Community are assembly costs, they are considered simply as a «value-added» and, therefore, are not included in the value of the parts of Community origin¹⁷²⁰. In comparison with the parts originating in the dumping country, the parts of Community origin will be underestimated. As a result, the 60/40 provision will be easier fulfilled.

There is one important exception to the 60/40 rule : in no case may circumvention be considered to be taking place where the value added to the parts brought in, during the assembly operation, is greater than 25 % of the manufacturing cost. Under the old rule on assembly activities, the 60/40 provision was applied straightforwardly, without any

¹⁷¹⁷ Council Regulation (EEC) No 1022/88 of 18 April 1988 extending the anti-dumping duty imposed by Regulation (EEC) No 1698/85 to certain electronic typewriters assembled in the Community, *O.J.*, 20 April 1988, No L 101/4 ; Council Regulation (EEC) No 3042/89 of 6 October 1989 extending the anti-dumping duty imposed by Regulation (EEC) No 3651/88 to certain serial-impact dot-matrix printers assembled in the Community, *O.J.*, 10 October 1989, No L 291/52 ; Commission Decision 89/543/EEC of 6 October 1989 accepting undertakings and terminating the investigation under Article 13 (10) of Regulation (EEC) No 2423/88 concerning certain serial-impact dot-matrix printers assembled in the Community, *O.J.*, 10 October 1989, No L 291/57.

¹⁷¹⁸ *Supra*, 161-162.

¹⁷¹⁹ Council Regulation (EEC) No 3205/88 of 17 October 1988 extending the anti-dumping duty imposed by Regulation (EEC) No 535/87 to certain plain paper photocopiers assembled in the Community, *O.J.*, 19 October 1988, No L 284/36 ; Commission Decision 88/519/EEC of 17 October 1988 accepting undertakings and terminating the investigation under Article 13 (10) of Regulation (EEC) No 2423/88 concerning certain plain paper photocopiers assembled in the Community, *O.J.*, 19 October 1988, No L 284/60 ; Commission Decision 89/57/EEC of 20 January 1989 terminating the proceedings under Article 13 (10) of Regulation (EEC) No 2423/88 concerning certain ball bearings assembled in the Community, *O.J.*, 28 January 1989, No L 25/90 ; Council Regulation (EEC) No 3042/89 of 6 October 1989 extending the anti-dumping duty imposed by Regulation (EEC) No 3651/88 to certain serial-impact dot-matrix printers assembled in the Community, *O.J.*, 10 October 1989, No L 291/52 ; Commission Decision 89/543/EEC of 6 October 1989 accepting undertakings and terminating the investigation under Article 13 (10) of Regulation (EEC) No 2423/88 concerning certain serial-impact dot-matrix printers assembled in the Community, *O.J.*, 10 October 1989, No L 291/57.

¹⁷²⁰ Council Regulation (EEC) No 1022/88 of 18 April 1988 extending the anti-dumping duty imposed by Regulation (EEC) No 1698/85 to certain electronic typewriters assembled in the Community, *O.J.*, 20 April 1988, No L 101/4 ; Commission Decision 88/225/EEC of 18 April 1988 terminating the investigation under Article 13 (10) of Regulation (EEC) No 2176/84 concerning certain hydraulic excavators assembled or produced in the Community, *O.J.*, 20 April 1988, No L 101/24 ; Commission Decision 88/227/EEC of 18 April 1988 terminating the investigation under Article 13 (10) of Regulation (EEC) No 2176/84 concerning certain electronic scales assembled or produced in the Community with regard to TEC-Keylard Weegschalen Nederland BV, *O.J.*, 20 April 1988, No L 101/28 ; Council Regulation (EEC) No 3205/88 of 17 October 1988 extending the anti-dumping duty imposed by Regulation (EEC) No 535/87 to certain plain paper photocopiers assembled in the Community, *O.J.*, 19 October 1988, No L 284/36 ; Commission Decision 88/519/EEC of 17 October 1988 accepting undertakings and terminating the investigation under Article 13 (10) of Regulation (EEC) No 2423/88 concerning certain plain paper photocopiers assembled in the Community, *O.J.*, 19 October 1988, No L 284/60. See also : VAN BAEL, I., and BELLIS, J.-F., *Anti-Dumping and other Trade Protection Laws of the EEC*, Bicester, CCH Editions, 1990, 236-237.

exception. There was much criticism as to the old 60/40 provision which was said to be an arbitrary ceiling, especially when compared to the definition of the Community industry in European anti-dumping case law. Indeed, a Community producer having corporate links with a dumping exporter is considered to be part of the Community industry, though he is importing parts of the dumping exporter and his assembly operations create only a value added of 20 to 35 %¹⁷²¹. Through his inclusion in the Community industry, a Community producer may, thus, be granted a safe-conduct to undertake actions for which other producers are sanctioned under the screwdriver factory provision¹⁷²². The fact that the Community industry is interpreted so as to include all the complainant Community producers and to exclude all the non-complaining Community producers¹⁷²³ increases the arbitrariness of the 60/40 provision¹⁷²⁴. Probably, in order to bend this criticism, the exception of the 25 % value added has been introduced.

(iii) *The remedial effects of the duty must be undermined and the assembled product must be dumped*

For anti-dumping duties to be extended to apply to products assembled within the Community, the «classical» conditions for anti-dumping relief must be fulfilled : there must be dumping which causes injury. In the case of assembly operations, however, the dumping has a specific meaning : there will be dumping here if the prices at which the

¹⁷²¹ C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, E.C.R., 1992, I, (1335), 1399 ; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, E.C.R., 1992, I, (1409), 1483 ; C.J.E.C., case C-176/87, 10 March 1992, *Konishiroku Photo Industry Co. Ltd v Council*, E.C.R., 1992, I, (1493), 1526 ; C.J.E.C., case C-177/87, 10 March 1992, *Sanyo Electric Co. Ltd v Council*, E.C.R., 1992, I, (1535), 1568 ; C.J.E.C., case C-179/87, 10 March 1992, *Sharp Corporation v Council*, E.C.R., 1992, I, (1635), 1680 ; Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, O.J., 24 February 1987, No L 54/12 ; VAN BAEL, I, «Japanese investment in the EC : Trojan Horse or hostage ?», *International Financial Law Review*, June 1987, (10), 11. For a critical comment, see : *supra*, 416-417.

¹⁷²² C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, E.C.R., 1992, I, (1335), 1349 (Report for the Hearing : plea in law of the applicant) ; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, E.C.R., 1992, I, (1409), 1432-1433 (Report for the Hearing : plea in law of the applicants) ; C.J.E.C., case C-176/87, 10 March 1992, *Konishiroku Photo Industry Co. Ltd v Council*, E.C.R., 1992, I, (1493), 1499 (Report for the Hearing : plea in law of the applicant) ; C.J.E.C., case C-177/87, 10 March 1992, *Sanyo Electric Co. Ltd v Council*, E.C.R., 1992, I, (1535), 1541 (Report for the Hearing : plea in law of the applicant) ; C.J.E.C., case C-179/87, 10 March 1992, *Sharp Corporation v Council*, E.C.R., 1992, I, (1635), 1647-1648 (Report for the Hearing : plea in law of the applicant) ; VAN GERVEN, G., «New Anti-Circumvention Rules in EEC Anti-Dumping Law», *International Lawyer*, 1988, (809), 820.

¹⁷²³ See : *supra*, 409-426.

¹⁷²⁴ This comparison with the definition of the Community industry does not imply that the 60/40 provision actually applies or should apply to the definition of the Community industry (C.J.E.C., case C-174/87, 10 March 1992, *Ricoh Co. Ltd v Council*, E.C.R., 1992, I, (1335), 1377 (Opinion of Advocate General MISCHO) and 1399 ; C.J.E.C., case C-175/87, 10 March 1992, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd v Council*, E.C.R., 1992, I, (1409), 1482 ; C.J.E.C., case C-176/87, 10 March 1992, *Konishiroku Photo Industry Co. Ltd v Council*, E.C.R., 1992, I, (1493), 1526 ; C.J.E.C., case C-177/87, 10 March 1992, *Sanyo Electric Co. Ltd v Council*, E.C.R., 1992, I, (1535), 1568 ; C.J.E.C., case C-179/87, 10 March 1992, *Sharp Corporation v Council*, E.C.R., 1992, I, (1635), 1680). It only shows that European anti-dumping law is not consistent, as it involves disparate provisions on similar problems.

assembled products are sold, are below the normal value of the dumped products established during the previous anti-dumping investigation which was terminated by the imposition of the definitive anti-dumping duty. Thus, the normal value used is not the price at which the products assembled within the Community are sold on the domestic market of the dumping country, nor their constructed value. Such normal value standards, however, are impracticable if it is the intention to sanction the dumping of products assembled within the Community. Indeed, those products will probably not be sold on the domestic market of the dumping exporter. The use of the constructed value will probably seldom result in a finding of dumping since the dumping of the assembled products is caused by the dumping of the parts of it.

With regard to the requirement of the existence of injury, it must not be shown that the assembly cause injury to the Community industry, but prevents the Community to benefit from the protection granted by the anti-dumping duty.

2.4.2.2. Evaluation

2.4.2.2.1. Economic point of view

The screwdriver factory provision is criticized for its alleged effect on direct foreign investments within the Community. It is argued that this provision will impede gradual foreign investments within the Community, implying the following steps : first the imports of the product, further the assembly of foreign parts in the Community, next the replacement of these by Community parts, leading finally to full production in the Community¹⁷²⁵. Commissioner W. DE CLERCQ, however, is «convinced that this measure will not discourage investment but, on the contrary, will encourage investment involving high value added and a transfer of technology»¹⁷²⁶. Both points of view are not contradictory. From a purely economic point of view, they may be both right. Without the screwdriver factory provision, anti-dumping measures may cause the relocation of assembly activities which may ultimately result in a relocation of in-depth production activities into the Community. The screwdriver factory provision, on the other hand, deters direct foreign investments in simple assembly activities in the Community, but may induce in-depth direct foreign investments.

¹⁷²⁵ VAN BAEL, I, and BELLIS, J.-F., *Anti-Dumping and other Trade Protection Laws of the EEC*, Bicester, CCH Editions, 1990, 232 ; VAN GERVEN, G., «New Anti-Circumvention Rules in EEC Anti-Dumping Law», *International Lawyer*, 1988, (809), 827.

¹⁷²⁶ Press release of W. DECLERQ, EC Commissioner for External Relations, 25 June 1987, quoted in : VAN BAEL, I, and BELLIS, J.-F., *Anti-Dumping and other Trade Protection Laws of the EEC*, Bicester, CCH Editions, 1990, 232, note 33 ; VAN GERVEN, G., «New Anti-Circumvention Rules in EEC Anti-Dumping Law», *International Lawyer*, 1988, (809), 827.

Nevertheless, the screwdriver factory provision should not be seen as a guarantee for in-depth direct foreign investments in the Community. Not only the effect of the anti-dumping duty and its possible extension to assembly activities in the Community, but also production costs (e.g., wages) and other circumstances determine the choice between direct exports (or mere assembly activities within the Community) and in-depth direct foreign investments in the Community. In other words, the exporter will compare the profits in all the possible situations - exportation, simple assembly within the Community and in-depth direct foreign investments within the Community, or direct foreign investments in third countries - and will choose the situation yielding the highest profit¹⁷²⁷.

Whether the Community wants to attract in-depth direct foreign investments rather than mere assembly activities, is a pure political choice¹⁷²⁸. As to this choice, the Community authorities should be aware that direct foreign investments require a climate of confidence and legal certainty. Investments are long-term decisions based upon expectations about the future. Only if prospective investors are confident that there will be a climate in which their expectations will be honoured, they will invest. Since ever increasing protectionist policies favouring the Community producers at the expense of direct foreign investments, do not create such a climate of confidence, direct foreign investments, from simple assembly up to in-depth investments, will be deterred¹⁷²⁹.

The Community authorities should also be aware that trade-restrictive measures, such as the extension of anti-dumping duties in accordance with the screwdriver factory provision, prevent production allocation on the basis of comparative advantages. They distort production location not only between the Community and the exporting country, but also within the Community, merely because Community resources will switch from production sectors in which the Community has a comparative advantage, to production sectors in which the Community does not have a comparative advantage. Even within the production sector distortions will appear. Indeed, whereas producers who are related or associated with an exporter subjected to a definitive anti-

¹⁷²⁷ See : MOTTA, M., «Multinational firms and the tariff-jumping argument. A game theoretic analysis with some unconventional conclusions», *European Economic Review*, 1992, (1557), 1557-1571.

For example, following the imposition of anti-dumping duties, in *ball bearings from Japan and Singapore*, a multinational company with locations in Singapore embarked upon massive expansion of its manufacture in Thailand. Only when some years later an anti-dumping duty was also imposed on ball bearings from Thailand, it began producing ball bearings in the Community (Council Regulation (EEC) No 2553/93 of 13 September 1993 amending Regulation (EEC) No 2089/84 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 18 September 1993, No L 235/3).

¹⁷²⁸ The Community seems to prefer foreign investments involving high value added, see : Answer of the Commission to written question No 540/88, *O.J.*, 12 June 1989, No C 145/13.

¹⁷²⁹ VAN BAEL, I., «Japanese investment in the EC : Trojan Horse or hostage ?», *International Financial Law Review*, June 1987, (10), 14.

dumping duty and who assemble or produce the finished product, come under the screwdriver factory provision, the Community producers assembling the like product do not. This unequal treatment does not induce a favourable climate for attracting direct foreign investments¹⁷³⁰ either¹⁷³¹.

2.4.2.2.2. Legal point of view

The unequal treatment between Community producers and producers assembling products by using parts originating in a dumping country caused by the old screwdriver factory provision has rightly been condemned by a GATT panel which, at a request of Japan, in accordance with Article XXIII of GATT, investigated whether the screwdriver factory provision was conform with GATT. The GATT panel started its investigation from the assumption that, as had been argued by the Community, the extension of anti-dumping duties does not fall within GATT anti-dumping law and could, therefore, not be justified on that basis¹⁷³². It found the extension of anti-dumping duties contrary to Article III(2) GATT, under which it is forbidden to subject «the products of the territory of any contracting party imported into the territory of any other contracting party (...), directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products». The GATT panel held that the extension of anti-dumping duties indirectly imposes an internal charge in excess of that applied to like domestic products on parts and materials originating in the dumping country indirectly. Under Article XX(d) GATT, the contracting parties may adopt or enforce measures «necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement (...)». However, it provides no justification for the breach of Article III(2) GATT, because the relocation of assembly activities complies with anti-dumping law. For the same reason, Article XX(d) GATT did not offered a justification either for the acceptance of undertakings on assembled products. Those undertakings, in which the assembling firms undertake to limit the use of imported parts and materials, were found to be contrary to Article III(4) GATT, because they were considered to come under the definition of «all laws, regulations or requirements affecting (the) internal sale» of the imported parts and materials¹⁷³³.

¹⁷³⁰ VAN BAELE, I., «Japanese investment in the EC : Trojan Horse or hostage ?», *International Financial Law Review*, June 1987, (10), 14.

¹⁷³¹ See also : BOURGEOIS, J.H.J., «EC Anti-dumping Enforcement - Selected Second Generations Issues», in *Antitrust and Trade Policy in the United States and the European Community*, HAWK, B.E. (ed.), New York, Bender, 1986, (563), 600, where it is held that anti-dumping law is not designed to pursue policies with respect to foreign investment.

¹⁷³² See also : BOURGEOIS, J.H.J., «EC Anti-dumping Enforcement - Selected Second Generations Issues», in *Antitrust and Trade Policy in the United States and the European Community*, HAWK, B.E. (ed.), New York, Bender, 1986, (563), 598-599.

¹⁷³³ GATT Doc. No. L/6657, 22 March 1990.

The GATT panel found only the extension of anti-dumping duties and the acceptance of undertakings on assembled products as being contrary to GATT law. As such, the screwdriver factory provision, however, was not considered to be inconsistent with GATT law, because that provision does not mandatorily impose the extension of anti-dumping duties or undertakings. Nevertheless, the GATT panel suggested that the screwdriver factory provision be withdrawn.

The Community authorities decided not to withdraw it, but made clear that any alteration of it would be contingent upon the amendment of the GATT Anti-dumping Code to address the issue of circumvention in the Uruguay Round negotiations¹⁷³⁴. They decided not to apply the screwdriver factory provision any longer¹⁷³⁵. In the meantime, however, the anti-dumping duties imposed and the undertakings accepted on the basis of the screwdriver factory provision remained in force¹⁷³⁶. Thereby, the European anti-dumping authorities have done a good stroke of business. The screwdriver factory provision, intended to put pressure on the Japanese government to open up its market for Community products, has been applied exclusively against Japanese exporters¹⁷³⁷.

The Uruguay Round, however, did not reach an agreement on anti-circumvention, but referred the problem to the GATT Committee on Anti-Dumping Practices¹⁷³⁸. On the occasion of the adaptation of EC anti-dumping law to the new GATT Anti-dumping Code, the Community authorities found it necessary to introduce a new provision to deal with practices, such as simple assembly in the Community, which have as their main aim the circumvention of anti-dumping measures. They explained their point of view by referring to «the failure of the multilateral negotiations (*i.e.*, the Uruguay Round) so far» and presented the new screwdriver factory provision as «pending the outcome of the referral to the GATT Anti-dumping Committee» (preamble to the basic EC Regulation). With the new provision they try to meet the remarks made by the GATT panel. In particular, the new requirement that the assembled products must be dumped and must cause injury to the Community industry, should be viewed from this

¹⁷³⁴ PETERSMANN, E.-U., «GATT Dispute Settlement Proceedings in the Field of Antidumping Law», *Common Market Law Review*, 1991, (69), 84; STEWART, T.P. (ed.), *The GATT Uruguay Round. A Negotiating History (1986-1992)*, Deventer, Kluwer Law and Taxation Publishers, 1993, vol. II, 1625.

¹⁷³⁵ SMEETS, M., «Globalisation and the Trade Policy Response», *Journal of World Trade*, 1990/5, (57), 67.

¹⁷³⁶ For instance, in *electronic weighing scales from Japan*, such an undertaking was repealed in 1993 because, since its acceptance, no circumvention had taken place (Council Regulation (EEC) No 993/93 of 26 April 1993 imposing a definitive anti-dumping duty on imports of certain electronic weighing scales originating in Japan, *O.J.*, 29 April 1993, No L 104/4)

¹⁷³⁷ VAN BAEL, I., «Japanese investment in the EC : Trojan Horse or hostage ?», *International Financial Law Review*, June 1987, (10), 10-11.

¹⁷³⁸ Final Act Embodying the Uruguay Round of Multilateral Trade Negotiations, Part III.

perspective. By requiring that the assembled products are dumped and that their dumping inflicts injury upon the Community industry, the Community authorities try to represent the screwdriver factory provision as a genuine anti-dumping provision. Indeed, under GATT anti-dumping law, anti-dumping duties may only be imposed when injurious dumping is being established. However, their attempt will not succeed. First, the dumping margin is not determined on the basis of a comparison between the normal value of the like product and the export price of the dumped product. Instead, the dumping is determined on the basis of a comparison between the normal value previously established for the like product and the resale price of the assembled product. That resale price does not meet the definition of the export price, *i.e.*, the price of the product sold from the exporting country to the Community (Article 2(8) basic EC Regulation), and the normal value is not the normal value of the assembled product sold on the domestic market of the exporting country. Second, the injury is defined as the undermining of the remedial effects of the anti-dumping duty by the sale of the assembled product on the Community market. However, GATT anti-dumping law does not define injury as a situation in which the Community industry is denied the effects of anti-dumping relief (see : Article 3 GATT Anti-dumping Code). Only within the framework of a review proceeding, it allows the continued imposition of anti-dumping duties if «injury would be likely to continue or recur if the duty were removed or varied» (Article 11.2. GATT Anti-dumping Code). However, the screwdriver factory provision does not concern the effects of the removal of the anti-dumping duty on the situation of the Community industry, but rather the absence of the expected effects of the anti-dumping duty. Hence, the screwdriver factory provision is not an anti-dumping provision and, as it treats the Community producers and the producers carrying out assembly operations, differently, it is not consistent with GATT just as the old screwdriver factory provision was.

2.4.3. *Anti-absorption measures*

In order to avoid the effects of the anti-dumping duty on the sales prices of his product on the Community market, the dumping exporter may bear the burden of the anti-dumping duty, rather than shift it to the Community consumers. The anti-dumping duty then only affects the profits of the dumping exporter. It does not remedy the injury caused to the Community industry.

European anti-dumping law wants sales prices of the dumping exporter on the Community market to increase by an amount corresponding to the anti-dumping duty¹⁷³⁹. Therefore, EC anti-dumping law allows to recalculate the dumping margin if it is demonstrated that the lack of

¹⁷³⁹ Nevertheless, the European anti-dumping authorities dare use the argument that there are possibilities for dumping exporters to absorb anti-dumping duties to a large extent, in order to show that high anti-dumping duties will not drive the dumping exporters out of the Community market (Commission Regulation (EEC) No 2172/93 of 30 July 1993 imposing provisional anti-dumping duties on imports of ethanolamine originating in the United States of America, *O.J.*, 4 August 1993, No L 195/5).

sufficient movement in the prices of the dumped product in the Community, *i.e.*, the absence of an increase in those prices by the amount of the anti-dumping duty, is due to a fall in the export prices. If such is the case, the anti-dumping duty may be amended (Article 12 basic EC Regulation). Though EC anti-dumping law is silent on this point, probably the rule that the amount of the anti-dumping duty must not exceed the dumping margin and should equal the injury margin if the latter is smaller than the dumping margin (Article 9(4) basic EC Regulation), applies.

Under ECSC anti-dumping law, on the other hand, an additional anti-dumping duty may be imposed to compensate for the amount of the anti-dumping duty borne by the dumping exporter, whenever the Community interests call for intervention (Article 13(11) basic ECSC Decision). The amount of the additional duty thus can never be higher than the amount of the anti-dumping duty¹⁷⁴⁰.

Mathematically, the total amount of the anti-dumping and additional duty together can exceed the injury margin and even the dumping margin. Under European anti-dumping law, though, the amount of the anti-dumping duty must not exceed the dumping margin and should even be less if the injury margin is lower (Article 13(3) basic ECSC Decision). European anti-dumping law does not state whether it considers the additional duty to be an ordinary anti-dumping duty. If it does, then the additional duty should be below both the dumping margin and the injury margin. However, it will be impossible to apply the injury margin. Indeed, if it would be subject to the latter, then an additional duty might never be imposed without the injury margin being exceeded, since the amount of anti-dumping duty equals already the injury margin. Consequently, in respect of additional duties, European anti-dumping law probably incorporates an implicit derogation from the rule that the injury margin must not be exceeded. As GATT anti-dumping law does not prohibit the amount of the anti-dumping duties from exceeding the injury margin, this derogation is legal. On the other hand, the additional duty must not deviate from the ceiling of the dumping margin since GATT anti-dumping law prohibits the amount of the duties from exceeding the dumping margin (Article 9.3. GATT Anti-dumping Code) and does not require the dumping prices to increase by the amount of the anti-dumping duty. Even if European anti-dumping law would consider the additional duty not as an ordinary anti-dumping duty, it would be at variance with GATT. In that case, the additional duty would be a customs duty the imposition and increase of which are prohibited by GATT (Article II GATT). Moreover, as it applies only in

¹⁷⁴⁰ Council Regulation (EEC) No 1607/92 of 22 June 1992 amending Regulation (EEC) No 2200/90 by imposing an additional anti-dumping duty on imports of silicon metal originating in the People's Republic of China, *O.J.*, 25 June 1992, No L 170/1 ; VAN BAEL, I., and BELLIS, J.-F., *Anti-Dumping and other Trade Protection Law of the EEC*, Bicester, CCH Editions, 1990, 176.

respect of imports coming from a limited number of countries, it would not conform to the principle of non-discrimination (Article II GATT)¹⁷⁴¹.

It is not yet clear which interpretation the European anti-dumping authorities uphold. Probably, they consider the additional duty as an anti-dumping duty since the imposition of an additional duty is effectuated by an increase in the amount of the definitive anti-dumping duty; consequently, the dumped imports are subject to a higher anti-dumping duty and not to two different kinds of duty¹⁷⁴². In the few cases which have resulted in the imposition of an additional duty, the dumping margin was not exceeded¹⁷⁴³ or it was impossible to ascertain whether it was exceeded¹⁷⁴⁴.

¹⁷⁴¹ In the same sense, see: BELLIS, J.-F., «The EEC Antidumping System», in *Antidumping Law and Practice. A Comparative Study*, JACKSON, J.H., and VERMULST, E.A. (eds.), New York, Harvester Wheatsheaf, 1990, (41), 60.

E.A. VERMULST and J.J. HOOIJER point out that there is no obligation in GATT anti-dumping law to pass on anti-dumping duties to customers and, therefore, hold the GATT-legality of the European anti-absorption rules is unclear («Annotation on Case C-170/89, *Bureau Européen des Unions de Consommateurs v. Commission*, Judgment of 28 November 1991; Case C-105/90, *Goldstar Co. Ltd. v. Council*, Judgment of 13 February 1992; Case C-188/88, *NMB (Deutschland) GmbH, NMB Italia Srl, NMB (UK) Ltd. v. Commission of the European Communities*, Judgment of 10 March 1992; Case 171/87, *Canon Inc. v. Council*; Case 172/87, *Mita Industrial Co. Ltd. v. Council*; Case 174/87, *Ricoh Company Ltd. v. Council*; Case 175/87, *Matsushita Electric Industrial Co. Ltd and Matsushita Electric Trading Co. Ltd. v. Council*; Case 176/87, *Konishiroky Photo Industry Co. Ltd. v. Council*; Case 177/87, *Sanyo Electric Co. Ltd. v. Council*; Case 178/87, *Minolta Camera Co. Ltd. v. Council*; Case 179/87, *Sharp Corporation v. Council*, Judgments of 10 March 1992; Case C-358/89, *Extramet Industrie SA v. Council*, Judgment of 11 June 1992», *Common Market Law Review*, 1993, (115), 171, note 29).

¹⁷⁴² Council Regulation (EEC) No 1607/92 of 22 June 1992 amending Regulation (EEC) No 2200/90 by imposing an additional anti-dumping duty on imports of silicon metal originating in the People's Republic of China, *O.J.*, 25 June 1992, No L 170/1; Council Regulation (EEC) No 2346/93 of 23 August 1993 amending Regulation (EEC) No 3308/90 by imposing an additional anti-dumping duty on imports of woven polyolefin sacks originating in the People's Republic of China, *O.J.*, 25 August 1993, No L 215/1.

¹⁷⁴³ See: *silicon metal from the People's Republic of China*:

- dumping margin = 38.73 % = 457.4 ECU per tonne;
- definitive anti-dumping duty = 198 ECU per tonne;
- additional + definitive anti-dumping duty = 396 ECU per tonne;

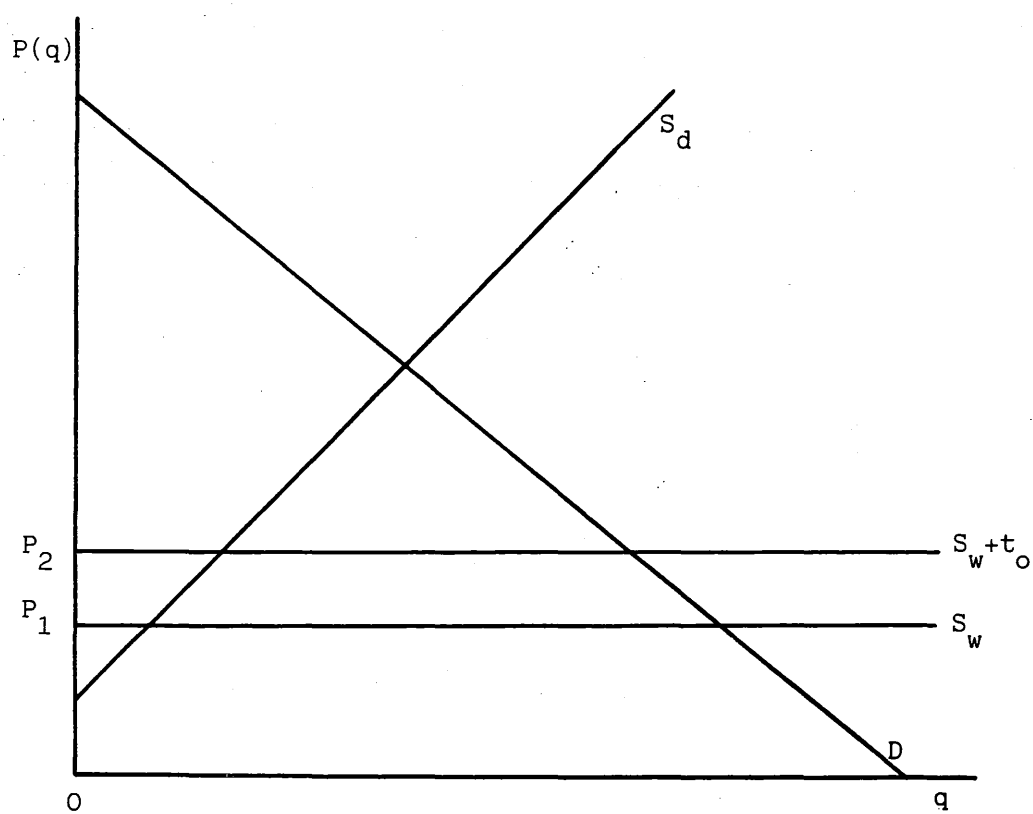
(Council Regulation (EEC) No 2200/90 of 27 July 1990 imposing a definitive anti-dumping duty on imports of silicon metal originating in the People's Republic of China, *O.J.*, 28 July 1990, No L 198/57; Council Regulation (EEC) No 1607/92 of 22 June 1992 amending Regulation (EEC) No 2200/90 by imposing an additional anti-dumping duty on imports of silicon metal originating in the People's Republic of China, *O.J.*, 25 June 1992, No L 170/1; own calculations).

¹⁷⁴⁴ It is impossible to ascertain whether the dumping margin is exceeded in *woven polyolefin sacks originating in the People's Republic of China* because the dumping margin and the duty are expressed at a different level of trade:

- dumping margin = 80.8 % of the total cif value at the Community frontier;
- definitive anti-dumping duty = 43.4 % of the net, free-at-Community frontier price;
- additional + definitive anti-dumping duty = 85.7 % of the net, free-at-Community frontier price;

(Commission Regulation (EEC) No 2051/90 of 17 July 1990 imposing a temporary anti-dumping duty on imports of woven polyolefin bags originating in the People's Republic of China, *O.J.*, 19 July 1990, No L 187/36 (corrigendum, *O.J.*, 20 September 1990, No L 256/38); Council Regulation (EEC) No 3308/90 of 15 November 1990 imposing a definitive anti-dumping duty on imports of woven polyolefin sacks originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty on such imports, *O.J.*, 17 November 1990, No L 318/2; Council Regulation (EEC) No 2346/93 of 23 August 1993 amending Regulation (EEC) No 3308/90 by imposing an additional anti-dumping duty on imports of woven polyolefin sacks originating in the People's Republic of China, *O.J.*, 25 August 1993, No L 215/1).

Figure 19



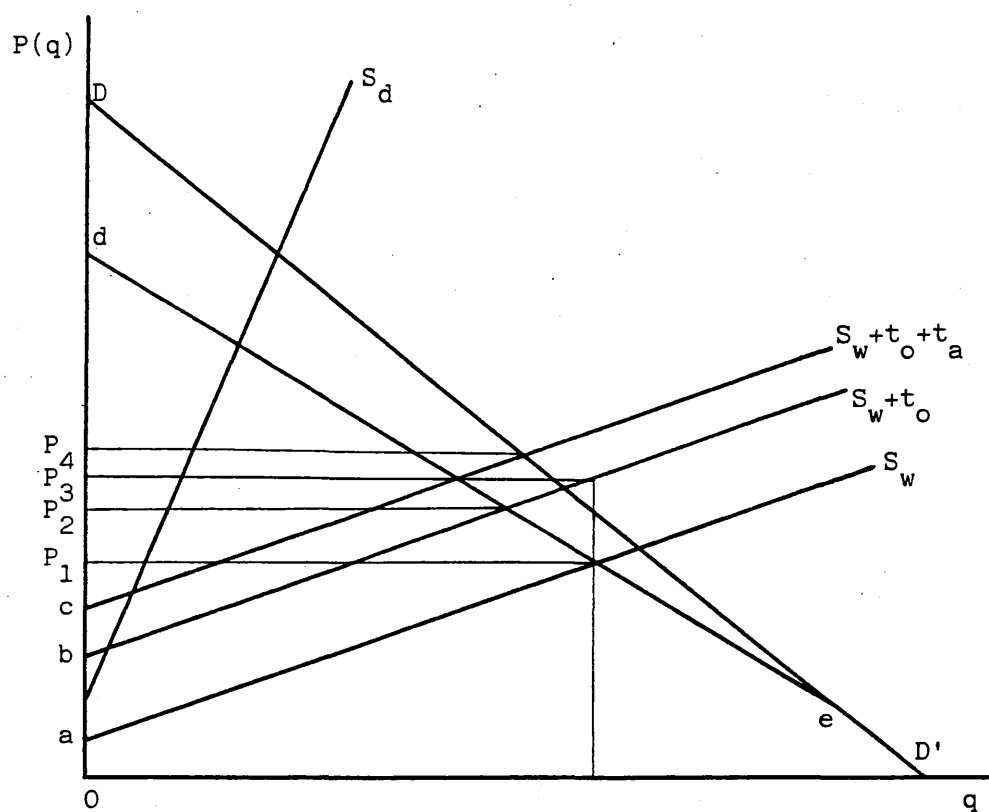
The scope of the provision of European anti-dumping law allowing the imposition of additional duties is probably wide. For in product markets where the Community is a price-maker, the exporter is likely to bear a part of the anti-dumping duty. Only in product markets where the Community is a price-taker, the exporter will shift the entire burden to the Community consumers.

In figure 19 perfect competition is assumed. The Community is assumed to be a price-taker, *i.e.*, the Community is assumed to be unable to influence, by means of the quantity it purchases, the price level at which exporters offer their products on the Community market. Therefore, the supply curve of the dumping exporters is given by the horizontal line S_w , whereas D and S_d represent, respectively, the Community consumers' demand and the Community producers' supply. Without there being any anti-dumping duty, the price paid for the like product on the Community market equals OP_1 . If a specific anti-dumping duty¹⁷⁴⁵ t_0 , equal to P_1P_2 , is imposed, the supply curve of the dumping exporter shifts to $S_w + t_0$. As a result, the price at which the dumping exporters sell the product on the Community market, goes up by the same amount P_1P_2 . The full amount of the anti-dumping duty, thus, is shifted to the Community consumers and Article 13(11) basic ECSC Decision cannot be applied.

However, in the case of price-makship Article 13(11) basic ECSC Decision always applies. The case of price-makship, *i.e.*, the case where the Community may influence the price at which the like products are offered on the Community market by means of the quantity it purchases, is represented in figure 20. The Community consumers' demand curve and the Community producers' supply curve are provided respectively by the curves DD' and S_d . If the Community producers are assumed to supply first the Community market, the dumping exporters are faced with a residual demand curve represented by the curve deD' , obtained by deducting S_d from DD' . In case of perfect competition, the price at which the dumping exporters offer the product, is determined by the intersection between the residual demand curve, deD' , and their supply curve, S_w . Thus, without anti-dumping duties, the price equals OP_1 . If a specific anti-dumping duty t_0 , equal to ab , is imposed, the dumping exporters' supply curve shifts upwards to $S_w + t_0$. If the full amount ab of the specific anti-dumping duty t_0 is shifted to the Community consumers, the price will rise from OP_1 to OP_3 . However, at the price OP_3 the Community market is faced with excess supply : at that price, the dumping exporters want to sell more than the Community consumers are willing to buy. Equilibrium on the Community market is reached at the price OP_2 as determined by the intersection between the residual demand curve deD' and the new supply curve $S_w + t_0$. Thus, the dumping exporters bear P_2P_3 of the burden of the anti-dumping duty t_0 , whereas the full burden of the anti-dumping duty t_0 amounts to P_1P_3 . In order to obtain a price increase of P_1P_3 , an additional duty t_a amounting to bc must be imposed. Then the supply curve shifts to $S_w + t_0 + t_a$ and the price on the Community market increases to OP_3 . Thus, after the imposition of the additional anti-dumping duty t_a , the Community consumers bear P_1P_3 which corresponds to the burden of the original anti-dumping duty t_0 . However, the full burden of the combination of the original and the additional anti-dumping duty amounts to P_1P_4 . Consequently, the dumping exporter bears again part of the burden of the anti-dumping duty, namely P_3P_4 .

¹⁷⁴⁵ The analysis also holds with regard to *ad valorem* anti-dumping duties. Only if variable anti-dumping duties are imposed, it will never be necessary to apply Article 13(11) basic ECSC Decision : since variable anti-dumping duties ensure the price of the like product on the Community market to be at least equal to the minimum price used as basis for the variable anti-dumping duty, the exporter can never bear any burden of a variable anti-dumping duty.

Figure 20



In both the figures 19 and 20 the only change with regard to the original situation was the introduction of anti-dumping duties : the dumping exporters did not alter their pricing policy, nor did their production costs change. In such case, the dumping exporters could not invoke any defence against the imposition of an additional duty. The only defence accepted under European anti-dumping law, is the absence of a price increase equal to the amount of the anti-dumping duty because of a reduction in the costs and/or profits of the importer for the product (Article 13(11)(c) basic ECSC Decision)¹⁷⁴⁶. In view of the analysis made in figure 20, the basis for the defence is clearly too narrow. The fact that the price-increasing effects of anti-dumping duties on the supply side (represented by the upward shift of the dumping exporter's supply curve in figure 20) are counterbalanced by their price-decreasing effects on the demand side, should be accepted as a defence. Indeed, the price increase caused by an anti-dumping duty reduces the Community consumers' demand and that reduced demand decreases the price level. Also other defences should be accepted, such as, for instance, the effect of increased competition on prices and the cyclical development of the price level¹⁷⁴⁷.

¹⁷⁴⁶ The following have not been upheld :

- the argument that the lower quality of the dumped products justified a price lower than that of the same product coming from other countries because the alleged difference in quality could not justify the decrease in the price of the dumped products and the difference between the price of the dumped products and that of identically the same product coming from other countries had increased (Council Regulation (EEC) No 1607/92 of 22 June 1992 amending Regulation (EEC) No 2200/90 by imposing an additional anti-dumping duty on imports of silicon metal originating in the People's Republic of China, *O.J.*, 25 June 1992, No L 170/1) ;
- the argument that the decrease in the price of the dumped products could be linked to an overall trend in the market because the price of the dumped products decreased, whereas the price of other imports of the like product coming from other countries remained stable over the same period (Council Regulation (EEC) No 1607/92 of 22 June 1992 amending Regulation (EEC) No 2200/90 by imposing an additional anti-dumping duty on imports of silicon metal originating in the People's Republic of China, *O.J.*, 25 June 1992, No L 170/1) ;
- the argument that the cost of the raw material in the exporting NME had declined because the normal value of NME countries has to be based on the normal value of the like product in a reference country (Council Regulation (EEC) No 2346/93 of 23 August 1993 amending Regulation (EEC) No 3308/90 by imposing an additional anti-dumping duty on imports of woven polyolefin sacks originating in the People's Republic of China, *O.J.*, 25 August 1993, No L 215/1).

The effect of fluctuations in the exchange rates since the imposition of the anti-dumping duty are neutralised by using the same exchange rate as for the calculation of the prices in the original investigation period (Council Regulation (EEC) No 2346/93 of 23 August 1993 amending Regulation (EEC) No 3308/90 by imposing an additional anti-dumping duty on imports of woven polyolefin sacks originating in the People's Republic of China, *O.J.*, 25 August 1993, No L 215/1).

¹⁷⁴⁷ In *ethanolamine from the United States of America*, the Commission pointed out that, notwithstanding the high anti-dumping duties proposed, there was no danger that the prices would be kept unjustifiably high given the cyclical low level of the prices of the imports of the product involved and given the high degree of competition from producers in other third countries (Commission Regulation (EEC) No 2172/93 of 30 July 1993 imposing provisional anti-dumping duties on imports of ethanolamine originating in the United States of America, *O.J.*, 4 August 1993, No L 195/5).

3. UNDERTAKINGS

3.1. CONTENTS

Two types of undertakings may be distinguished : price undertakings and quantity undertakings. Under the former, prices are revised and, under the latter, exports are ceased to the extent that the dumping margin or the injurious effects of the dumping are eliminated (Article 8.1. GATT Anti-dumping Code ; Article 8(1) basic EC Regulation ; Article 10(2)(b) basic EC legislation). In practice, there appears to be a clear preference for price undertakings in European anti-dumping case law¹⁷⁴⁸. However, undertakings to reduce exports to a level at which there will be no further injury, have also been accepted¹⁷⁴⁹. The European anti-dumping authorities usually do

¹⁷⁴⁸ In *binder and baler twine from Brazil*, quantitative undertakings were accepted because, in the absence of an international spot quotation concerning sisal fibre, variations in price of the prime material cannot be monitored and create a factor of unpredictability as to whether a price undertaking would still be effective shortly after its acceptance (Commission Decision 93/521/EEC of 3 September 1993 accepting undertakings given in connection with the anti-dumping review in respect of imports of binder and baler twine originating in Brazil, terminating the anti-subsidy review proceeding with regard to these imports and terminating the anti-dumping and anti-subsidy review in respect of imports of binder and baler twine originating in Mexico, *O.J.*, 8 October 1993, No L 251/28).

STEGEMANN, K., «EC Anti-Dumping Policy : Are Price Undertakings a Legal Substitute for Illegal Price Fixings», *Weltwirtschaftliches Archiv*, 1990, (268), 269 and 282.

¹⁷⁴⁹ Commission Decision 86/639/ECSC of 23 December 1986 accepting an undertaking given in connection with the anti-dumping investigation concerning imports of certain sheets and plates, of iron or steel, originating in Yugoslavia and terminating the investigation, *O.J.*, 31 December 1986, No L 371/84 ; Council Decision 87/104/EEC of 9 February 1987 accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China, and terminating the investigation, *O.J.*, 14 February 1987, No L 46/45 ; Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, *O.J.*, 7 November 1987, No L 317/1 ; Commission Decision No 2131/88/ECSC of 18 July 1988 imposing a definitive anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Yugoslavia and definitively collecting the provisional anti-dumping duty imposed on those imports, *O.J.*, 19 July 1988, No L 188/14 ; Commission Regulation (EEC) No 3052/88 of 29 September 1988 imposing a provisional anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China, *O.J.*, 4 October 1988, No L 272/16 ; Council Decision 88/576/EEC of 14 November 1988 repealing Decision 87/104/EEC accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China and terminating the investigation, *O.J.*, 18 November 1988, No L 312/33 ; Commission Decision 93/521/EEC of 3 September 1993 accepting undertakings given in connection with the anti-dumping review in respect of imports of binder and baler twine originating in Brazil, terminating the anti-subsidy review proceeding with regard to these imports and terminating the anti-dumping and anti-subsidy review in respect of imports of binder and baler twine originating in Mexico, *O.J.*, 8 October 1993, No L 251/28 ; Commission Decision 94/202/EC of 9 March 1994 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of silicon carbide originating in the People's Republic of China, Norway, Poland and the former USSR and terminating the proceeding against imports originating in Norway and several republics previously part of the former USSR, *O.J.*, 13 April 1994, No L 94/32 ; Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries ; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24. See also : Council Regulation (EEC) No 2109/85 of 25 July 1985 imposing a definitive anti-dumping duty on imports of certain kinds of polystyrene sheet originating in Spain, *O.J.*, 30 July 1985, No L 198/1 ; C.J.E.C., joined cases 133/87 and 150/87, 14 March 1990, *Nashua Corporation v. Commission and Council*, E.C.R., 1990, I, (719), 742.

Contra : BOUDANT, J., *L'anti-dumping communautaire*, Paris, Economica, 1991, 189, according to whom quantity undertakings must cease all imports. See also : BELLIS, J.-F., «The EEC Antidumping System», in *Antidumping Law and Practice. A Comparative Study*, JACKSON, J.H., and VERMULST, E.A. (eds.), New York, Harvester Wheatsheaf, 1990, (41), 54.

not justify their preference for either price undertakings or quantity undertakings. Just once, they have referred to the fluctuation in prices in order to explain why they preferred a quantity undertaking ; because of those price fluctuations, an undertaking based on a minimum price level, could have ended up excluding the dumped imports from the Community market¹⁷⁵⁰.

GATT and EC anti-dumping law also stipulate that the exporter from whom an undertakings has been accepted, must provide, periodically, information relevant to the fulfilment of such undertaking, and must permit verification to pertinent data (Article 8.6. GATT Anti-dumping Code ; Article 8(7) basic EC Regulation) ; however, even under ECSC anti-dumping law, which is silent in this respect, undertakings provide that regular (*e.g.*, half-yearly) reports on quantities and prices of exports (unit prices and total value) of the product to the Community must be submitted by the exporters to the Commission¹⁷⁵¹.

GATT and European anti-dumping case law do not provide much further information about the contents of undertakings. The content of undertakings appears to be confidential and cannot be disclosed (Article 6 GATT Anti-dumping Code ; Article 19 basic EC Regulation ; Article 8 basic ECSC Decision)¹⁷⁵². However, GATT and EC anti-dumping law require that the non-

¹⁷⁵⁰ Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries ; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24.

¹⁷⁵¹ Commission Regulation (EEC) No 2444/83 of 29 August 1983 imposing a provisional anti-dumping duty on certain imports of hardboard originating in Czechoslovakia, Poland and Sweden and re-opening the anti-dumping proceedings concerning these imports, *O.J.*, 31 August 1983, No L 241/9 ; Commission Regulation (EEC) No 558/84 of 29 February 1984 imposing a provisional anti-dumping duty on imports of hardboard originating in the Soviet Union and re-opening the anti-dumping proceeding concerning those imports, *O.J.*, 2 March 1984, No L 61/21 ; Commission Regulation (EEC) No 14/88 of 23 December 1987 imposing a provisional anti-dumping duty on imports of roller chains for cycles originating in the People's Republic of China, *O.J.*, 6 January 1988, No L 3/5 ; Commission Decision No 229/88/ECSC of 25 January 1988 imposing a provisional anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Yugoslavia, *O.J.*, 28 January 1988, No L 23/13 ; Commission Decision 93/157/EEC of 4 March 1993 accepting undertakings offered by three producers in connection with the anti-dumping proceeding concerning certain imports of electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea, *O.J.*, 18 March 1993, No L 66/37 ; Commission Decision 93/521/EEC of 3 September 1993 accepting undertakings given in connection with the anti-dumping review in respect of imports of binder and baler twine originating in Brazil, terminating the anti-subsidy review proceeding with regard to these imports and terminating the anti-dumping and anti-subsidy review in respect of imports of binder and baler twine originating in Mexico, *O.J.*, 8 October 1993, No L 251/28 ; Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries ; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24 ; Commission Regulation (EC) No 1418/94 of 20 June 1994 imposing a provisional anti-dumping duty on imports of artificial corundum originating in the People's Republic of China, *O.J.*, 22 June 1994, No L 155/8 ; Commission Decision 94/825/EC of 12 December 1994 accepting an undertaking offered in connection with the anti-dumping proceeding concerning imports of urea ammonium nitrate solution originating in Bulgaria and Poland, *O.J.*, 31 December 1994, No L 350/115 ; Answer of the Commission to written question No 280/87, *O.J.*, 5 November 1987, No C 295/18 ; Answer of the Commission to written question No 2522/86, *O.J.*, 28 January 1988, No C 23/7.

¹⁷⁵² See : Answer of the Commission to written question No 658/80, *O.J.*, 23 October 1980, No C 275/18 ; Answer of the Commission to written question No 1609/81, *O.J.*, 13 April 1981, No C 92/29 ; STEGEMANN, K., «EC Anti-Dumping Policy : Are Price Undertakings a Legal Substitute for Illegal Price Fixing», *Weltwirtschaftliches Archiv*, 1990, (268), 286.

confidential part of the undertaking is made available (under EC anti-dumping law, though, only to the interested parties to the investigation, *i.e.* the exporters, importers and representative associations of importers or exporters, the representatives of the exporting country and the complainants, and probably the representative users and representative consumer organizations which have made themselves known as well (Articles 5(11) and 21 basic EC Regulation)) (Article 12.2.3. GATT Anti-dumping Code ; Article 8(4) basic EC Regulation).

The information made available to the public is usually limited to the standard statement that the undertaking offered is acceptable, because it increases the export prices of the product to a level necessary to eliminate the injury caused by the dumping and that the price increases induced by the undertaking do not exceed the dumping margin (see : Article 8.1. GATT Anti-dumping Code ; Article 8(1) basic EC Regulation ; Article 10(2)(b) basic ECSC Decision). To that end the exporters undertake to comply with certain minimum export prices. Those minimum prices are determined on the basis of the price necessary to cover the Community producers' production costs and a reasonable profit margin¹⁷⁵³. They, thus, bear no relationship to the normal value determination, the latter being based on actual data on prices and costs of the dumping producer/exporter¹⁷⁵⁴. Nevertheless, they frequently equal the normal value established by the European anti-dumping authorities¹⁷⁵⁵.

The contents of undertakings seems not confined to the determination of ceilings on prices and quantities. They also comprise the following elements :

¹⁷⁵³ Commission Decision 88/47/EEC of 26 January 1988 accepting an undertaking given in connection with the anti-dumping review proceeding concerning imports of a herbicide originating in Romania, *O.J.*, 30 January 1988, No L 26/107.

¹⁷⁵⁴ Council Regulation (EEC) No 2112/90 of 23 July 1990 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan and collecting definitively the provisional duty, *O.J.*, 25 July 1990, No L 193/1.

¹⁷⁵⁵ See *e.g.* : Council Regulation (EEC) No 341/90 of 5 February 1990 accepting undertakings and imposing a definitive anti-dumping duty on imports of ferro-silicon originating in Iceland, Norway, Sweden, Venezuela or Yugoslavia, except those sold for export to the Community by companies whose undertakings have been accepted, *O.J.*, 10 February 1990, No L 38/1.

- the reference price level will be determined quarterly on the basis of the constructed values of certain types of the product for each dumping exporter¹⁷⁵⁶ ;
- the exchange rates which have to be applied when imports are made in another currency than the ECU, in which the minimum price is expressed, as well as their adjustment on a half-yearly basis¹⁷⁵⁷ ;
- the price increase consequent to the undertaking must be passed on to the Community market¹⁷⁵⁸ ;
- the obligation of the dumping exporters not to enter into direct or indirect compensatory arrangements with their customers¹⁷⁵⁹
- undertakings must bring some stability to the Community market while allowing the dumping exporters to maintain a share of the Community market¹⁷⁶⁰ ;
- the obligation to follow a pricing and marketing policy which does not disrupt the like product market and the traditional trading pattern in the Community (implying target volumes of imports into individual Member States)¹⁷⁶¹ ;

¹⁷⁵⁶ Commission Regulation (EEC) No 165/90 of 23 January 1990 imposing a provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, accepting undertakings offered by certain exporters in connection with the anti-dumping proceeding concerning imports of these products and terminating the investigation in their respect, *O.J.*, 25 January 1990, No L 20/5 (corrigendum, *O.J.*, 27 January 1990, No L 22/79 ; corrigendum, *O.J.*, 10 February 1990, No L 38/44) ; Council Regulation (EEC) No 2112/90 of 23 July 1990 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan and collecting definitively the provisional duty, *O.J.*, 25 July 1990, No L 193/1 ; Council Regulation (EEC) No 577/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of certain types of electronic microcircuits known as EPROMs (erasable programmable read only memories) originating in Japan, *O.J.*, 12 March 1991, No L 65/1 ; Council Regulation (EEC) No 611/93 of 15 March 1993 imposing a definitive anti-dumping duty on imports into the Community of certain electronic microcircuits known as DRAMs originating in the Republic of Korea and exported by companies not exempted from this duty, and collecting definitively the provisional anti-dumping duty, *O.J.*, 18 March 1993, No L 66/1 ; Commission Decision 93/157/EEC of 4 March 1993 accepting undertakings offered by three producers in connection with the anti-dumping proceeding concerning certain imports of electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea, *O.J.*, 18 March 1993, No L 66/37 ; Commission Decision 93/538/EEC of 18 October 1993 accepting an undertaking in connection with the anti-dumping proceeding concerning imports of certain types of electronic micro-circuits known as EPROMs (erasable programmable read only memories) originating in Japan, *O.J.*, 21 October 1993, No L 262/64.

¹⁷⁵⁷ Commission Decision 93/479/EEC of 30 July 1993 accepting undertakings offered in connection with the review of anti-dumping measures applicable to certain imports of monosodium glutamate originating in Indonesia, the Republic of Korea, Taiwan and Thailand, *O.J.*, 4 September 1993, No L 225/35.

¹⁷⁵⁸ Commission Decision 81/406/EEC of 4 June 1981 accepting undertakings in connection with the anti-dumping proceeding concerning imports of ball and tapered roller bearings, originating in Japan, Poland, Romania and the Soviet Union and terminating that proceeding, *O.J.*, 11 June 1981, No L 152/44.

¹⁷⁵⁹ Commission Decision 94/825/EC of 12 December 1994 accepting an undertaking offered in connection with the anti-dumping proceeding concerning imports of urea ammonium nitrate solution originating in Bulgaria and Poland, *O.J.*, 31 December 1994, No L 350/115.

¹⁷⁶⁰ Commission Decision 89/143/EEC of 21 February 1989 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of urea originating in Austria, Hungary, Malaysia or Romania, confirming the undertakings accepted pursuant to Council Regulation (EEC) No 3339/87 and terminating the investigations, *O.J.*, 24 February 1989, No L 52/37.

¹⁷⁶¹ Commission Decision No 2131/88/ECSC of 18 July 1988 imposing a definitive anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Yugoslavia and definitively collecting the provisional anti-dumping duty imposed on those imports, *O.J.*, 19 July 1988, No L 188/14.

- the obligation to cease the concentration of exports on the market of one Member State¹⁷⁶² ;
- the provision that regular (*e.g.*, half-yearly) reports on quantities and prices of exports (unit prices and total value) of the product to the Community must be submitted by the exporters to the Commission¹⁷⁶³ ;
- the obligation to comply with the price ceilings as determined by the undertaking, not only on its own account but also through its subsidiaries, branches and agents¹⁷⁶⁴ ;

1762 Commission Decision No 229/88/ECSC of 25 January 1988 imposing a provisional anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Yugoslavia, *O.J.*, 28 January 1988, No L 23/13.

1763 Commission Regulation (EEC) No 2444/83 of 29 August 1983 imposing a provisional anti-dumping duty on certain imports of hardboard originating in Czechoslovakia, Poland and Sweden and re-opening the anti-dumping proceedings concerning these imports, *O.J.*, 31 August 1983, No L 241/9 ; Commission Regulation (EEC) No 558/84 of 29 February 1984 imposing a provisional anti-dumping duty on imports of hardboard originating in the Soviet Union and re-opening the anti-dumping proceeding concerning those imports, *O.J.*, 2 March 1984, No L 61/21 ; Commission Regulation (EEC) No 14/88 of 23 December 1987 imposing a provisional anti-dumping duty on imports of roller chains for cycles originating in the People's Republic of China, *O.J.*, 6 January 1988, No L 3/5 ; Commission Decision No 229/88/ECSC of 25 January 1988 imposing a provisional anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Yugoslavia, *O.J.*, 28 January 1988, No L 23/13 ; Commission Decision 93/157/EEC of 4 March 1993 accepting undertakings offered by three producers in connection with the anti-dumping proceeding concerning certain imports of electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea, *O.J.*, 18 March 1993, No L 66/37 ; Commission Decision 93/521/EEC of 3 September 1993 accepting undertakings given in connection with the anti-dumping review in respect of imports of binder and baler twine originating in Brazil, terminating the anti-subsidy review proceeding with regard to these imports and terminating the anti-dumping and anti-subsidy review in respect of imports of binder and baler twine originating in Mexico, *O.J.*, 8 October 1993, No L 251/28 ; Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries ; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24 ; Commission Regulation (EC) No 1418/94 of 20 June 1994 imposing a provisional anti-dumping duty on imports of artificial corundum originating in the People's Republic of China, *O.J.*, 22 June 1994, No L 155/8 ; Answer of the Commission to written question No 280/87, *O.J.*, 5 November 1987, No C 295/18 ; Answer of the Commission to written question No 2522/86, *O.J.*, 28 January 1988, No C 23/7.

1764 Commission Regulation (EEC) No 14/88 of 23 December 1987 imposing a provisional anti-dumping duty on imports of roller chains for cycles originating in the People's Republic of China, *O.J.*, 6 January 1988, No L 3/5 ; Commission Regulation (EEC) No 360/88 of 4 February 1988 imposing a provisional anti-dumping duty on imports of potassium permanganate originating in the People's Republic of China, *O.J.*, 9 February 1988, No L 35/13 ; Commission Regulation (EEC) No 2386/88 of 29 July 1988 imposing a provisional anti-dumping duty on imports of copper sulphate originating in Bulgaria and the USSR, *O.J.*, 30 July 1988, No L 205/68 ; Commission Regulation (EEC) No 3052/88 of 29 September 1988 imposing a provisional anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China, *O.J.*, 4 October 1988, No L 272/16 ; Council Decision 88/576/EEC of 14 November 1988 repealing Decision 87/104/EEC accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China and terminating the investigation, *O.J.*, 18 November 1988, No L 312/33 ; Commission Regulation (EEC) No 2535/89 of 2 August 1989 imposing a provisional anti-dumping duty on imports of potassium permanganate originating in Czechoslovakia, *O.J.*, 22 August 1989, No L 245/5 ; Council Regulation (EEC) No 2966/92 of 12 October 1992 amending Regulation (EEC) No 1798/90 in respect of the definitive anti-dumping duty on certain imports of monosodium glutamate originating, *inter alia*, in Indonesia and the Republic of Korea, *O.J.*, 15 October 1992, No L 299/1 ; Council Regulation (EEC) No 611/93 of 15 March 1993 imposing a definitive anti-dumping duty on imports into the Community of certain electronic microcircuits known as DRAMs originating in the Republic of Korea and exported by companies not exempted from this duty, and collecting definitively the provisional anti-dumping duty, *O.J.*, 18 March 1993, No L 66/1.

- the obligation to take the necessary steps to prevent circumvention of the undertaking by means of resale of the company's products from other countries¹⁷⁶⁵ ;
- the obligation of the government of the dumping country to monitor a quantity undertaking by the introduction of a general system of exporting licensing for the dumped product¹⁷⁶⁶.

3.2. SCOPE OF APPLICATION

The scope of undertakings is identical to that of anti-dumping duties but for the elements which are being elaborated in the present section.

¹⁷⁶⁵ Council Regulation (EEC) No 101/83 of 17 January 1983 imposing a definitive anti-dumping duty on certain chemical fertilizer originating in the United States of America, *O.J.*, 19 January 1983, No L 15/1 ; Commission Regulation (EEC) No 14/88 of 23 December 1987 imposing a provisional anti-dumping duty on imports of roller chains for cycles originating in the People's Republic of China, *O.J.*, 6 January 1988, No L 3/5 ; Commission Regulation (EEC) No 3052/88 of 29 September 1988 imposing a provisional anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China, *O.J.*, 4 October 1988, No L 272/16 ; Council Decision 88/576/EEC of 14 November 1988 repealing Decision 87/104/EEC accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China and terminating the investigation, *O.J.*, 18 November 1988, No L 312/33 ; C.J.E.C., joined cases 133/87 and 150/87, 14 March 1990, *Nashua Corporation v. Commission and Council*, *E.C.R.*, 1990, I, (719), 742.

¹⁷⁶⁶ Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries ; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24.

3.2.1. *Ratione temporis*

According to EC anti-dumping law, undertakings which are accepted during the course of the anti-dumping investigation, are deemed to take effect from the date on which the investigation is concluded for the exporting country (Article 8(8) basic EC Regulation). Therefore, it seems that undertakings, which are accepted at the date of the termination of the investigation, enter into force on that date. In view of this provision of EC anti-dumping law, the question crops up whether the undertaking or the Decision by which an undertaking is accepted, may determine the date on which the undertaking enters into force. Under ECSC anti-dumping law, which is silent as to the date of entry into force of undertakings, the answer is affirmative¹⁷⁶⁷. Usually, though, the Decisions by which undertakings are accepted do not determine on which day the undertakings enter into force. They only indicate the day on which the undertakings were accepted. Under ECSC anti-dumping law, the undertakings enter into force probably immediately or on the day stipulated by the undertaking¹⁷⁶⁸.

3.2.2. *Ratione personae*

Under GATT and EC anti-dumping law, undertakings may only be accepted if they are offered by exporters (Article 8.1. GATT Anti-dumping Code ; Article 8(1) basic EC Regulation). Hence, European anti-dumping case law, built up in application of ECSC anti-dumping law which does not specify by whom the undertaking is offered, cannot be upheld. Indeed, under ECSC anti-

¹⁷⁶⁷ More recent decisions determined that the undertaking would take effect on the day of entry into force of the (modification of the) definitive anti-dumping duty imposed on the imports of the dumping exporters who had not offered an undertaking (Commission Decision 92/177/EEC of 16 March 1992 accepting an undertaking given by a Japanese producer in connection with the anti-dumping proceeding concerning imports of certain thermal paper originating in Japan, and terminating the investigation with regard to the producer in question, *O.J.*, 26 March 1992, No L 81/22 ; Commission Decision 92/494/EEC of 12 October 1992 accepting an undertaking in connection with the anti-dumping proceeding concerning imports on certain types of electronic microcircuits known as DRAMs (dynamic random access memories) originating in Japan, and terminating the investigation with regard to the producer in question, *O.J.*, 15 October 1992, No L 299/43 ; Commission Decision 92/572/EEC of 14 December 1992 accepting an undertaking by a Polish producer in connection with the anti-dumping proceeding concerning imports of ferrosilicon originating in Poland and Egypt, *O.J.*, 18 December 1992, No L 369/32 ; Commission Decision 93/538/EEC of 18 October 1993 accepting an undertaking in connection with the anti-dumping proceeding concerning imports of certain types of electronic micro-circuits known as EPROMs (erasable programmable read only memories) originating in Japan, *O.J.*, 21 October 1993, No L 262/64 ; Commission Decision 94/825/EC of 12 December 1994 accepting an undertaking offered in connection with the anti-dumping proceeding concerning imports of urea ammonium nitrate solution originating in Bulgaria and Poland, *O.J.*, 31 December 1994, No L 350/115).

Undertakings take sometimes effect on a day, determined by the Decision, well before the entry into force of the definitive anti-dumping duty (Council Regulation (EEC) No 1189/93 of 14 May 1993 imposing definitive anti-dumping duties on imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in Hungary, Poland and the Republic of Croatia and definitively collecting provisional anti-dumping duties, *O.J.*, 15 May 1993, No L 120/34 ; Commission Decision 93/260/EEC of 14 May 1993 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of certain seamless pipes and tubes, of iron or non-alloy steel, originating in Hungary, Poland and the Republic of Croatia, *O.J.*, 15 May 1993, No L 120/42).

¹⁷⁶⁸ In *DRAMs from in the Republic of Korea*, it was stated in the preamble to the Decision that the undertaking had to enter into force on the same day as the definitive anti-dumping duty. As the provision of the Decision did not stipulate the day on which the undertaking entered into force, and as the Decision dated well before the entry into force of the definitive anti-dumping duty, only the provisions of the undertaking should have determined the date of its entry into force (Commission Decision 93/157/EEC of 4 March 1993 accepting undertakings offered by three producers in connection with the anti-dumping proceeding concerning certain imports of electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea, *O.J.*, 18 March 1993, No L 66/37).

dumping law, undertakings may be offered not only by exporters, but also, for example, by the government of the exporting country¹⁷⁶⁹. The European anti-dumping authorities have accepted undertakings offered by the government of a NME country¹⁷⁷⁰. It seems that they only accept such undertakings in order to prevent their circumvention. Thus, they have rejected undertakings offered by exporters established in NME countries because accepting undertakings from those exporters would imply individual treatment. Such individual treatment is considered to be inappropriate if the government of the NME country can interfere in the exporters' economic operations and, thus, circumvent high anti-dumping protection by channeling imports through exporters subject to low anti-dumping protection¹⁷⁷¹. Therefore, the European anti-dumping authorities have also required that the government of the dumping country offered the undertaking and monitored it by the introduction of a general system of exporting licensing for the dumped product. In view of the large number of exporters, they thought that undertakings offered by the exporters might easily be circumvented¹⁷⁷². GATT and EC anti-dumping law, on the other hand, explicitly mention the large number of exporters as a reason to refuse the undertakings offered, and not as reason to accept undertakings offered by the government of the exporting country (Article 8.3. GATT Anti-dumping Code ; Article 8(3) basic EC Regulation).

A residual anti-dumping duty is usually imposed on unknown or uncooperative exporters when individual anti-dumping duties are imposed on cooperative exporters. Similarly, because of the individualized character of undertakings, they are frequently complemented by a residual anti-dumping duty and sometimes by individual anti-dumping duties imposed on cooperative exporters who have not offered an acceptable undertaking.

1769 BOUDANT, J., *L'anti-dumping communautaire*, Paris, Economica, 1991, 189.

1770 Commission Decision 94/202/EC of 9 March 1994 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of silicon carbide originating in the People's Republic of China, Norway, Poland and the former USSR and terminating the proceeding against imports originating in Norway and several republics previously part of the former USSR, *O.J.*, 13 April 1994, No L 94/32 ; Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries ; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24.

1771 Commission Decision 94/202/EC of 9 March 1994 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of silicon carbide originating in the People's Republic of China, Norway, Poland and the former USSR and terminating the proceeding against imports originating in Norway and several republics previously part of the former USSR, *O.J.*, 13 April 1994, No L 94/32.

1772 Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries ; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24.

Since residual as well as individual anti-dumping duties are imposed on producers who do not export to the Community¹⁷⁷³, the question emerges whether undertakings offered by such producers may be accepted. It may be argued that GATT and EC anti-dumping law allow the acceptance of such undertakings as they mention «the (too great) number of actual and *potential* exporters» as a reason for refusing undertakings (Article 8.3. GATT Anti-dumping Code ; Article 8(3) basic EC Regulation). Thus, if the number of the actual and potential exporters is not too great, the undertakings offered by those exporters should be accepted. Of course, GATT and EC anti-dumping law may also be interpreted as implying the undertakings offered by originally potential exporters being acceptable on the moment those exporters have become actual exporters. In that case, the undertakings of all exporters are not accepted because eventually, *i.e.*, as soon as the potential exporters have become actual exporters, the number of undertakings to be monitored would be too great. European anti-dumping case law, applying ECSC anti-dumping law which does not refer to actual nor potential exporters, does not provide an answer either. Indeed, originally, the European anti-dumping authorities adopted a rather casuistic approach : prior to November 1984, six undertakings offered by non-dumping or non-exporting companies were accepted¹⁷⁷⁴ whereas only one was rejected¹⁷⁷⁵. In *sodium carbonate from the United States of America*¹⁷⁷⁶ of November 1984, the Council took the view that, in general, undertakings from potential exporters should not be accepted, on the following grounds :

- «(a) it is difficult to determine an appropriate export price for a company that has not exported to the Community, since any data which may be available are likely to relate to another period or to another destination and would therefore be of questionable relevance ;

¹⁷⁷³ *Supra*, 688-690.

¹⁷⁷⁴ Council Regulation (EEC) No 2761/81 of 22 September 1981 imposing a definitive anti-dumping duty on *o*-xylene (orthoxylene) originating in Puerto Rico and the United States of America, *O.J.*, 25 September 1981, No L 270/1 ; Council Regulation (EEC) No 2940/81 of 14 October 1981 imposing a definitive anti-dumping duty on *p*-xylene (paraxylene) originating in Puerto Rico, the United States of America and the United States Virgin Islands, *O.J.*, 15 October 1981, No L 296/1 ; Council Regulation (EEC) No 90/82 of 18 January 1982 imposing a definitive anti-dumping duty on phenol originating in the United States of America, *O.J.*, 18 January 1982, No L 12/1 ; Commission Decision 83/625/EEC of 12 December 1983 accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of certain glass textile fibres (rovings) originating in Japan and terminating this proceeding, *O.J.*, 15 December 1983, No L 352/47 ; Council Regulation (EEC) No 3540/83 of 14 December 1983 imposing a definitive anti-dumping duty on imports of certain glass textile fibres (rovings) originating in the German Democratic Republic and Czechoslovakia, *O.J.*, 16 December 1983, No L 354/15 ; Council Regulation (EEC) No 2275/84 of 1 August 1984 amending Regulation (EEC) No 1100/80 imposing a definitive anti-dumping duty on certain acrylic fibres originating in the United States of America, *O.J.*, 4 August 1984, No L 209/1. See also : Commission Regulation (EEC) No 1633/82 of 23 June 1982 imposing a provisional anti-dumping duty on imports of fibre building board (hardboard) originating in Romania, repealing Commission Decision No 80/564/EEC of 4 June 1980 and accepting undertakings in connection with the proceeding in respect of imports of fibre building board from Czechoslovakia, Finland, Hungary, Norway, Poland, Spain, Sweden and the Soviet Union and terminating the proceeding with regard to those countries and Bulgaria, *O.J.*, 25 June 1982, No L 181/19. In the latter case, dumping margins were established for two product types. The Commission, however, did not specify whether the undertakings offered by exporters who dumped only one product type, only applied to that product type.

¹⁷⁷⁵ Council Regulation (EEC) No 2089/84 of 19 July 1984 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 21 July 1984, No L 193/1.

¹⁷⁷⁶ Council Regulation (EEC) No 3337/84 of 27 November 1984 imposing a definitive anti-dumping duty on certain imports of dense sodium carbonate originating in the United States of America, *O.J.*, 29 November 1984, No L 311/26.

- (b) it is also likely to be difficult or impossible in the case of the potential exporter to determine the volume of any possible future exports and, therefore, what impact they would have on the Community (...);
- (c) an anti-dumping investigation should, in the interests of all parties concerned be conducted expeditiously. If potential exporters were to be investigated, this would result in an unreasonable administrative burden on the investigative authorities, would lead to a prolongation of the investigation and would thus impede their effectiveness in view of the statutory time requirements.»

As a result, the undertakings offered by non-exporting companies were not accepted in this case, nor were they in other cases¹⁷⁷⁷ before May 1991. As from May 1991, undertakings offered by producers who do not yet export to the Community, but who have the intention of doing so, have been accepted; the undertaking price was not lower than the normal value¹⁷⁷⁸.

The reasons put forward by the Council in *sodium carbonate from the United States of America* for refusing undertakings offered by non-exporting companies are convincing and are legally correct. They also apply to individual as well as to residual anti-dumping duties. The Council, however, did not stick to its reasoning when in the same case it imposed a residual anti-dumping duty on potential future exports of non-exporting companies. The Council thereby recognized that the non-acceptance of their undertakings could be disadvantageous, but that such refusal was not unreasonable. The Council held that view because these companies, if they start exporting to the Community, may request a review or a refund of anti-dumping duties (Articles 9.3. and 11.2. up to 11.4. GATT Anti-dumping Code; Article 11 basic EC Regulation; Articles 14 and 16 basic

¹⁷⁷⁷ Commission Regulation (EEC) No 3643/84 of 20 December 1984 imposing a provisional anti-dumping duty on imports of electronic typewriters originating in Japan and terminating the anti-dumping proceeding with regard to Nakajima All Co. Ltd, *O.J.*, 22 December 1984, No L 335/43; Commission Regulation (EEC) No 595/85 of 7 March 1985 imposing a provisional anti-dumping duty on imports of certain hydraulic excavators originating in Japan, *O.J.*, 8 March 1985, No L 68/13. See also: Commission Decision 87/135/EEC of 23 February 1987 accepting an undertaking given by Kyocera Corporation in connection with the anti-dumping proceeding concerning imports of plain paper photocopiers originating in Japan and terminating the investigation, *O.J.*, 24 February 1987, No L 54/36. In this anti-dumping case the Commission accepted an undertaking given by an exporter who exported during the investigation period, but who had since discontinued all exports and production of the product. However, this case is no deviation from the opinion of the Council in *sodium carbonate from the United States of America*, as the exporter was found to practise injurious dumping during the investigation period and anti-dumping relief is granted on the basis of the facts established during the investigation period (see: Council Regulation (EEC) No 2089/84 of 19 July 1984 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore, *O.J.*, 21 July 1984, No L 193/1; Council Regulation (EEC) No 1739/85 of 24 June 1985 imposing a definitive anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan, *O.J.*, 27 June 1985, No L 167/3).

¹⁷⁷⁸ Council Regulation (EEC) No 1115/91 of 29 April 1991 imposing definitive anti-dumping duties in connection with the review of anti-dumping measures concerning imports of ferro-silicon originating in Brazil, *O.J.*, 3 May 1991, No L 111/1; Commission Decision 91/240/EEC of 29 April 1991 accepting undertakings offered by certain exporters in connection with the review of anti-dumping measures concerning imports of ferro-silicon originating in Brazil and terminating the investigation as regards those exporters, *O.J.*, 3 May 1991, No L 111/47; Commission Decision 93/538/EEC of 18 October 1993 accepting an undertaking in connection with the anti-dumping proceeding concerning imports of certain types of electronic micro-circuits known as EPROMs (erasable programmable read only memories) originating in Japan, *O.J.*, 21 October 1993, No L 262/64.

ECSC Decision)¹⁷⁷⁹. However, the Council disregards that the same review proceeding is equally available in respect to undertakings (Article 11.5. GATT Anti-dumping Code ; Article 11 basic EC Regulation ; Article 14 basic ECSC Decision) and that exporters may withdraw their undertakings (Article 8(9) and (10) basic EC Regulation ; Article 10(6) basic ECSC Decision). More fundamentally, the existence of review and refund proceeding do not remove the illegality of anti-dumping duties on imports which are not shown to have been dumped and to have caused injury¹⁷⁸⁰. Moreover, as recognized by the Council, exporting and non-exporting companies are treated unequally when undertakings offered by non-exporting companies are rejected and when at the same time anti-dumping duties are imposed on their potential future exports. Indeed, undertakings are more advantageous for exporters than anti-dumping duties¹⁷⁸¹, since the price increases caused by undertakings accrue to the exporters, whereas those of anti-dumping duties accrue to the Community authorities¹⁷⁸². This discrimination is all the worse, because it disadvantages companies against which anti-dumping relief cannot legally be granted.

3.2.3. *Ratione loci*

Whereas anti-dumping duties are always applicable to the whole territory of the Community, undertakings may be restricted to a region within the Community, but only in cases where the Community industry is interpreted, in accordance with Articles 4.1.(ii) GATT Anti-dumping Code, 4(1)(ii) basic EC Regulation and 4(5) basic ECSC Decision, as referring to the producers in a certain regional market (Article 4.2. GATT Anti-dumping Code ; Article 4(3) basic EC

¹⁷⁷⁹ Council Regulation (EEC) No 3337/84 of 27 November 1984 imposing a definitive anti-dumping duty on certain imports of dense sodium carbonate originating in the United States of America, *O.J.*, 29 November 1984, No L 311/26 ; Commission Regulation (EEC) No 3643/84 of 20 December 1984 imposing a provisional anti-dumping duty on imports of electronic typewriters originating in Japan and terminating the anti-dumping proceeding with regard to Nakajima All Co. Ltd, *O.J.*, 22 December 1984, No L 335/43 ; Commission Regulation (EEC) No 595/85 of 7 March 1985 imposing a provisional anti-dumping duty on imports of certain hydraulic excavators originating in Japan, *O.J.*, 8 March 1985, No L 68/13.

¹⁷⁸⁰ *Supra*, 688-690.

¹⁷⁸¹ BELLIS, J.-F., «The EEC Antidumping System», in *Antidumping Law and Practice. A Comparative Study*, JACKSON, J.H., and VERMULST, E.A. (eds.), New York, Harvester Wheatsheaf, 1990, (41), 56.

¹⁷⁸² *Supra*, 367.

Regulation ; Article 13(6) basic ECSC Decision)¹⁷⁸³. In a number of cases in which the Community market was not divided in two or more regional markets, however, undertakings only applied to some Member States¹⁷⁸⁴. Moreover, in some undertakings the minimum prices were differentiated as to the importing Member State, as the injury varied for each Member State¹⁷⁸⁵. Both types of undertakings do not comply with European anti-dumping law : since none of those cases divided the Community market into two or more regional markets, the condition under which regionally applicable undertakings may be accepted, was not fulfilled¹⁷⁸⁶.

¹⁷⁸³ Article 13(6) basic EC legislation has been used only four times, see : Commission Decision 86/36/EEC of 26 February 1986 accepting undertakings entered into in connection with the anti-dumping proceeding concerning imports into Greece of certain categories of glass originating in Turkey, Yugoslavia, Romania, Bulgaria, Hungary and Czechoslovakia and terminating the investigation, *O.J.*, 28 February 1986, No L 51/73 ; Commission Decision 91/256/EEC of 14 May 1991 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of welded wire-mesh originating in Yugoslavia and terminating the investigation, *O.J.*, 18 May 1991, No L 123/54 ; Commission Decision 91/392/EEC of 21 June 1991 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain asbestos cement pipes originating in Turkey, and terminating the investigation, *O.J.*, 31 July 1991, No L 209/37 ; Commission Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the investigation with regard to these countries ; as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, *O.J.*, 21 May 1994, No L 129/24.

¹⁷⁸⁴ See :

- *welded steel tubes from Romania*, where the exporter offered «an undertaking that it would adhere to certain minimum prices in respect of its exports to the Federal Republic of Germany» (emphasis added) (Commission Regulation (EEC) No 1334/82 of 28 May 1982 accepting an undertaking offered in connection with the anti-dumping procedure concerning certain welded steel tubes originating in Romania, terminating that procedure and cancelling the provisional anti-dumping duty, *O.J.*, 29 May 1982, No L 150/79) ;
- *angles, shapes and sections of iron or steel from Romania*, where the exporter offered «an undertaking to raise the prices of his exports to the Federal Republic of Germany and France» (emphasis added) (Commission Regulation (EEC) No 1976/82 of 19 July 1982 imposing a provisional anti-dumping duty on certain imports of certain chemical fertilizer originating in the United States of America, *O.J.*, 22 July 1982, No L 214/7 ; Commission Regulation (EEC) No 2302/82 of 18 August 1982 amending Regulation (EEC) No 1976/82 imposing a provisional anti-dumping duty on certain imports of chemical fertilizer originating in the United States of America, *O.J.*, 21 August 1982, No L 246/5).

¹⁷⁸⁵ Commission Decision 80/252/EEC of 22 February 1980 accepting undertakings given by exporters in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and Romania in connection with the anti-dumping proceeding concerning imports of standardized electric multi-phase motors having an output of more than 0.75 kW but not more than 75 kW, originating in those countries, and terminating the procedure in respect of them, *O.J.*, 27 February 1980, No L 53/21.

¹⁷⁸⁶ *Contra* : Answer of the Commission to written question No 658/80, *O.J.*, 23 October 1980, No C 275/18. Here the Commission argued that, contrary to undertakings, anti-dumping duties must apply uniformly to the Community territory as a whole, in view of the uniform character of the common customs tariff. The reference to the common customs tariff is, however, not to the point. Uniform anti-dumping duties are required by Article 13(6) basic EC legislation.

3.3. ANTI-CIRCUMVENTION MEASURES

When undertakings are violated (or withdrawn¹⁷⁸⁷) and when the Community interests call for intervention, a provisional anti-dumping duty may be applied forthwith on the basis of the facts established before the acceptance of the undertaking (Article 8.6. GATT Anti-dumping Code ; Article 8(9) and (10) basic EC Regulation ; Article 10(6) basic ECSC Decision)¹⁷⁸⁸.

An undertaking will not only be violated if the exporters do not observe the minimum price level, but also if they do not comply with procedural obligations, such as the obligation to submit reports to the Commission regarding their exports to the Community at the time as provided by the undertaking¹⁷⁸⁹. An undertaking is not violated when dumping recurs because the undertaking is outdated due to significant changes in the exporter's production costs¹⁷⁹⁰. It is not violated either when the Community industry still suffers injury, but export prices have fallen

¹⁷⁸⁷ See e.g. : Commission Regulation (EEC) No 1976/82 of 19 July 1982 imposing a provisional anti-dumping duty on certain imports of certain chemical fertilizer originating in the United States of America, *O.J.*, 22 July 1982, No L 214/7 ; Commission Regulation (EEC) No 2302/82 of 18 August 1982 amending Regulation (EEC) No 1976/82 imposing a provisional anti-dumping duty on certain imports of chemical fertilizer originating in the United States of America, *O.J.*, 21 August 1982, No L 246/5 ; Commission Regulation (EEC) No 2957/93 of 26 October 1993 imposing a provisional anti-dumping duty on certain imports of gas-fuelled, non-refillable pocket flint lighters originating in Thailand, *O.J.*, 28 October 1993, No L 267/2 ; Commission Regulation (EC) No 2286/94 of 21 September 1994 imposing a provisional anti-dumping duty on imports of tungsten ores and concentrates, tungstic oxide, tungstic acid, tungsten carbide and fused tungsten carbide originating in the People's Republic of China, *O.J.*, 23 September 1994, No L 248/8 (corrigendum, *O.J.*, 14 October 1994, No L 264/31).

¹⁷⁸⁸ See also : C.J.E.C., joined cases 239 and 275/82, 21 February 1984, *Allied Corporation a.o. v Commission*, *E.C.R.*, 1984, (1005), 1032 ; Commission Regulation (EC) No 2286/94 of 21 September 1994 imposing a provisional anti-dumping duty on imports of tungsten ores and concentrates, tungstic oxide, tungstic acid, tungsten carbide and fused tungsten carbide originating in the People's Republic of China, *O.J.*, 23 September 1994, No L 248/8 (corrigendum, *O.J.*, 14 October 1994, No L 264/31).

¹⁷⁸⁹ Commission Regulation (EC) No 1418/94 of 20 June 1994 imposing a provisional anti-dumping duty on imports of artificial corundum originating in the People's Republic of China, *O.J.*, 22 June 1994, No L 155/8 ; Council Regulation (EC) No 2556/94 of 19 October 1994 amending Regulation (EEC) No 2552/93 imposing a definitive anti-dumping duty on imports of artificial corundum originating in the People's Republic of China, the Russian Federation and Ukraine, with the exception of those imports sold for export to the Community by companies whose undertakings have been accepted, and definitively collecting the amounts secured by way of the provisional anti-dumping duty imposed by Commission Regulation (EC) No 1418/94, *O.J.*, 21 October 1994, No L 270/24.

¹⁷⁹⁰ Council Regulation (EEC) No 906/83 of 18 April 1983 amending Regulation (EEC) No 2761/81 imposing a definitive anti-dumping duty on o-xylene (ortho-xylene) originating in Puerto Rico and the United States of America, *O.J.*, 20 April 1983, No L 101/4 ; Council Regulation (EEC) No 2978/83 of 24 October 1983 amending Regulation (EEC) No 191/80 imposing a definitive anti-dumping duty on lithium hydroxide originating in the United States of America and the Soviet Union, *O.J.*, 26 October 1983, No L 294/3 ; Commission Decision 84/408/EEC of 16 August 1984 accepting an undertaking given in connection with the anti-dumping review proceeding concerning imports of copper sulphate originating in Czechoslovakia and terminating that proceeding, *O.J.*, 22 August 1984, No L 225/22 ; Council Regulation (EEC) No 3018/86 of 30 September 1986 repealing the Regulation accepting the undertakings given respectively by exporters in Bulgaria, Czechoslovakia, the German Democratic Republic, Poland and Romania in connection with the anti-dumping procedure concerning imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW originating in these countries, *O.J.*, 1 October 1986, No L 280/66 ; Commission Regulation (EEC) No 3019/86 of 30 September 1986 imposing a provisional anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0,75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania and the USSR, *O.J.*, 1 October 1986, No L 280/68.

because of a drop in the exchange rate of the currency of the exporting country¹⁷⁹¹. Moreover, as the anti-circumvention rule on assembly operations in the Community does not apply to undertakings (Article 11(2) basic EC Regulation), an undertaking will not be violated if the dumped imports are replaced by assembly operations in the Community. The anti-absorption rule does not apply either to undertakings (Article 12 basic EC Regulation ; Article 13(11) basic ECSC Decision). With regard to price undertakings, fixing a minimum price for the dumped imports, the exporter cannot bear the burden of the undertaking, unless he is violating the undertaking by charging a price below the minimum price ; in that case, the normal rule on the violation of undertakings applies. With regard to quantity undertakings, the non-application of the anti-absorption rule implies that those undertakings will not be violated if the prices of the dumped imports do not increase as much as the quantitative restriction would normally have caused.

In all the cases which impose provisional anti-dumping duties after a violation of an undertaking, the anti-dumping investigation is reopened¹⁷⁹² ; in most of these cases, a definitive anti-

¹⁷⁹¹ Council Regulation (EEC) No 2455/93 of 2 September 1993 amending Regulation (EEC) No 1798/90 in respect of the definitive anti-dumping duty on imports of monosodium glutamate originating in Indonesia, the Republic of Korea, Taiwan and Thailand, *O.J.*, 4 September 1993, No L 225/1.

¹⁷⁹² Commission Regulation (EEC) No 2516/81 of 26 August 1981 imposing a provisional anti-dumping duty on imports of light sodium carbonate originating in Bulgaria, *O.J.*, 29 August 1981, No L 246/14 ; Commission Regulation (EEC) No 558/84 of 29 February 1984 imposing a provisional anti-dumping duty on imports of hardboard originating in the Soviet Union and re-opening the anti-dumping proceeding concerning those imports, *O.J.*, 2 March 1984, No L 61/21 ; Commission Regulation (EEC) No 3106/85 of 6 November 1985 imposing a provisional anti-dumping duty on imports of copper sulphate originating in Yugoslavia, *O.J.*, 8 November 1985, No L 296/26 ; Commission Regulation (EEC) No 14/88 of 23 December 1987 imposing a provisional anti-dumping duty on imports of roller chains for cycles originating in the People's Republic of China, *O.J.*, 6 January 1988, No L 3/5 ; Commission Decision No 229/88/ECSC of 25 January 1988 imposing a provisional anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Yugoslavia, *O.J.*, 28 January 1988, No L 23/13 ; Commission Regulation (EEC) No 360/88 of 4 February 1988 imposing a provisional anti-dumping duty on imports of potassium permanganate originating in the People's Republic of China, *O.J.*, 9 February 1988, No L 35/13 ; Commission Regulation (EEC) No 2386/88 of 29 July 1988 imposing a provisional anti-dumping duty on imports of copper sulphate originating in Bulgaria and the USSR, *O.J.*, 30 July 1988, No L 205/68 ; Commission Regulation (EEC) No 3052/88 of 29 September 1988 imposing a provisional anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China, *O.J.*, 4 October 1988, No L 272/16 ; Commission Regulation (EEC) No 2535/89 of 2 August 1989 imposing a provisional anti-dumping duty on imports of potassium permanganate originating in Czechoslovakia, *O.J.*, 22 August 1989, No L 245/5 ; Commission Regulation (EC) No 1418/94 of 20 June 1994 imposing a provisional anti-dumping duty on imports of artificial corundum originating in the People's Republic of China, *O.J.*, 22 June 1994, No L 155/8.

dumping duty is imposed¹⁷⁹³, unless it is shown that the undertaking is not violated, in which case the originally imposed provisional anti-dumping duty is revoked¹⁷⁹⁴. In principle, new undertakings offered by exporters who violate an existing undertaking, are not accepted because a renewal of the previous undertaking would not afford the Community industry sufficient protection¹⁷⁹⁵ or because an exporter who violates his undertaking should not be treated more favourably than exporters who fully meet their obligations¹⁷⁹⁶. After a violation of an undertaking, a new undertaking has only been accepted because, in view of the special circumstances on the domestic market of the dumping exporters, the steps taken by the government of the dumping country and the monitoring possibilities available in the dumping country vouch for its compliance¹⁷⁹⁷.

¹⁷⁹³ Council Regulation (EEC) No 3648/83 of 19 December 1983 imposing a definitive anti-dumping duty on imports of hardboard originating in Czechoslovakia and Poland and definitively collecting the amounts secured by way of a provisional anti-dumping duty on certain imports of hardboard originating in Sweden, *O.J.*, 24 December 1983, No L 361/6; Council Regulation (EEC) No 1825/84 of 28 June 1984 imposing a definitive anti-dumping duty on imports of hardboard originating in the Soviet Union, *O.J.*, 29 June 1984, No L 170/68; Council Regulation (EEC) No 1244/86 of 28 April 1986 imposing a definitive anti-dumping duty on imports of copper sulphate originating in Yugoslavia, *O.J.*, 30 April 1986, No L 113/4; Council Regulation (EEC) No 1198/88 of 25 April 1988 imposing a definitive anti-dumping duty on imports of roller chains for cycles originating in the People's Republic of China and providing for the definitive collection of the provisional anti-dumping duty on the said imports, *O.J.*, 3 May 1988, No L 115/1; Council Regulation (EEC) No 1531/88 of 31 May 1988 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty imposed on those imports, *O.J.*, 3 June 1988, No L 138/1; Commission Decision No 2131/88/ECSC of 18 July 1988 imposing a definitive anti-dumping duty on imports of certain sheets and plates, of iron or steel, originating in Yugoslavia and definitively collecting the provisional anti-dumping duty imposed on those imports, *O.J.*, 19 July 1988, No L 188/14; Council Regulation (EEC) No 176/89 of 23 January 1989 imposing a definitive anti-dumping duty on imports of copper sulphate originating in Bulgaria or the Soviet Union, *O.J.*, 27 January 1989, No L 23/1; Council Regulation (EEC) No 725/89 of 20 March 1989 imposing a definitive anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty on such imports, *O.J.*, 22 March 1989, No L 79/24; Council Regulation (EEC) No 385/90 of 12 February 1990 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in Czechoslovakia and definitively collecting the provisional anti-dumping duty imposed on those imports, *O.J.*, 16 February 1990, No L 42/1.

¹⁷⁹⁴ Commission Regulation (EEC) No 3333/81 of 20 November 1981 revoking the imposition of a provisional anti-dumping duty on imports of light sodium carbonate originating in Bulgaria and terminating the proceedings, *O.J.*, 24 November 1981, No L 337/5.

¹⁷⁹⁵ Council Regulation (EEC) No 1531/88 of 31 May 1988 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty imposed on those imports, *O.J.*, 3 June 1988, No L 138/1; Council Regulation (EEC) No 725/89 of 20 March 1989 imposing a definitive anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty on such imports, *O.J.*, 22 March 1989, No L 79/24; Council Regulation (EEC) No 385/90 of 12 February 1990 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in Czechoslovakia and definitively collecting the provisional anti-dumping duty imposed on those imports, *O.J.*, 16 February 1990, No L 42/1.

¹⁷⁹⁶ Council Regulation (EEC) No 1825/84 of 28 June 1984 imposing a definitive anti-dumping duty on imports of hardboard originating in the Soviet Union, *O.J.*, 29 June 1984, No L 170/68; Council Regulation (EEC) No 385/90 of 12 February 1990 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in Czechoslovakia and definitively collecting the provisional anti-dumping duty imposed on those imports, *O.J.*, 16 February 1990, No L 42/1.

¹⁷⁹⁷ Commission Decision 83/649/EEC of 19 December 1983 accepting undertakings in connection with the anti-dumping procedure in respect of certain imports of hardboard originating in Sweden and terminating that procedure, *O.J.*, 24 December 1983, No L 361/47.

4. SPECIAL MEASURES

Special measures, *i.e.*, measures which are not anti-dumping duties nor undertakings and which do not run counter to GATT obligations (Article 22(iii) basic EC Regulation ; Article 17(2) basic ECSC Decision), are of no great practical importance, since they have been used only twice in European anti-dumping law. In these two instances, they consisted of an additional duty¹⁷⁹⁸ and a follow-up of the dumped imports in order to trigger the rapid imposition of either an anti-dumping duty or an undertaking if necessary¹⁷⁹⁹.

Their conformity with GATT law, however, may raise some doubts, unless they are applied against imports from countries not Contracting Parties to GATT. For, in the latter case, GATT anti-dumping law does not apply¹⁸⁰⁰. In respect of imports coming from Contracting Parties to GATT, it may be argued, though, that GATT law only allows anti-dumping duties and undertakings to be enacted against injurious dumping, thus forbidding other types of measure. Moreover, the special measures enacted by the European anti-dumping authorities, in particular, seem to be at variance with GATT law. Indeed, the additional duty applies to the imports of one country and is therefore contrary to the principle of non-discrimination (Article I GATT). The follow-up is not necessarily contrary to GATT law. Only insofar as the information necessary for the follow-up imposes a too excessive administrative burden on the dumping exporters, it violates GATT law. Indeed, an excessive administrative burden has a trade-restrictive or even a trade-prohibitive effect and comes within the concept «other measures», in addition to duties, taxes or other charges meant by Article XI GATT through which prohibit or restrict. Moreover, such «other measure» would also violate the principle of non-discrimination (Article I GATT) because the follow-up applies to only a limited number of exporting countries.

These two applications of special measures show that it is difficult to comply with GATT. Usually, any special measure will restrict trade and violates at least the principle of non-discrimination (Article I GATT). Therefore, the special measures as a category of anti-dumping relief should be abolished. The cases where anti-dumping duties and undertakings are not

¹⁷⁹⁸ Council Regulation (EEC) No 2464/77 of 7 November 1977 adopting special measures in respect of imports of certain nuts of iron or steel originating in Taiwan, *O.J.*, 10 November 1977, No L 286/7.

¹⁷⁹⁹ Commission Decision 84/103/EEC of 23 February 1984 terminating the anti-dumping proceeding concerning imports of non-alloyed unwrought aluminium originating in Norway, Surinam, the Soviet Union and Yugoslavia, *O.J.*, 28 February 1984, No L 57/19 ; Commission Decision 91/142/EEC of 15 March 1991 terminating the anti-dumping proceeding concerning imports of Atlantic salmon originating in Norway, *O.J.*, 16 March 1991, No L 69/32 (corrigendum, *O.J.*, 21 March 1991, No L 75/64) ; Answer of the Commission to written question No 3066/90, *O.J.*, 13 December 1991, C 323/3.

¹⁸⁰⁰ BOUDANT, J., *L'anti-dumping communautaire*, Paris, Economica, 1991, 58 ; LESGUILLONS, H., «Le régime anti-dumping de la Communauté européenne», *Droit et pratique du commerce international*, 1978, (459), 466 ; LESGUILLONS, H., *Le régime communautaire de protection contre le dumping et les subventions*, Paris, F.E.D.U.C.I., 1983, 27.

appropriate, are exceptional. There is only a legal difference between an anti-dumping duty and an additional duty, which precisely results in an additional duty violating GATT law. Similarly, the same trade-restrictive effects which may be monitored by a follow-up, may be obtained by means of an anti-dumping duty or an undertaking. Moreover, the possibility to direct the customs authorities to register imports, as provided by the new EC anti-dumping legislation, will make the category of special measures superfluous for organising a follow-up (Article 14(5) basic EC Regulation). The category of special measures will only be useful to the European anti-dumping authorities in that it allows the acceptance of engagements offered by the government of the exporting country. Indeed, under the new GATT Anti-dumping Code and EC anti-dumping legislation, undertakings may only be offered by the dumping exporters (Article 8.1. GATT Anti-dumping Code ; Article 8(1) basic EC Regulation), whereas the European anti-dumping authorities, applying ECSC anti-dumping law, sometimes found it more appropriate to accept engagements of the government of the exporting country¹⁸⁰¹. In view of the prohibition of voluntary export restraints, orderly marketing agreements and similar measures, such as monitoring imports, under the 1994 GATT Agreement on Safeguard Measures (Article 11), it seems, however, that both the follow up and the engagements offered by the government of the exporting country will run counter to obligations under GATT.

5. CONCLUSION

Anti-dumping duties, undertakings and special measures constitute the different categories of anti-dumping relief. The category of special measures is neglectible since it is seldom applied. Its unfrequent application may have different causes. First, it is highly probable that measures other than anti-dumping duties and undertakings will go against GATT obligations. Second, the same trade-restrictive effects may be obtained by an anti-dumping duty or an undertaking. Third, instruments, such as trade agreements with the exporting country, are not classified as special measures, though they might and, under the new GATT Anti-dumping Code and EC anti-dumping legislation, should be classified as such ; instead, when such instruments are applied, the anti-dumping proceeding is said to be terminated without any anti-dumping relief¹⁸⁰².

¹⁸⁰¹ *Supra*, 747.

¹⁸⁰² *Supra*, 641-642.

The European anti-dumping authorities seem to prefer undertakings to anti-dumping duties. For anti-dumping proceedings seem always to be terminated by the acceptance of undertakings whenever an exporter offers one, unless the undertaking does not sufficiently remedy the injury caused by the dumping¹⁸⁰³ or the exporter did not observe a former undertaking. Notwithstanding their importance, there is but little information as to the contents of undertakings. Usually the information is confined to the statement holding, in the first place, that the undertaking affects prices and/or volume of the dumped imports so as to remedy the injury, and, in the second place, that the price increase does not exceed the dumping margin.

More information is available on anti-dumping duties. They may take the form of a specific, *ad valorem* or variable duty or a combination of the three. However, it is impossible to know in advance which form of anti-dumping duty will be imposed. The choice made by the European anti-dumping authorities is not based on their specific characteristics. On the contrary, identical explanations sustain the imposition of different forms of anti-dumping duty.

The major problem raised by anti-dumping relief is that it may apply to non-dumped imports. First, anti-dumping relief applies to the future, whereas it is determined on the basis of facts from the past. Second, each type of anti-dumping relief is completed by a residual anti-dumping duty applicable to unknown and uncooperative exporters. Third, anti-dumping relief is sometimes granted against products which were not subject to the anti-dumping proceeding and which, therefore, are not shown to have been dumped (an extreme example is the screwdriver factory provision which allows to extend anti-dumping duties to the import of parts of the dumped product). Fourth, anti-dumping duties apply to imports in the whole of the Community, even when only in some regional markets imports are dumped.

The information on anti-dumping duties also shows that the European anti-dumping authorities tend to grant too high a degree of anti-dumping relief. European anti-dumping law prohibits the amount of anti-dumping duties to exceed the injury margin, *i.e.*, the amount of injury caused by the dumping only. However, the way the injury margin is determined, may result in an amount of anti-dumping duty exceeding that margin. For example, as the relative inefficiency of Community producers compared to the dumping exporters is not accounted for in the injury margin, the injury margin comprises the injury Community producers suffer from the competition of more efficient foreign producers. Even worse, the amount of anti-dumping duty may exceed the dumping margin. Indeed, ECSC anti-dumping law allows to impose an additional anti-dumping duty when the amount of anti-dumping duty is not fully reflected in an increase in the price of the dumped product. It does not prohibit that the combination of an anti-dumping duty

¹⁸⁰³ *Supra*, 359-363.

and such an additional duty exceeds the dumping margin. However, that combination may easily result in an amount which exceeds the dumping margin.

CONCLUSION

CHAPTER VIII

GENERAL CONCLUSION : SOME OPTIONS FOR THE FUTURE

In this work GATT and European substantive anti-dumping law have been examined from a legal and from an economic point of view. Substantive anti-dumping law may be divided into two parts : the assessment of dumping and the inquiry whether anti-dumping relief should be granted. The legal and economic analyses of both parts have been made on a general and on a specific level. The general approach has examined the fundamental principles underlying anti-dumping law. The specific approach has investigated the concrete implementation of those fundamental principles. On both the general and the specific level, the confrontation between the legal and the economic analysis has resulted in several proposals for improving current anti-dumping law. On that occasion, it has been investigated whether the innovations of the new GATT Anti-dumping Code and EC anti-dumping legislation will actually improve current anti-dumping law as suggested by this work.

By way of a general conclusion, an overview will be given of the most important conclusions of this work. By comparing the conclusions of the general and the specific approach, as well as by considering simultaneously the conclusions concerning dumping and anti-dumping relief, it becomes possible to make some reflexions on the appropriateness of anti-dumping law to deal with so-called unfair trade practices.

Therefore, this Chapter is divided in three sections. This first section will overview the results of the analysis of the fundamental principles on dumping and anti-dumping relief. The second section will summarize the major problems in the implementation and the interpretation of current substantive anti-dumping law and how they can be resolved. The last section will suggest an alternative approach to anti-dumping law which, from an economic point of view, is the most appropriate instrument to deal with predatory practices.

1. THE FUNDAMENTALS OF ANTI-DUMPING LAW

GATT law allows the imposition of anti-dumping duties or the acceptance of undertakings, if dumping is being practised, which causes injury to the domestic industry of the importing country. By doing this, GATT seems to negate its very goal, *i.e.*, the promotion of free trade. Indeed, the general conclusion this work has drawn from the economic analysis of the welfare effects of anti-dumping duties and undertakings, is that anti-dumping measures generally reduce the importing country's welfare. This conclusion is completely in line with the traditional recommendation of trade theory that free trade maximizes the welfare of each country and of the world. Admittedly, there may be instances, such as price-makship, imperfect competition and market distortions, in which anti-dumping relief increases the national welfare of the importing country. However, as it is extremely difficult to make a correct assessment as to whether the conditions are fulfilled which are necessary for anti-dumping relief to improve the importing country's national welfare, errors are quite probable. Moreover, the use of such welfare-improving trade restrictions will usually provoke retaliatory reactions by the other countries, as their national welfare will be reduced. Such retaliation will make each country eventually worse off. Therefore, it seems appropriate, as a general guideline, not to resort to anti-dumping duties or undertakings, unless it has been demonstrated that they actually will increase the importing country's welfare, due account being taken of possible retaliatory actions by other countries. Thus, anti-dumping relief might be granted, for instance, in order to break through a third country's protectionist trade policy, though it should be pointed out that there will never be a fully waterproof guarantee that such actions will actually be successful.

It might also be argued that anti-dumping relief will benefit the importing country, as it may thwart the unfair trade practices resorted to by exporters. Indeed, the contradiction between free trade and anti-dumping relief, inherent in GATT, is usually explained by presenting dumping as an unfair trade practice. Such unfair trade practices are usually considered to be contrary to free trade.

Economic theory recommends free trade as a guideline for trade policy, because free trade generally maximizes world welfare, as well as the national welfare of each country. Indeed, it does not distort the efficient allocation of production resulting from profit maximization pursued by the producers. The efficient allocation of production implies that products will be produced at the lowest possible costs and, consequently, will be offered at the lowest possible prices to the consumers.

(The contention that unfair trade practices, such as dumping, are contrary to free trade will only be correct, if the notion of «unfair trade practices» refers to anti-competitive or predatory practices.

Indeed, predatory pricing should be distinguished from competitive pricing. A producer engages in predatory pricing, if he temporarily sells his products at prices below his short-run profit-maximizing prices, in order to drive his competitors out of the market or to prevent new competitors from entering the market, his object being to monopolize the market with a view to raise his prices later on and, consequently, to gain monopoly profits. As a consequence, dumping will only be contrary to free trade, if it is predatory. In case of predatory dumping, anti-dumping relief may be welfare-improving if it prevents the predator from monopolizing the importing country's market and if it does not result in the monopolization by the importing country's import-competing industry of their domestic market. Thus, anti-dumping relief should strike a balance between preventing the predator to monopolize and preventing the import-competing industry to monopolize. The problem, however, is that European anti-dumping law does not attain that balance. Indeed, European anti-dumping case law provides evidence that the danger of the Community industry using anti-dumping relief as a device to monopolize the Community market, is usually underestimated, whereas the danger of monopolization by the dumping exporters is generally accepted even without substantial proof to that effect.

Another problem is that GATT and European anti-dumping law provide a definition of dumping which does not distinguish predatory dumping from non-predatory dumping. They define dumping as price discrimination between national markets and as sales at a loss. European anti-dumping law further distinguishes NME dumping (*i.e.*, pricing exports from NME countries below the prices or costs of a third ME country) as a third category of dumping. The problem is that, in most cases, those three types of dumping will not be predatory. Price discrimination and sales at a loss will frequently result from short-run profit maximization. Though NME dumping results from foreign currency maximization, rather than from profit maximization, it is not predatory either, as NME dumping resulting from foreign currency maximization is not aimed at monopolizing the importing country's market. Moreover, uniform pricing and selling at prices covering all production costs, as well as charging prices for NME products which are higher than or equal to the prices and costs in third ME countries, do not prove that the exporter is not engaged in predatory pricing.

The main problem is that it is extremely difficult to distinguish predatory pricing from non-predatory pricing. GATT and European anti-dumping law provide too simple a definition, for it is impossible to capture predatory pricing by means of bright-line rules. A flexible rule-of-reason test, which takes account of all relevant facts, without giving priority to any of those factors, seems to be the best possible approach to make a correct distinction between predatory pricing and non-predatory pricing.

In the field of international trade law, however, a flexible approach may result in «one-way flexibility», *i.e.*, that such a broad interpretation will be placed upon the concept of «predatory dumping» so that predatory dumping will be found, even if it is not being practised. «One-way flexibility» is quite probable, if not unavoidable, in the field of international trade. Indeed, the positive effects of free trade on a country's welfare result from the fact that the welfare gains obtained by the consumers and the exporting industries of that country outweigh the welfare losses incurred by the domestic import-competing industries. In order to prevent their welfare losses, the import-competing industries will try to goad their country's authorities into pursuing a protectionist policy. Consumers and exporting countries will not provide much counterbalance to this demand for protection, because the relationship between free trade and their welfare gains is not as apparent for them as the positive effects of protection to the import-competing industries. Since consumers largely outnumber the producers part of an import-competing industry, the individual welfare gain of each consumer is smaller than the individual welfare loss of each import-competing producer. The exporting industries, on the other hand, will usually not be aware of the relationship between their export performances and the trade policy pursued by their governments. As a result, governments will be more aware of the interests of the import-competing industries and, in their efforts to get re-elected, they will try to meet the demand of the import-competing industries for protection against foreign competition. Governments must also observe international law and, in particular, the international agreements they have concluded. At least, they want to give the impression that they comply with them. Accordingly, in international trade, governments find themselves in an ambiguous situation : they want to adopt a protectionist policy, but that is prohibited by GATT. As GATT, though, allows the enactment of trade restrictions, under certain exceptional circumstances, the governments will rely on such lawful exceptions in order to offer protection to their import-competing industries and will place a broad interpretation on those exceptions. If necessary, they may even resort to illegal interpretations. In view of the danger of «one-way flexibility», a flexible rule-of-reason test within the field of international trade law is not adequate. Indeed, the more room there is for interpretation, the higher the probability of a «one-way flexible» interpretation and the higher the chance will be of finding non-predatory pricing to be predatory.

The mechanism which may result in «one-way flexibility» also explains why the current legal definition of dumping is not accurate, from an economic point view. Indeed, under prevailing GATT and European anti-dumping law, it is not necessary to place a «one-way flexible» interpretation on the definition of dumping for non-predatory dumping to be sanctioned. Thus, the argument that dumping, as legally defined, is an unfair trade practice does not hold.

2. THE IMPLEMENTATION OF ANTI-DUMPING LAW

GATT and European anti-dumping law seem to encompass quite bright-line rules and, thus, seem to limit «one-way flexibility» to the minimum. Indeed, it seems easy to determine whether or not there is price discrimination : only the export price must be compared with the price charged by the exporter in his home market. Similarly, the assessment of sales at a loss is as simple since it requires only a comparison between the export price and the exporter's production costs. Neither will the assessment of NME dumping cause major problems, as it involves only a comparison between the NME export price and the prices or production costs of a third ME country.

It has been shown, however, in this study that GATT and European anti-dumping law contain many open-ended provisions. Their provisions on injury, for instance, are a clear example : the assessment of injury involves the evaluation of many economic factors the interconnection of which is extremely complex and will vary from case to case. Thus, the assessment of injury cannot be regulated by strict - though easy to apply - provisions. This has been confirmed by recent economic research, showing that policy considerations, rather than technical considerations dominate injury determinations. The same economic research has shown that dumping determinations are of a rather technical nature, but that policy considerations still play a role, be it to a lesser degree, in the assessment of dumping¹⁸⁰⁴. This should not come as a surprise, since the assessment of dumping, under its current legal definition, also requires open-ended provisions. For example, as exporters may try to manipulate their prices or production costs in order to circumvent anti-dumping enforcement, anti-dumping law must offer the anti-dumping authorities sufficient flexibility in order to take account of such price and cost manipulations.

Moreover, not only the implementation of GATT and European anti-dumping law, but also the very provisions are characterized by «one-way flexibility». Indeed, the mechanism which explains why trade laws are interpreted in «one-way flexible» way, applies equally to the enactment of the trade laws themselves. Indeed, import-competing industries will only induce their governments to agree to international trade agreements which allow a sufficient degree of protectionism. The new GATT Anti-dumping Code provides a good example in this respect : many of its provisions on dumping are but a codification of the «one-way flexible» interpretations which have been placed on current GATT anti-dumping law.

The new GATT Anti-dumping Code, therefore, seems to be a missed opportunity. Nevertheless, it contains a number of welcome improvements which will exclude «one-way flexibility» or, at

¹⁸⁰⁴ THARAKAN, P.K.M., and WAELEBROECK, J., «Antidumping and countervailing duty decisions in the E.C. and in the U.S. An experiment in comparative political economy», *European Economic Review*, 1994, (171), 171- 193.

least, render it more difficult to apply. Moreover, as it still encompasses many open-ended provisions, there is always the possibility of reducing «one-way flexibility» in their implementation and interpretation. Indeed, the problem is not the open-ended nature of the anti-dumping provisions, but their implementation and interpretation. To a certain extent, a correct assessment of all the conditions which must be met for granting anti-dumping relief, requires, indeed, a flexible approach allowing to take account of all relevant factors. Moreover, even the more strict or detailed provisions of GATT anti-dumping law, do not prevent the Community from adopting a less «one-way flexible» anti-dumping law, at least insofar as European anti-dumping law will not sanction exports which are not actionable under GATT anti-dumping law. Indeed, GATT anti-dumping law does not require its Contracting Parties to sanction all instances of dumping actionable under GATT anti-dumping law ; it only provides the possibility for its Contracting Parties to sanction those instances of dumping and, at the same time, prohibits them to sanction other pricing practices.

Admittedly, though, chances are low that the implementation and interpretation of GATT anti-dumping law by the Community will become less «one-way flexible». Probably, the Community will interpret the new GATT Anti-dumping Code as being a confirmation by GATT of its own anti-dumping law. Nevertheless, it is appropriate to point out the deficiencies in prevailing anti-dumping law, be it only to put a limit to too extreme a «one-way flexible» implementation and interpretation of anti-dumping law.

2.1. *DUMPING*

A «one-way flexible» interpretation of the provisions regarding dumping allows to find dumping in cases where no dumping is being practised or to find dumping margins which are higher than the actual dumping margins. The most important causes of «one-way flexibility» in respect of the determination of dumping are the conviction that prices must cover all production costs and yield a reasonable profit margin, the quasi-total refusal of using export prices to third countries as normal value standard, especially in respect to NME countries, the unequal treatment of associations, and the special techniques used for calculating the dumping margin.

2.1.1. *Sales at a loss*

The conviction that prices must cover all production costs (including selling, administrative and other general expenses) plus a reasonable profit margin, results in a restrictive interpretation being placed on the concept «ordinary course of trade». By doing so, the constructed value, rather than the prices actually paid or payable, will frequently be used as normal value standard. The

definition that the constructed value must be equal to the sum of all the production costs (including selling, administrative and other general expenses) plus a reasonable profit margin, is based on the assumption that producers apply the method of full-cost pricing for determining their prices. Producers are, thus, not allowed to sell their products at a loss, not even if those losses result from non-predatory profit maximization. This definition disregards the fact that sales at a loss may result from non-predatory profit-maximizing pricing. Obviously, there is no reason to disregard sales at a loss resulting from non-predatory profit maximization. As a general rule, prices resulting from non-predatory profit maximization should be applied as normal value. If this suggestion would still be too big a step to take, it might be envisaged to apply the assumption that sales at a loss do not result from non-predatory profit maximization, unless the exporter shows that, under short-run profit maximization, prices cannot cover all the production costs and yield a reasonable profit margin.

Once it has been accepted that sales at a loss may result from non-predatory profit maximization, the use of the constructed value as normal value standard will be limited. Indeed, under European anti-dumping law, the constructed value may be used if sales have not been made in the ordinary course of trade, whereas sales at a loss are considered not to have been made in the ordinary course of trade. Admittedly, certain conditions have to be fulfilled for sales at a loss to be considered not to have been made in the ordinary course of trade : sales at a loss must have been made in substantial quantities at prices which do not permit the recovery of all costs during a reasonable period of time which is normally one year and minimum six months. Those conditions, however, do not prevent sales at a loss resulting from non-predatory profit maximization from being found not to have been made in the ordinary course of trade. Indeed, if, over a longer period than the period taken into account, sales permit the recovery of all costs, it is possible to find sales at a loss which are not in the ordinary course of trade by taking into account a smaller period during which only sales at a loss are made. This is possible because there is no obligation to adopt a period equal to the duration of a full business cycle. Thus, by obliging the European anti-dumping authorities to take into account at least one business cycle, it would already be possible to restrict the «one-way flexible» application of European anti-dumping law.

2.1.2. The export price to third countries : a valid normal value standard

Once it is admitted that sales at a loss may result from non-predatory profit maximization, the strict application of the method of full-cost pricing for the determination of the constructed value, will have to be replaced by more complex rules in order to determine the price under short-run profit maximization. Since such complex rule will probably reduce the use of the constructed value, it will become more obvious to use the export price to third countries as normal value standard. The infrequent use of the export price to third countries in European anti-dumping case

law has been explained by the fear that this price may also be a dumping price. Unless this price is the result of a predatory pricing strategy, there is, however, no reason why a dumping export price to third countries should not be used as normal value standard. It is even possible to reverse the argument: not the exporter's domestic market price, but rather his export price to third countries should be used as normal value standard, since the simultaneous dumping of that exporter on the Community market and in third countries may be proof of the specific conditions prevailing in his domestic market in comparison with the rest of the world. Accordingly, the possibility that the exports to third countries are being dumped, is no sufficient reason for rejecting those dumping prices as normal value standard. It should, at least, be demonstrated that those exports are actually being dumped. It seems that the new GATT Anti-dumping Code and EC anti-dumping legislation share this point of view. Under them, export prices to third countries may only be rejected if they do not cover all production costs. Hence, export prices may be refused as normal value standard if the export transactions are made at a loss. Since dumping is being defined as sales at a loss and since the domestic market price cannot be used as touchstone (otherwise the domestic market price should be used as normal value standard and the export price would not be considered), GATT and EC anti-dumping law, thus, imply that export prices may be rejected if they are demonstrated to be dumping prices.

This amelioration induced by the new GATT Anti-dumping Code, however, does not pertain to NME dumping, though the use of the export prices to third ME countries is the most warranted in anti-dumping cases against NME countries. For they are the only available normal value standard guaranteeing a direct link with the allegedly dumping NME exporter. Moreover, they are the only prices directly comparable with their export prices to the Community as they are determined by the same interaction between the economic systems of ME and NME countries. The prices or production costs of a ME country do not have such a direct link with the NME country, nor are they determined by the interaction between the economic systems of ME and NME countries. They are, moreover, a source of arbitrariness in respect of the NME exporter. For he cannot know in advance which ME country will be selected as reference country. If, however, the NME export prices to third countries was used as normal value standard, he would have the opportunity of knowing in advance whether he will be found dumping under European anti-dumping law.

2.1.3. The unequal treatment of associations

Under European anti-dumping law, associations are treated unequally. For determining the normal value in their respect, the economic unit theory is applied. Accordingly, the normal value is set equal to the price paid by the first independent purchaser. For determining the export price, on the other hand, the «dealing at arm's length» price is used. More specifically, the resale price is determined, *i.e.*, the price paid by the first independent purchaser after deducting the costs

incurred between the imports and resales, including a reasonable margin of profit. As a result, if the allegedly dumping exporter does not actually dump, dumping will nevertheless be found, namely up to the amount of the costs incurred between imports and resales, plus the margin of profit. Thus, associated exporters will be sanctioned not because of their dumping, but because of their association. That result is contrary to GATT and European anti-dumping law. It is all the more worrisome, because a broad interpretation is being placed on the concept «association». Indeed, the existence of an effective control of one associated party over the other is not required. Moreover, the prices between associated parties are assumed to be influenced by the association, unless the exporter can provide proof to the contrary on the basis of a comparison of his prices with the prices of non-associated producers. Thus, associated parties which are able to charge lower prices because of their higher efficiency will never be able to prove that their prices are not influenced by their association.

In order to remedy the bias against associated exporters anti-dumping law should be modified in three respects. First, the concept «association» must be given a more restrictive meaning by requiring that one of the associated parties exercises an effective control over the other. Second, the assumption that the prices between associated parties are being influenced by the association must be reversed. Thus, until evidence to the contrary is being provided, the prices between associated parties should be assumed not to have been influenced by the association. Third, associated parties should be given an equal treatment. More specifically, the «dealing at arm's length» price, in particular the resale price charged to an independent purchaser, excluding the costs and profits of the associated party reselling the product to the independent purchaser, should be used as export price as well as normal value standard. The new GATT Anti-dumping Code has opted for this third solution, but it gives ample opportunity, which the Community has made use of, to disregard its requirement of determining normal value and export price of associated parties at the same level of trade.

2.1.4. The calculation of the dumping margin

Under European anti-dumping law, several techniques are being applied, which result in an overestimation of the dumping margin. The most apparent technique is one of disregarding the cases of reverse dumping. By considering sales of small quantities in the domestic market of the allegedly dumping exporter as not being comparable sales in the ordinary course of trade, European anti-dumping law incorporates a bias towards disregarding cases of reverse dumping. Indeed, if only small quantities are sold on the domestic market of the allegedly dumping exporter, it is probable that reverse dumping is being practised.

There is, however, no reason for disregarding reverse dumping in order to calculate the dumping margin. Admittedly, exporters may adopt a strategy of «hit-and-run» in order to evade the application of anti-dumping law and still succeed in gaining or maintaining a foothold or even a dominant position in the Community market. On the other hand, it is also possible that their apparent «hit-and-run» strategy is purely the result of competitive pricing. A stable, rigid price level is not a characteristic of a competitive market, on the contrary. This is, indeed, recognized under European anti-dumping law where sales at a loss may only be considered as not having been made in the ordinary course of trade, if the prices charged during a reasonable period of time do not permit the recovery of all production costs. Thereby, European anti-dumping law recognizes that sales at a loss may be compensated by profitable sales. The same should be accepted in connection with dumping, since it is equally possible that cases of dumping proper are compensated by cases of reverse dumping. But even that is not a necessary condition for taking into account all cases, including cases of reverse dumping. Reverse dumping is not necessarily practised in order to compensate for the losses incurred from dumping proper. For dumping proper does not necessarily imply that the dumping exporters incur losses or reduced profits. Dumping proper may, indeed, be optimal under short-run profit maximization. Thus, insofar as dumping and reverse dumping result from short-run profit maximization, they should both be taken into account for determining the dumping margin. Only if may be shown that the dumping exporter adopts a predatory «hit-and-run» strategy in order to circumvent anti-dumping enforcement, reverse dumping should be disregarded.

2.2. INJURY

«One-way flexibility» allows to find dumping causing injury to the Community industry in cases where it does not inflict any injury upon the Community industry. In order to find injurious dumping that is not actually there, the Community industry is defined in a «one-way flexible» manner and a «one-way flexible» trends analysis is applied in order to determine whether the Community industry suffers injury from the dumping.

2.2.1. *Community industry*

The definition of the Community industry depends on the definition of the like product. In principle, the like product determination should not be influenced by its possible effect on the outcome of the anti-dumping proceeding. Through its relationship with the definition of the Community industry, the like product determination, indeed, may affect the outcome of an anti-dumping proceeding. For an anti-dumping proceeding will stand or fall depending on whether or

not a Community industry exists, and its very existence depends on the definition of the like product category. If too narrow a definition is provided for the like product category, there may be no Community industry producing the like product. On the other hand, if too broad an interpretation is placed on the like product category, there will probably exist a Community industry, but it will be less probable that this broadly defined Community industry will be injured by the dumping. However, the like product category may marginally be extended to encompass product types which do not cause any injury, insofar as the majority of the products which are part of the like product category, do cause injury. In such a case, the overall like product category, including the non-injurious product types, will still be found to inflict injury upon the Community industry.

As the like product determination may be a decisive element in the assessment of injury, it should be governed by strict and objective principles. GATT and European anti-dumping law, however, do not provide many guidelines for determining the like product category. They should be supplemented by the requirement of using the cross elasticities of demand and supply. It must be recognized that the use of the cross elasticities of demand and supply would still leave some room for interpretation, since a general clear-cut threshold of cross elasticity above which products must be considered to be like products, cannot be determined. Nevertheless, their use will prevent cases of extreme «one-way flexibility» merely because it renders the like product determination more transparent.

GATT and European anti-dumping law do not require the Community industry to comprise all the Community producers producing the like product. Community producers whose collective output represents a major proportion of total Community output, may also constitute a Community industry. Thereby, anti-dumping proceedings are made possible, though not all Community producers are complaining to suffer injury from the dumping. In respect of the determination of the Community industry, GATT and European anti-dumping law further allow to disregard producers producing the like product within the Community, who are related to the dumping exporters or who are themselves importers of the dumped product. The European anti-dumping authorities have applied both possibilities restrictively in respect of complainant producers, but have allowed a more extensive application of them in respect of non-complainant producers. There is no legal ground justifying this inconsequential application of GATT and European anti-dumping law. Only «one-way flexibility» may explain this inconsistent attitude of the European anti-dumping authorities, since the inconsequential application of the definition of the Community industry increases the chances of finding a major proportion of the Community producers complaining about the dumping. The exclusion of a non-complainant producer reduces the overall output of the like product of Community origin, whereas it does not affect the amount of output of the complainant Community producers. Accordingly, the proportion of the output of the

complainant producers in the overall Community output increases. Conversely, by including a complainant producer, both total output and the output of the complainant Community producers increases. However, the relative increase in the output of the complainant Community producers will be higher than the relative increase in total Community output. As a result, the chances of finding a Community industry increase by including complainant producers. The inconsequential application of the possibility to exclude producers from the Community industry should be forbidden.

2.2.2. *Trends analysis*

The European anti-dumping authorities apply the trends analysis in order to determine whether the Community industry suffers injury from the dumping. They investigate whether the Community industry is suffering injury, whether the condition of the Community industry shows a parallel developments with the evolution of the volume and the prices of the dumped imports, and whether there are other factors which may also have caused injury to the Community industry. In order to determine the state of the Community industry, an unlimited number of factors may be taken into account. If need be, there may always be found a factor, indicating that the Community industry is not doing well. On the other hand, the number of other factors which may have caused the injury, is also unlimited. Thus, it may be expected that, if need be, it will also be possible to find such other factor which may be said to have caused the injury to the Community industry. In European anti-dumping case law, however, the other factors have only exceptionally been considered as the cause of the injury. It has always pertained to cases in which it was completely impossible to uphold that it was still the dumping which was causing the injury. With the exception of those cases, the injury suffered by the Community industry is usually found to have been caused by the dumping. Indeed, the European anti-dumping authorities apply several techniques in order to obtain a finding of injurious dumping. The most important device in this respect is the cumulation of dumped imports. Cumulation may result in small volumes of dumped imports being found to cause or to attribute to the injury suffered by the Community industry, though those imports are explicitly said not to cause injury by themselves to the Community industry.

It should be clear that the trends analysis as applied under European anti-dumping law does not guarantee that the dumping is the actual cause of the injury suffered by the Community industry. The volume of the dumped imports and the deterioration in the situation of the Community industry showing a parallel development does not prove that the dumping causes the injury. The trends analysis cannot guarantee either that all other factors are known and, consequently, taken into account. Moreover, if the injury is caused jointly by the dumping and some other factors, the trends analysis does not offer a method for determining the part of the dumping into the

injury. On the other hand, the trends analysis does not allow to detect all cases of injurious dumping. Indeed, under the trends analysis, the Community industry will only be found to suffer injury, if its state has deteriorated in comparison with its prior condition. It is, however, possible that the state of the Community industry has not deteriorated, but that the Community industry would be doing better without the dumping. Dumping which prevents the condition of the Community industry from improving, also causes injury to the Community industry.

The drawbacks of the trends analysis may be avoided through substituting it by the comparative analysis. According to the comparative analysis, the factual situation of the Community industry is compared with what its situation would have been without the dumping (the so-called counterfactual world). As both situations are identical but for the dumping, the difference between those two situations must be caused by the dumping. If the counterfactual situation (without dumping) is not as good as the factual situation (with dumping), the dumping must have been the cause of the injury suffered by the Community industry. The comparative analysis also allows to assert whether the dumped imports should be cumulated. For dumped imports should only be cumulated, if they have a collective injurious effect on the Community industry. The comparative analysis allows to measure exactly whether there is such a collective injurious effect. Indeed, if the injurious effect of the cumulated dumped imports is higher than the sum of the injurious effects of each of the separate dumped imports, the dumped imports will have a collective injurious effect and should be cumulated.

The problem with the comparative analysis is that the condition of the Community industry without dumping is not known. It must be calculated by means of a mathematical model, a model which, for the sake of practicability, must necessarily be grounded on certain assumptions. Moreover, certain parameters, such as price elasticities of demand and supply, must be known. However, as it will seldom be easy to gain an exact knowledge of them, the results of the comparative analysis will not always be fully accurate. Nevertheless, the application of the comparative analysis should be recommended. The inaccuracy of its results will only cause problems in cases situated right in between material injury and no material injury. In such cases, a combined use of the comparative analysis and the trends analysis might be considered.

2.3. COMMUNITY INTERESTS

By subjecting the imposition of anti-dumping duties to the requirement that they must be in the interests of the Community, European anti-dumping law has taken a step in the right direction. In conformity with the desire expressed by GATT anti-dumping law, it has, thereby, broken the

automatic relationship between the existence of injurious dumping and the granting of anti-dumping relief. It should only be regretted that the European anti-dumping authorities have not made use of the concept «Community interest» to effectively break the automatism between injurious dumping and anti-dumping relief. Instead, they have used it to strengthen the automatism linking injurious dumping and anti-dumping relief. The concept «Community interest» has always been relied upon in order to show the necessity of anti-dumping relief, whereas the argument that anti-dumping relief is injurious to consumers of the dumped product and processing industries using it has nearly always been rejected. Indeed, the concept «Community interests» is used to give twice attention to the injury suffered by the Community industry. Moreover, in several anti-dumping cases, the Community interests and the Community industry's interests are considered to coincide entirely. In such cases, anti-dumping relief will be found to be in the Community interests, as soon as is proven that the Community industry suffers injury from the dumping. Such conclusion is, however, contrary to the conclusions of the economic analysis of anti-dumping relief. Economic theory demonstrates that anti-dumping relief usually causes the welfare of the importing country to decline. It causes a decline in welfare because its positive effects on the Community industry are offset by its negative effects on the consumers and the processing industries using the dumped product. Therefore, European anti-dumping law should apply the assumption that anti-dumping relief is not in the Community interests, unless proof to the contrary is being provided. The rebuttal of this assumption may be based, for example, on antitrust considerations (preventing the dumping exporters to monopolize the Community market by means of predatory dumping), or on reasons of employment or even national security, the interests of the Community industry being valued higher than those of the consumers and the processing industries.

2.4. *ANTI-DUMPING RELIEF*

In connection with anti-dumping relief, European anti-dumping law should be improved in three respects. First, anti-dumping duties should be preferred to undertakings, so that undertakings may be accepted only if anti-dumping duties, in comparison with undertakings, are shown to be less favourable to the Community interests. Indeed, economic theory shows that undertakings generally cause a bigger welfare loss than anti-dumping duties.

Second, a more accurate observance of the provision that the magnitude of anti-dumping relief should not exceed the amount adequate to remove the injury, should be guaranteed. The way in which the injury margin is calculated does not guarantee that the amount of anti-dumping duty will be adequate to remedy the injury from the dumping. Indeed, the assumption applied in European

anti-dumping case law, that the margin of price undercutting measures the injury caused by the dumping, does not always hold. For example, the assumption will only hold insofar as the Community producers are as efficient as the dumping exporters. However, if the dumping exporters are more efficient, they may undercut the Community producers' prices, merely because of their higher efficiency and because their margin of price undercutting will only measure their higher efficiency. The European anti-dumping authorities, however, find it extremely difficult to measure and to compare efficiency. That difficulty may be circumvented if the comparative analysis, rather than the trends analysis, is being used for determining whether the dumping is causing injury. Indeed, by means of the comparative analysis, it is possible to determine exactly by what amount the dumping price must increase in order to remedy the injury caused by the dumping.

Finally, the trend in European anti-dumping law to extend the scope of anti-dumping relief because such an extension is necessary for preventing circumvention, should be stopped. It concerns the screwdriver factory provision as well as several less conspicuous cases in which the scope *ratione materiae* of anti-dumping relief has been extended to products not subjected to the anti-dumping proceeding. In those cases, too broad an interpretation is placed on the circumvention of anti-dumping relief. Indeed, under GATT, the relocation of assembly activities into the territory of the importing country has been found not to violate anti-dumping law. As is the case for the relocation of assembly facilities, the substitution of dumped imports by imports of other, though similar, products not subject to the anti-dumping measures, cannot be said either to be a circumvention of anti-dumping relief. The argument about the circumvention of anti-dumping law seems to be merely an excuse to extend the scope of anti-dumping law to products which have not been shown to have been dumped and to have been inflicting injury upon the Community industry.

As they only cover a protectionist policy in violation of GATT, the screwdriver factory provision should be repealed and the extension of the scope *ratione materiae* of anti-dumping measures to include products of which it is not shown that all the conditions for granting anti-dumping relief are fulfilled, should be prohibited.

3. THE ALTERNATIVE FOR ANTI-DUMPING LAW

One of the main conclusions of this work is that dumping should only be sanctioned if it is predatory. This work has also pointed out that current anti-dumping law applies to non-predatory dumping, but cannot detect all instances of predatory dumping. It is, indeed, impossible to formulate general bright-line rules, which allow to detect only - though all - instances of predatory dumping. Therefore, this work proposes a rule-of-reason test, as such a test allows to take account of all relevant factors and provides the flexibility necessary to assess complex economic situations. However, flexibility in trade laws usually results in protectionist «one-way flexibility» because of the pronounced demand of the import-competing industries for protection against foreign competition.

This work has also shown that trade restrictions, such as anti-dumping duties and undertakings, usually reduce the importing country's national welfare, though they provide the import-competing industries with the required protection. Their negative welfare effects are due to the fact that their positive effects on the welfare of the import-competing industries do not fully compensate their negative effects on the welfare of the domestic consumers and other producers. Though European anti-dumping law requires that anti-dumping relief may only be granted if it is in the Community interests, the European anti-dumping authorities have seldom held that anti-dumping relief was not in the Community interests. They usually hold that the Community consumers and processing industries are not that much injured by anti-dumping relief. Though they are right in asserting that anti-dumping relief only marginally affects the welfare of each individual consumer and each individual producer part of the processing industry, they ignore that the overall negative welfare effects on consumers and processing industries are far greater than the positive effects on the import-competing industries.

Predatory dumping, though, should be sanctioned because of its anti-competitive effects. Anti-dumping relief, however, is not the optimal instrument for sanctioning predatory dumping as it causes the importing country to suffer a welfare loss. Therefore, it might be contemplated to apply antitrust law to predatory dumping. Indeed, because of its anti-competitive effects on the domestic market of the importing country, predatory dumping falls within the scope of antitrust law.

Moreover, antitrust law does not impose trade restrictions in order to sanction anti-competitive practices and, thus, does not have a negative effect on the importing country's national welfare. Antitrust sanctions deal also more readily with predatory dumping. Indeed, under antitrust law, past predatory dumping practices are condemned and a fine is possibly imposed on the dumping producer. Moreover, periodic penalty payments may also be imposed in order to prevent future

predatory dumping practices. The remedies of anti-dumping law, on the other hand, in principle, cannot sanction past dumping practices. Indeed, retroactive anti-dumping measures are, in principle, forbidden and, under European anti-dumping law, no use has been made of the few exceptions, under which retroactivity is allowed. Furthermore, the remedies of anti-dumping law do not prevent future predatory dumping. Anti-dumping duties will make it only more costly for the dumping exporter to monopolize the market of the importing country. Indeed, if, after the imposition of an anti-dumping duty, he still intends to monopolize the market of the importing country, he will have to go on lowering his prices, thereby cutting his profits or increasing his losses. Undertakings are even worse : they will replace the anti-competitive effects of predatory dumping by their own anti-competitive effects. For they will probably result in restricting competition on the market of the importing country. Indeed, dumping exporters will only offer price undertakings if they are sure that they will not be undercut by the domestic producers of the importing country, whereas quantity undertakings will result in a market segmentation between the domestic producers and the dumping exporters.

Another important advantage of antitrust law is that it precludes «one-way flexibility» for two reasons. First, its object is to prevent injury to competition, rather than injury to import-competing industries. As a consequence, it does not pay exclusive attention to the interests of import-competing industries, but considers equally the interests of consumers¹⁸⁰⁵. Second, the import-competing industries will not demand «one-way flexible» antitrust law which might sanction non-predatory competition since antitrust law applies both to them and to their competitors and they certainly do not want their ordinary competitive actions to be sanctioned by antitrust law.

It would be appropriate to replace GATT anti-dumping law by uniform international antitrust rules and apply them to predatory dumping. International antitrust rules should be preferred to national antitrust law, since dumping implies international trade involving at least two different countries. Without uniform international antitrust rules, those countries may enact quite disparate national antitrust laws which may clash and which may even distort free trade and result in predatory dumping, especially if they contain specific rules for exporters, such as exemptions for export cartels. However, it seems that, though there have been already several attempts to reach an agreement on binding international antitrust law, a worldwide consensus seems impossible to be

1805 BOURGEOIS, J.H.J., «EC Anti-dumping Enforcement - Selected Second Generations Issues», in *Antitrust and Trade Policy in the United States and the European Community*, HAWK, B.E. (ed.), New York, Bender, 1986, (563), 569.

reached soon, as there are still too many and all too divergent views on what international antitrust law should be¹⁸⁰⁶.

As an alternative, the importing country might apply its national antitrust law to predatory dumping. Here too, there may be some problems in substituting anti-dumping law by antitrust law. Indeed, the import-competing industries will oppose such a change, precisely because antitrust law will be less strict for importers, as it will not sanction competitive pricing. It is, moreover, argued that a country will not give up a protectionist policy which, as is the case with anti-dumping policy, is allowed by GATT as long as the other countries do not give it up¹⁸⁰⁷. It seems, however, that those problems will not remain insurmountable since, recently, countries have become increasingly aware of the interconnection between trade policy and competition policy¹⁸⁰⁸, as well as of their increasingly protectionist implementation of anti-dumping law. They also notice that their exports may increasingly be harassed by anti-dumping enforcement in other countries which have started to copy their protectionist anti-dumping laws¹⁸⁰⁹. If the degree of protectionism in anti-dumping law continues to increase and an increasing number of countries start to retaliate against this protectionist trend by resorting to anti-dumping enforcement themselves, the welfare losses caused by this increasing protectionism will become more and more apparent and eventually the point will be reached at which the countries will want to get rid of that protectionism. If, at that time, an agreement on a uniform international antitrust law is still unattainable, countries might perhaps decide that each country will apply its national antitrust law, and reach an agreement on the extra-territorial application of their antitrust laws. Moreover, it should be stressed that, from an economic point of view, countries are better off not to adopt protectionist trade policies, even if the other countries do not want to give up their trade restrictive policies.

As to the Community, the question is whether European antitrust law can substitute anti-dumping law : does it encompass all types of predatory dumping and is its application to dumping allowed under public international law and under GATT anti-dumping law ?

1806 See : PETERSMANN, E.-U., «International Competition Rules for the GATT-MTO World Trade and Legal System», *Journal of World Trade*, 1993/6, (35), 35-41 and 75-83. See also : BOURGEOIS, J.H.J., «EC Anti-dumping Enforcement - Selected Second Generations Issues», in *Antitrust and Trade Policy in the United States and the European Community*, HAWK, B.E. (ed.), New York, Bender, 1986, (563), 567.

1807 BOURGEOIS, J.H.J., «EC Antidumping Enforcement - Selected Second Generation Issues», in *Antitrust and Trade Policy in the United States and the European Community*, HAWK, B.E. (ed.), New York, Bender, 1986, (563), 565 and 577 ; VERMULST, E.A., «EEG Anti-dumping en Mededingingsrecht : Twee handen op één buik ?», *S.E.W.*, 1988, (430), 439-440.

1808 PETERSMANN, E.-U., «International Competition Rules for the GATT-MTO World Trade and Legal System», *Journal of World Trade*, 1993/6, (35), 75.

1809 HORLICK, G.N., «How the GATT Became Protectionist. An Analysis of the Uruguay Round Draft Final Antidumping Code», *Journal of World Trade*, 1993/5, (5), 17.

3.1. DUMPING AS UNLAWFUL PRACTICE UNDER EUROPEAN ANTITRUST LAW

European antitrust law prohibits all agreements between undertakings, all decisions by associations of undertakings and all concerted practices which are liable to affect trade between Member States and which are designed to prevent, restrict or distort competition within the Common market or must have this effect (Article 85(1) EC Treaty). It also prohibits any abuse by one or more undertakings of a dominant position within the Common Market or in a substantial part of it insofar as it may affect trade between Member States (Article 86 EC Treaty).

Thus, European antitrust law does not sanction dumping as such. It does not prohibit price discrimination between national markets, sales at a loss or, with respect to NME countries, sales at prices below the prices or below the production costs of a third ME country. On the contrary, arrangements intended to prevent dumping are prohibited under European antitrust law (Article 85 EC Treaty), if they hamper competition within the Community¹⁸¹⁰. However, this does not prevent European antitrust law from being applied to dumping. Indeed, the dumping, just as the arrangement preventing dumping, may come under European antitrust law¹⁸¹¹. However, not all kinds of dumped imports as defined by GATT and European anti-dumping law fall within the scope of European antitrust law. For dumping to be sanctioned under European antitrust law, it should result from either a cooperation between the dumping exporters¹⁸¹² or from the abuse of the dominant position the dumping exporter has on the Community market¹⁸¹³. Moreover, the dumping must have anti-competitive effects on the trade between the Member States of the Community.

Hence, it seems safe to conclude that European antitrust will only sanction predatory dumping. Dumping practised by an exporter not having a dominant position on the Community market or by

¹⁸¹⁰ Commission Decision 75/497/EEC of 15 July 1975, *IFTRA Rules for producers of virgin aluminium for the European markets*, O.J., 29 August 1975, No L 228/3; Commission Decision 85/206/EEC of 19 December 1984, *Aluminium imports from Eastern Europe*, O.J., 30 March 1985, No L 92/1.

¹⁸¹¹ See: BARACK, B., *The application of the Competition rules (antitrust law) of the European Economic Community*, Deventer, Kluwer, 1981, 166-170.

¹⁸¹² According to the Commission, arrangements between exporters located outside the Community controlling imports in terms of quantity or price fall under Article 85 EC Treaty (*Second Report on Competition Policy of the Commission*, Luxembourg, 1973, 25-26. See also: BARACK, B., *The application of the Competition rules (antitrust law) of the European Economic Community*, Deventer, Kluwer, 1981, 166; BELLAMY, C., and CHILD, G.D., *Common Market Law of Competition*, London, Sweet & Maxwell, 1987, 117, § 2-215 and 178, § 4-062).

¹⁸¹³ Predatory pricing may constitute an abuse of a dominant position, see: C.J.E.C., case C-62/86, 3 July 1991, *Akzo Chemie BV v Commission*, E.C.R., 1991, I, (3359), 3453-3456; Commission Decision 85/609/EEC of 14 December 1985, *ECS/Akzo*, O.J., 31 December 1985, No L 374/1; BELLAMY, C., and CHILD, G.D., *Common Market Law of Competition*, London, Sweet & Maxwell, 1987, 414-415, § 84-048 and 8-049.

exporters which do not hold a collective dominant position or which do not cooperate with each other, will not be sanctioned¹⁸¹⁴. Such dumping will usually not have anti-competitive effects, even if it is intended to be predatory, because, in order for predatory dumping to be successful, the predator has to possess a certain degree of market power. Indeed, if the predator wants its predatory pricing strategy to succeed, he must be able to exercise control over the market price in the short run, *i.e.*, he must be able to reduce his prices in the short run¹⁸¹⁵. Thus, the requirement of market power does not imply that European antitrust law may only sanction predation after it has resulted in the monopolization of the Community market. It appears to be possible to sanction predatory dumping under European antitrust law, if there is proof to the effect that the dumping prices deviate from short-run profit-maximizing prices and that such pricing policy may reduce competition on the Community market¹⁸¹⁶.

Because of the requirement that the predator already possesses some degree of market power, it may be so that certain instances of predatory dumping will not be detected under European antitrust law. However, those cases of predatory dumping practised by a predator without market power, will likely result in lower price increases than the instances of predatory dumping practised by a predator with market power. For, the current degree of market power may be said to indicate the lower bound to the power that would follow upon a successful predatory pricing strategy, and the lower the degree of market power, the lower the monopoly prices will be that the predator may charge eventually. Therefore, the non-detection of predatory pricing by predators without market power will have less negative effects on consumers (*i.e.*, there will be lower price increases) and will also be less likely to be pursued (*i.e.*, because of the lower price increases, the monopoly profits will be lower)¹⁸¹⁷. As a consequence, European antitrust law seems to be adequate to sanction but predatory dumping and to disregard instances of dumping which are not or are probably not predatory. Admittedly, it may disregard instances which are predatory, but the monopolizing effects in those instances will be fairly unimportant. Therefore, European antitrust law seems to be a more than adequate alternative to anti-dumping law.

1814 LANDSITTEL, R., *Dumping in Außerhandels- und Wettbewerbsrecht*, Baden-Baden, Nomos, 1987, 141-143.

1815 JOSKOW, P.L., and KLEVORICK, A.K., «A Framework for Analyzing Predatory Pricing Policy», *Yale Law Journal*, 1979-1980, (213), 225-227.

1816 Possible anti-competitive effects fall under European antitrust law, see : C.J.E.C., case 85/76, 13 February 1979, *Hoffmann-La Roche & Co KG., Basel v Commission*, E.C.R., 1979, (461), 541.

1817 JOSKOW, P.L., and KLEVORICK, A.K., «A Framework for Analyzing Predatory Pricing Policy», *Yale Law Journal*, 1979-1980, (213), 225-227 and 237.

3.2. *EXTRA-TERRITORIAL APPLICATION OF EUROPEAN ANTITRUST LAW*

The problem which may arise in respect of the application of national antitrust rules to predatory dumping is that the dumping exporters are established outside the Community. Therefore, it is important to know whether European antitrust law is and, under public international law, may be extra-territorially applied. With regard to predatory dumping, the question is whether it is sufficient that the effects of the predatory dumping practices take place on the Community market for European antitrust law to apply.

According to the Court of Justice, cooperation between undertakings established outside the Community may be sanctioned under Article 85 EC Treaty, if that cooperation has anti-competitive effects on the Community market¹⁸¹⁸. The Court, moreover, held that such extra-territorial application of Article 85 EC Treaty is not contrary to public international law¹⁸¹⁹.

Indeed, the Court's judgement does not seem to pose any problem in terms of public international law, since, in respect of extra-territorial application of national laws, the Permanent Court of International Justice has held that :

«(...) the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects have taken place there»¹⁸²⁰.

The Permanent Court's judgement, though, is open to two interpretations. On the one hand, it may be interpreted as allowing the effects doctrine, according to which a country's national laws may have extra-territorial application, as soon as the effects of the infringement take place on the territory of that country. On the other hand, it may also be interpreted as granting extra-territorial application to a country's national laws, especially if, besides at least one of the constituent

¹⁸¹⁸ C.J.E.C., joined cases 89, 104, 114, 116, 117 and 125 to 129/85, 27 September 1988, *A. Åhlström Osakeyhtiö a.o. v Commission, E.C.R.*, 1988, (5193), 5242-5243.

It may be argued that the Court of Justice did not adopt a exclusively effects-based test of jurisdiction (LANGE, D.G.F., and SANDAGE, J.B., «The *Wood Pulp* Decision and its Implications for the Scope of EC Competition Law», *Comon Market Law Review*, 1989, (137), 157). Indeed, the Court did not refer to the effects doctrine, but rather mentioned the principle of territoriality. However, the reference to this principle must be read in combination with the fact that the *locus* of the implementation of the unlawful agreement, decision or concerted business practice was considered to be a decisive factor for determining the Community's jurisdiction in respect of Article 85 EC Treaty. It follows from that combination that the Court adopted the effects doctrine since this doctrine is a specific application of the principle of territoriality, in particular of the objective principle of territoriality.

¹⁸¹⁹ C.J.E.C., joined cases 89, 104, 114, 116, 117 and 125 to 129/85, 27 September 1988, *A. Åhlström Osakeyhtiö a.o. v Commission, E.C.R.*, 1988, (5193), 5243-5244.

¹⁸²⁰ P.C.I.J., *Case of the SS «Lotus»*, *PCIJ Series A*, No 10, 1927, 23.

elements of the infringement, its effects take place on the territory of the State in question¹⁸²¹. In respect of antitrust law, it is irrelevant which interpretation is right. Indeed, an infringement of Article 85 EC Treaty consists of two elements: the conclusion of the agreement, decision or concerted practice, and the implementation thereof¹⁸²². Thus, also the effects of unlawful cooperation are constituent elements of the infringement¹⁸²³. Therefore, it may be concluded that the extra-territorial application placed on European antitrust law is in line with public international law. The Court of Justice has chosen the effects of the unlawful cooperation as a relevant criterion because, if the application of Article 85 EC Treaty were to depend on the place where the agreement, decision or concerted practice was concluded, the enforcement of that Article could easily be circumvented¹⁸²⁴.

Public international law, though granting countries a wide margin of discretion, does put a limit on the extra-territorial application of their national laws. That limit is the principle of sovereign equality of States, implying that a State has the right to exercise jurisdiction within the limits of its sovereignty, but is not entitled to encroach upon the sovereignty of other States¹⁸²⁵. It limits the extra-territoriality of both the legislative and enforcement jurisdiction of a State.

¹⁸²¹ GOLDMAN, B., «Les champs d'application territoriale des lois sur la concurrence», *Recueil des Cours de l'Académie de Droit International*, 1969/III, (631), 700.

¹⁸²² C.J.E.C., joined cases 89, 104, 114, 116, 117 and 125 to 129/85, 27 September 1988, *A. Åhlström Osakeyhtiö a.o. v Commission*, E.C.R., 1988, (5193), 5243.

¹⁸²³ C.J.E.C., case 48/69, 14 July 1972, *Imperial Chemical Industries Ltd. v Commission*, E.C.R., 1972, (619), 694 (Opinion of Advocate-General MAYRAS); GOLDMAN, B., «Les champs d'application territoriale des lois sur la concurrence», *Recueil des Cours de l'Académie de Droit International*, 1969/III, (631), 700; VAN DER ESCH, B., «Some Aspects of "Extra-Territorial" Infringement of EEC Competition Rules», in *Antitrust and Trade Policy in the United States and the European Community*, HAWK, B.E. (ed.), New York, Bender, 1986, (285), 289.

¹⁸²⁴ C.J.E.C., joined cases 89, 104, 114, 116, 117 and 125 to 129/85, 27 September 1988, *A. Åhlström Osakeyhtiö a.o. v Commission*, E.C.R., 1988, (5193), 5243.

¹⁸²⁵ LEENEN, A.Th.S., «Extraterritorial Application of the EEC-Competition Law», *Netherlands Yearbook of International Law*, 1984, (139), 157; MANN, F.A., «The Doctrine of International Jurisdiction Revisited After Twenty Years», *Recueil des Cours de l'Académie de Droit International*, 1984/III, (11), (9), 20.

In the *Wood Pulp cases*, the applicants advanced the principles of non-interference and international comity. With regard to the principle of non-interference, the Court of Justice replied that the conditions for applying it, were not met, since the other country, which could also claim jurisdiction, did not order the undertakings to adopt a conduct contrary to Article 85 EC Treaty. As a result, the Court of Justice held that the principle of international comity was not applicable either, as there was no conflict of laws (C.J.E.C., joined cases 89, 104, 114, 116, 117 and 125 to 129/85, 27 September 1988, *A. Åhlström Osakeyhtiö a.o. v Commission*, E.C.R., 1988, (5193), 5244).

The principle of non-interference may be said to be the mirror image or, at least, a consequence of the principle of sovereign equality of States. Indeed, on the basis of the principle of sovereign equality, each sovereign State has the right to exercise jurisdiction within the scope of its sovereignty, but has a duty to refrain from encroaching upon the sovereignty of other States, i.e., the duty to refrain from interfering with the internal affairs of other States.

The principle of international comity, on the other hand, does not affect the scope of a State's jurisdiction. It is only a kind of criterion for resolving conflicts of laws on the basis of politeness, friendliness and good manners between States (O'CONNELL, D.P., *International Law*, London, Stevens, 1970, volume 1, 20-21).

In respect of Article 85 EC Treaty, a State may have extra-territorial legislative jurisdiction, if the competition between undertakings located outside the Community creates a direct and immediate restriction on competition on the Community market, that this anti-competitive effect is reasonably foreseeable and that the effect on the Community market is substantial¹⁸²⁶. The principle of sovereign equality of States, however, sets more severe limits to the enforcement of Article 85 EC Treaty. Indeed, a State cannot take coercive measures or measures of investigation beyond its territorial scope, without the consent of the State in which the act of enforcement takes place or without the cooperation of the undertaking which is subject to the investigation¹⁸²⁷. As a consequence, under public international law, the Community may prohibit and declare void any anti-competitive cooperation between undertakings located outside the Community. It is even possible to impose pecuniary sanctions. But it is not possible to force, e.g., under pain of periodic penalty payments, the undertakings located outside the Community to undertake the necessary actions to undo the prohibited cooperation and its effects. Nor is it possible to collect the pecuniary sanctions by means of forcible execution¹⁸²⁸.

For Article 86 EC Treaty to apply, it is necessary that the dominant position of the dumping undertakings is being held on the Community market and that the abuse of that dominant position takes place on the Community market. On the other hand, it is not required that the undertakings having a dominant position are established within the Community. As all the constituent elements of the offence, including its effects, take place on the Community market, the Community has legislative and enforcement jurisdiction over exporters abusing their dominant position on the Community market. Hence, exporters located outside the Community and dominating a large share of the imports into the Community may be prohibited under Article 86 EC Treaty to make abuse of their dominant position¹⁸²⁹. Undertakings, though not being established in the

1826 C.J.E.C., case 48/69, 14 July 1972, *Imperial Chemical Industries Ltd. v Commission*, E.C.R., 1972, (619), 693-694 (Opinion of Advocate-General MAYRAS); C.J.E.C., joined cases 89, 104, 114, 116, 117 and 125 to 129/85, 27 September 1988, A. Åhlström *Osaakeyhtiö* a.O. v *Commission*, E.C.R., 1988, (5193), 5224-5227.. See also: GOLDMAN, B., «Les champs d'application territoriale des lois sur la concurrence», *Recueil des Cours de l'Académie de Droit International*, 1969/III, (631), 689-698; LEENEN, A.Th.S., «Extraterritorial Application of the EEC-Competition Law», *Netherlands Yearbook of International Law*, 1984, (139), 148-149. See also: TURNER, D.F., «Application of Competition Laws to Foreign Conduct: Appropriate Resolution of Jurisdictional Issues», in *Antitrust and Trade Policy in the United States and the European Community*, HAWK, B.E. (ed.), New York, Bender, 1986, (231), 238, according to whom predatory export pricing has substantial anticompetitive effects on the market of the importing country.

1827 GOLDMAN, B., «Les champs d'application territoriale des lois sur la concurrence», *Recueil des Cours de l'Académie de Droit International*, 1969/III, (631), 706-717; LEENEN, A.Th.S., «Extraterritorial Application of the EEC-Competition Law», *Netherlands Yearbook of International Law*, 1984, (139), 159-163; MANN, F.A., «The Doctrine of International Jurisdiction Revisited After Twenty Years», *Recueil des Cours de l'Académie de Droit International*, 1984/III, (11), 34-45.

1828 C.J.E.C., case 48/69, 14 July 1972, *Imperial Chemical Industries Ltd. v Commission*, E.C.R., 1972, (619), 695 (Opinion of Advocate-General MAYRAS)

1829 C.J.E.C., joined cases 6 and 7/73, 6 March 1974, *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v Commission*, E.C.R., 1974, 223; C.J.E.C., case 27/76, 14 February 1978, *United Brands Company and United Brands Continentaal B.V. v Commission*, E.C.R., 1978, 207; BELLIS, J.F., «International Trade and the Competition Law of the European Economic Community», *Common Market Law Review*, 1979, (647), 667-668.

Community, may also be enforced, *e.g.*, under pain of periodic penalty payments, to put an end to their abuse of their dominant position on the Community market¹⁸³⁰.

Because of the limited extra-territorial enforcement jurisdiction of the Community, Article 85 EC Treaty will only prevent unlawful cooperation between undertakings located outside the Community from being enforceable before the courts of the Community. As a consequence, Article 85 EC Treaty does not provide a far-reaching effective guarantee against predatory dumping. However, frequently, Articles 85 and 86 EC Treaty will be simultaneously applicable in respect of predatory dumping. Indeed, in order for predatory dumping to be successful, the cooperating dumping exporters must collectively hold a sufficient degree of market power. Indeed, they should be able to influence prices in order to prevent their competitors to enter or to stay in the Community market. Thus, in terms of European antitrust law, they must have a collective dominant position on the Community market. As a consequence, the cooperating dumping exporters may be found to abuse their collective dominant position in the sense of Article 86 EC Treaty, if they agree to practise dumping in such a way as to monopolize the Community market.

3.3. CONFORMITY WITH GATT

As, under public international law, predatory dumping may be effectively sanctioned by European antitrust law, the only remaining question is whether GATT law also allows to sanction predatory dumping by means of antitrust law. According to Article 16(1) GATT Anti-dumping Code, no specific action against dumping of exports from a Party to the GATT Anti-dumping Code may be taken except in accordance with the provisions of GATT. At first sight, it might, therefore, be argued that the application of antitrust law to predatory dumping is contrary to GATT law.

GATT anti-dumping law will indeed be violated, if the Community would apply its antitrust law within the framework of its anti-dumping law. This would be the case if, for instance, the Community would apply its anti-dumping law in order to assess whether there is injurious

¹⁸³⁰ Penalty payments have been imposed on exporters located outside the Community in *e.g.* : Commission Decision 72/457/EEC of 14 December 1972, *ZOJA CSC-ICI*, *O.J.*, 31 December 1972, No L 299/51 ; Commission Decision 76/353/EEC of 17 December 1975, *Chiquita*, *O.J.*, 9 April 1976, No L 95/1.

These penalty payments have been upheld by the Court of Justice, see respectively : C.J.E.C., joined cases 6 and 7/73, 6 March 1974, *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v Commission*, *E.C.R.*, 1974, (223), 255-257 ; C.J.E.C., case 27/76, 14 February 1978, *United Brands Company and United Brands Continentaal B.V. v Commission*, *E.C.R.*, 1978, (207), 306-308.

See : BARACK, B., *The application of the Competition rules (antitrust law) of the European Economic Community*, Deventer, Kluwer, 1981, 278-279.

dumping, and impose antitrust sanctions as a special (anti-dumping) measure provided by European anti-dumping law (Article 17(3) basic EC Regulation ; Article 17(2) basic ECSC Decision). For GATT anti-dumping law only allows anti-dumping duties or undertakings in order to sanction dumping as defined under anti-dumping law. By subsuming antitrust law under the concept «special measures» of European anti-dumping law, antitrust law would be sanctioning dumping in the sense of price discrimination or selling at a loss irrespective of its anti-competitive effects.

It is, however, possible to apply antitrust law not as a special measure in the sense of European anti-dumping law, but separately from European anti-dumping law. Then, dumping will be sanctioned, not because it implies price discrimination between national markets or selling at a loss, but because of its anti-competitive effects on the Community market. As a result, GATT law will not be violated if antitrust law is applied to predatory dumping¹⁸³¹. It is even possible and legal for the same dumping practices to be subject to both anti-dumping and antitrust enforcement¹⁸³².

Hence, it may be concluded that European antitrust law is a valid alternative to anti-dumping law. First, it encompasses all instances of predatory dumping - the only instances of dumping which should be sanctioned. Second, the application of European antitrust law to predatory dumping is not at variance with public international law or with GATT law. Third, the remedies under antitrust law are more effective against the anti-competitive effects of predatory dumping than anti-dumping relief. Those are good reasons for dumping anti-dumping law and for applying antitrust law against predatory dumping.

¹⁸³¹ LANDSITTEL, R., *Dumping in Außerhandels- und Wettbewerbsrecht*, Baden-Baden, Nomos, 1987, 146.

¹⁸³² In several anti-dumping cases, the European anti-dumping authorities have stated :

«that the purpose of anti-dumping proceedings is not, and cannot be, to condone or encourage restrictive business practices, and that the initiation of such a (anti-dumping) proceeding does not therefore deprive an undertaking of its right to initiate proceedings under Article 85 or 86 of the Treaty, the outcome of which cannot be prejudiced by an anti-dumping investigation»

(Commission Regulation (EEC) No 1361/87 of 18 May 1987 imposing a provisional anti-dumping duty on imports of ferro-silico-calcium/calcium silicide originating in Brazil, *O.J.*, 19 May 1987, No L 129/5 ; Commission Regulation (EEC) No 2450/87 of 12 August 1987 imposing a provisional anti-dumping duty on imports of mercury originating in the Union of Soviet Socialist Republics, *O.J.*, 14 August 1987, No L 227/8 ; Council Regulation (EEC) No 3365/87 of 9 November 1987 imposing a definitive anti-dumping duty on imports of ferro-silico-calcium/calcium silicide originating in Brazil, *O.J.*, 12 November 1987, 322/1 ; Council Regulation (EEC) No 2808/89 of 18 September 1989 imposing a definitive anti-dumping duty on imports of calcium metal originating in the People's Republic of China and the Soviet Union and definitively collecting the provisional anti-dumping duty imposed on such imports, *O.J.*, 20 September 1989, No L 271/1).

Their statement was a response to the allegation that anti-dumping law was being used by the Community producers as a means supporting their efforts of monopolising the Community market. Thus, the initiation of proceedings under Articles 85 and 86 EC Treaty would be against anticompetitive behaviour of the Community producers. However, the same holds in respect of anticompetitive behaviour of the dumping exporters whether or not the European anti-dumping authorities terminate the anti-dumping proceedings by granting anti-dumping relief.

With regard to American anti-dumping law, it has also been suggested that dumping may at the same time be subjected to antitrust and anti-dumping proceedings, see : DAVIDOW, J., «U.S. Antitrust, Free Trade, and Nonmarket Economies», *Journal of World Trade Law*, 1978, (473), 478.

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